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COMMENCEMENT OF AN ACT OF PARLIAMENT (or its provision)

Pondicherry (Extension of Laws) Act, 1968 (26 of 1968) — S. 3 (2) — Appointed date under — 18-12-1968 appointed as the date on which the following Acts shall come into force in Union Territory of Pondicherry:

1. Legal Representatives' Suits Act, 1855 (12 of 1855);
2. Indian Bills of Lading Act, 1856 (9 of 1856);
3. Waste Lands (Claims) Act, 1863 (23 of 1863);
4. Converts, Marriage Dissolution Act, 1866 (21 of 1866);
5. Court-fees Act, 1870 (7 of 1870) (As in force in Union Territory of Andaman and Nicobar Islands on 1-8-1966);
6. Indian Contract Act, 1872 (9 of 1872);
7. Indian Majority Act, 1875 (9 of 1875);
8. Indian Easements Act, 1882 (5 of 1882);
9. Powers of Attorney Act, 1882 (7 of 1882);
10. Suits Valuation Act, 1887 (7 of 1887);
11. Epidemic Diseases Act, 1897 (3 of 1897);
12. Destruction of Records Act, 1917 (5 of 1917);
13. Poisons Act, 1919 (12 of 1919);
14. Indian Securities Act, 1920 (10 of 1920);
15. Maintenance Orders Enforcement Act, 1921 (18 of 1921);
16. Indian Boilers Act, 1923 (5 of 1923);
17. Sale of Goods Act, 1930 (3 of 1930);
18. Arbitration Act, 1940 (10 of 1940);

19. Tariff Commission Act, 1951 (50 of 1951);
20. Prize Competitions Act, 1955 (42 of 1955);
21. Slum Areas (Improvement and Clearance) Act 1956 (96 of 1956);
22. Foreign Awards (Recognition & Enforcement) Act, 1961 (45 of 1961);

—Pondicherry Gaz., 17-12-1968. Ext. P. 1.
Indian Ports Act, 1908 (15 of 1908) — S. 4(1)(a) and (2) — Extension to and defining local limits of — Provisions of said Act, extended to Port of Kanyakumari in Kanyakumari District with effect from 4-12-1968 and with reference to sub-section (2) of S. 4 local limits of said Port defined as specified in schedule annexed to Notification. — Ft. St. Geo. Gaz., 4-12-1968, Pt. II. Sec. I, P. 2027

Probation of Offenders Act, 1958 (20 of 1958) — S. 1(3) — Appointed date under — 1-12-1968 appointed as the date on which said Act shall come into force in districts of East Godavari, Guntur, Chittoor, Khammam and Warangal of the State. — A. P. Gaz., 5-12-1968, Pt. I, P. 2237

Indian Ports Act, 1908 (15 of 1908) — Section 4(1) & (2) — Extension and defining local limits — Provisions of said Act extended to Port of Veppalodai in District of Tirunelveli and with reference to sub-section (2) local limits of said Port defined as specified in Notification. — Ft. St. Geo. Gaz., 11-12-1968, Pt. II. Sec. I, P. 2039.

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—S. 115 — Reference to Civil Court under S. 146 (1), Criminal P. C. — Civil Court refusing to summon deponent of affidavit filed before Magistrate for being cross-examined — It is "case decided" in Civil Court subordinate to High Court — Decision directly affected

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All 82 B (C N 16)

—S. 115 — Error apparent on face of record — Petitioner aggrieved by a decree against him can invoke the jurisdiction of the High Court under Art. 227 if there is an error apparent on face of record though it may not be a jurisdictional error entitling him to file a revision under S. 115, Civil P. C. — See Constitution of India, Art. 227

Bom 49 A (C N 7)

—S. 115 — Ejectment of tenant ordered — Revision — Setting aside such order — Discretion — (Tenancy Laws — Calcutta Thika Tenancy Act (2 of 1949), S. 4)

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—S. 115 — Amendment of preliminary decree in pursuance of order directing fresh drawal of the decree — Revision against order incompetent

Orissa 28 A (C N 13)

—S. 115 — Exercise of power under is discretionary

Orissa 28 B (C N 13)

—S. 115, O. 1, R. 10 — Order dismissing application under O. 1, R. 10 — High Court can interfere in revision if it finds some material irregularity or illegality in order

Punj 57 A (C N 10)

—Ss. 144 and 151 — Against whom restitution can be granted — Stay of execution on condition that judgment-debtor deposits decree amount — J. D's clerk, by mistake, paying the money to a wrong person instead of depositing into Court — Restitution, held, could not be granted — Court has no control over the alleged recipient of the money — Powers under S. 151 not exercised when there is definite provision under S. 144

Guj 55 E (C N 11)

—S. 151 — Restitution — Against whom can be granted — Powers under the section cannot be exercised in view of specific provision under S. 144 — See Civil P. C. (1908), S. 144

Guj 55 E (C N 11)

—S. 151, O. 38, R. 5 and O. 41, R. 23 — Order of attachment before judgment — Remand by District Judge on appeal — Order of remand, held was one under S. 151 and not under O. 41, R. 23

J. and K. 22 B (C N 7)

—O. 1, R. 10 — Election petition — Necessary parties — See Representation of the People Act (1951), S. 87

Andh Pra 68 D (C N 25)

—O. 1, R. 10 — Order dismissing application under — Interference with in revision — See Civil Procedure Code (5 of 1908), S. 115

Punj 57 A (C N 10)

—O. 1, R. 10 — Addition of parties — A person may not be added as defendant merely because he would be incidentally affected by the judgment

Punj 57 B (C N 10)

—O. 1, R. 10 — Addition of party — Addition of defendant when plaintiff is opposed to such addition — Not desirable

Punj 57 C (C N 10)

CIVIL P. C. (contd.)

—O. 1, R. 13 — Election petition — Necessary parties — See Representation of the People Act (1951), S. 87

Andh Pra 68 D (C N 25)

—O. 5, R. 17 — Service of summons resisted by defendant — Process-server driven away by him making service as contemplated by R. 17 impossible — It must be deemed to be sufficient service

Andh Pra 67 (C N 24)

—O. 9, R. 9 — Can be applied to writ proceedings — See Constitution of India, Article 226

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—O. 19 — Evidence in Section 148 (1-A) Cr. P. C. includes affidavit — See Criminal P. C. (1898), S. 146

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—O. 21, R. 2 — Agreement against execution — Question whether agreement is bar to execution — Agreement not superseding decree — Executing Court can decide the effect of agreement under S. 47 subject to O. 21, R. 2 — See Civil P. C. (1908), S. 47

Orissa 32 (C N 15)

—Or. 21, R. 10 and S. 2 (3) — Who may apply for execution — Decree in the name of a joint Hindu family firm by its manager — Firm subsequently made a partnership firm with same family members as partners — The two firms are different entities and the latter cannot execute the decree

Guj 55 A (C N 11)

—O. 21, R. 11 to 17 — Execution petition according to law under Art. 182 of Limitation Act 1908 — See Limitation Act (1908), Sch. 1, Art. 182, Cl. 5

Guj 55 B (C N 11)

—O. 21, R. 11 — Scope — See Civil P. C. (1908), O. 21, R. 12

Guj 55 C (C N 11)

—O. 21, R. 12 and 11 — Scope — Judgment-debtor himself being in possession of moveables — Description not necessary — Inventory, however, necessary if they are with the agent of the J. D.

Guj 55 C (C N 11)

—O. 22, R. 3 — Hindu Succession Act (1956), S. 6, Proviso and Explanation I — Proceedings instituted by Karta of joint Hindu Mitakshara family — Death of minor coparcener during pendency of lis and after commencement of Act — Failure to substitute his only heir (mother) — List abates as a whole

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—O. 37, R. 2 — Stay of suit — Summary suit — Leave to appear not necessary — See Civil P. C. (1908), S. 10

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—O. 37, R. 3 — Stay of suit — Summary suit — Leave to appear not necessary — See Civil P. C. (1908), S. 10

Bom 40 A (C N 6)

—O. 38, R. 5 — Attachment before judgment — Notice to show cause is not obligatory — It is in the discretion of Court — Discretion has to be exercised according to exigencies of situation

J. and K. 22 A (C N 7)

—O. 38, R. 5 — Attachment before judgment — Appeal to D. J. — Remand — Order of remand is one under S. 151 — See Civil P. C. (1908), S. 151

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—O. 39, Rr. 1 and 2 — Interim injunction
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—O. 39, R. 2 — Interim injunction in a declaratory suit against a society — Principles stated — See Civil P. C. (1908), O. 39, R. 1

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—O. 39, R. 6 (2) — Scope — See Civil P. C. (1908), O. 39, R. 7 Andh Pra 47 B (C N 19)

—O. 39, R. 7 — Order for production of account books required as evidence for obtaining permanent injunctions — Whether order is valid or irregular unless it is vacated, it has got to be obeyed — See Contempt of Courts Act (1952) S. 3 Andh Pra 47 A (C N 19)

—O. 39, Rr. 7 and 6 (2) — Scope — Account books required as piece of evidence by plaintiff for establishing his allegations to obtain order of permanent injunction — Rule 7 confers ample powers on Court to seize them — Provisions of R. 7 and R. 6 (2), are wide enough to authorise any party to suit to apply for and obtain orders to seize account books and to have them into Court as piece of evidence if plaintiff or defendant cares to rely on them Andh Pra 47 B (C N 19)

—O. 41, R. 23 — Applicability — See Civil P. C. (1908), S. 105 (2)

Andh Pra 45 (C N 18)
—O. 41, R. 23 — Remand in appeal against order of attachment before judgment — Order of remand is one under S. 151 and not under O. 41, R. 23 — See Civil P. C. (1908), S. 151 J. and K. 22 B (C N 7)

—O. 41, R. 25 — Non-consideration of a question by lower Court — Remand — See Partition Act (1893), S. 4 Cal 88 B (C N 16)

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—R. 1 — Rules are valid — See Constitution of India, Art. 309 Punj 34 B (C N 7)

—Part IV, R. 11 (o) — Equation of posts — Representation against rejected by Central Government — High Court cannot sit in appeal over that decision — See Constitution of India, Art. 226 Punj 34 F (C N 7)

—RETIRING GRATUITY RULES OF TISCO LTD.

—R. 6 — Retiring Gratuity rules of Tisco company became an implied condition of service of all employees of Tisco Ltd. But gratuity cannot be claimed as of right — See Industrial Disputes Act (1947), Sch. III, Item 5 Pat 53 B (C N 15)

—R. 7 — Retiring Gratuity rules of Tisco company became an implied condition of service of all employees of Tisco Ltd. But gratuity cannot be claimed as of right — See Industrial Disputes Act (1947), Sch. III, Item 5 Pat 53 B (C N 15)

—R. 10 — Retiring Gratuity rules of Tisco company became an implied condition of ser-

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vice of all employees of Tisco Ltd. But gratuity cannot be claimed as of right — See Industrial Disputes Act (1947), Sch. III, Item 5 Pat 53 B (C N 15)

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—S. 34 — Court cannot “pierce the veil” in case of a non-statutory company like Hindustan Steel Ltd. registered under Companies Act — See Constitution of India, Article 311 (2) Cal 95 A (C N 18)

—S. 38 — “Court cannot pierce the veil” in case of non-statutory company like Hindustan Steel Ltd. registered under Companies Act — See Constitution of India, Art. 311 (2) Cal 95 A (C N 18)

—S. 617 — Government company — It is not identified with State — Employees are not holders of Civil post — See Constitution of India, Art. 311 (2) Cal 95 A (C N 18)

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—Pre. — Powers and responsibilities entrusted to different persons and authorities under Constitution — Desirability of exercising those powers within strict limits laid down in Constitution and their working in co-operation and in harmony pointed out

Assam 25 B (C N 7)
—Art. 1 — Transfer of certain territory to Pakistan in pursuance of an award — It is not cession of Indian territory — No alteration in Art. 1 involved — See Constitution of India, Art. 368 Delhi 64 B (C N 13)

—Art. 1 (3) (c) — Acquisition of territory — Mere possession is not sufficient when Government is uncertain about its title to such territory Delhi 64 D (C N 13)

—Art. 5 — See Jammu and Kashmir Constitution Act (1996), S. 1 J. and K. 25 B (C N 8) (FB)

—Art. 6 — See Jammu and Kashmir Constitution Act (1996), S. 1 J. and K. 25 B (C N 8) (FB)

—Art. 12 — ‘Other authority’ — Statutory corporation exercising statutory powers falls under expression other authority — See Constitution of India, Art. 311 (2) Cal 95 A (C N 18)

—Art. 14 — Rules for selection of candidates for admission to integrated M. B. B. S. Course in Medical Colleges in Telangana appended to G. O. Ms. 1135 Health dated 16-6-1966 — Rule 6 (a) (ii) not invalid Andh Pra 35 A (C N 15)

—Art. 14 — Rules for selection of candidates for admission to integrated M. B. B. S. Course in Medical Colleges in Telangana appended to G. O. Ms. 1135 Health dated 16-6-1966 — Rule 6 (a) (i) and corresponding portion of R. 17 (viii) invalid — Unrestricted reservation of seats for sons and daughters of Government Officers serving in Hyderabad and Secunderabad discriminatory and invalid

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Proviso under R. 6 (a) (ii) does not govern R. 6 (a) (i) Andh Pra 35 B (C N 15)

—Art. 14 — Provisions of S. 3 (1) (b) of Prevention of Detention Act 1950 do not violate Art. 14 of the Constitution — See Public Safety — Preventive Detention Act (1950), S. 3 (1) (b)

Delhi 45 D (C N 10) (FB)

—Art. 14 — Notification issued under Cl. 3 of Kerala Rice and Paddy Levy Order 1966 is not violative of the rule of equal protection in the Article — See Kerala Rice and Paddy (Procurement by Levy) Order (1966), Cl. 3 Ker 38 N (C N 13) (FB)

—Art. 14 — Classification of cultivators under Cl. 3 of Kerala Rice and Paddy Levy Order 1966 is not unreasonable — See Kerala Rice and Paddy (Procurement by Levy) Order (1966), Cl. 3 Ker 38 O (C N 13) (FB)

—Art. 14 — Discretion given to administrative officers under Cl. (b) of Kerala Rice and Paddy Levy Order 1966 is not unguided and arbitrary — See Kerala Rice and Paddy (Procurement by Levy) Order (1966), Cl. 13 Ker 38 P (C N 13) (FB)

—Art. 14 — Classification of stock-holders under Cl. (4) of Kerala Paddy and Rice (Declaration of Stocks) Order 1966 — Not unreasonable — See Kerala and Rice (Declaration and Requisitioning of Stocks) Order (1966), Cl. 4 Ker 38 R (C N 13) (FB)

—Art. 14 — Absence of provision to oblige officer to take excess paddy does not result in discrimination — See Kerala Paddy and Rice (Declaration and Requisitioning of Stocks) Order (1966), Cl. 3 (1)

Ker 38 T (C N 13) (FB)

—Art. 14 — Granting rebate to some and not others or giving rebate on one type of goods is not discrimination within the Article — See Khadi Village Industries Commission Act (1956), S. 15 Mys 47 (C N 10)

—Arts. 14 and 16 — Provisions of Art. 14 do not ensure absolute uniformity — Likewise equality of opportunity for appointment to public offices under Art. 16 need not be absolute — Rule 2 of Mysore Absorption of Instructors and Assistant Instructors in Tailoring Rules providing for appointment of retrenched craft teachers from Commerce and Industries Department as Tailoring Instructors in Education Department notwithstanding any orders fixing the qualification for such Instructors, do not violate Arts. 14 and 16 of the Constitution — Such retrenched crafts teachers form a separate class Mys 59 (C N 13)

—Art. 14 — Exemption from Excise duty — Differentiation between manufacturers prior to 13-6-62 and subsequently is reasonable — See Central Excises and Salt Act (1944), S. 37 Punj 50 A (C N 9)

—Art. 14 — Equal protection of Law — Reasonable classification for discrimination — Types of classifications enumerated Punj 50 B (C N 9)

—Art. 14 — Taxation laws — Discretion of Government in selecting persons or bodies

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to be taxed — Only when selection operates unequally that it will violate Art. 14

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—Art. 15 — Granting of rebate to some and not to others or giving rebate on one type of goods is not discrimination — See Khadi Village Industries Commission Act (1956), Section 15 Mys 47 (C N 10)

—Art. 16 — Equality of opportunity for appointment — Not absolute — See Constitution of India, Art. 14 Mys 59 (C N 13)

—Art. 16 (4) — Socially backward class — School teacher is not a member of backward class — Even if such teacher after retirement takes to agriculture as his occupation, he does not qualify under Mysore Government Order No. ED 75 TGL D/-26-7-1963 — Admission to Medical College cannot be granted to his son on ground of one belonging to socially backward class Mys 48 (C N 11)

—Art. 19 (d) — See Constitution of India, Art. 253 Delhi 64 D (C N 13)

—Art. 22 (5) and (6) — Some of grounds served on detenu vague and not conveying proper particulars to enable him to make a representation — Detention order is invalid — See Public Safety — Preventive Detention Act (1950), S. 3 (1) (a) and (b)

Delhi 45 C (C N 10) (FB)

—Art. 31 — Word "person" — Managing Committee of School is a "person" — Application under Art. 226 can be filed by the Managing Committee claiming fundamental right to property — See Constitution of India, Art. 226 Orissa 30 A (C N 14)

—Art. 31 (2) — Clause 7 of Kerala Rice and Paddy (Procurement by Levy) Order, 1966, does not violate Art. 31 (2) — See Kerala Rice and Paddy (Procurement by Levy) Order (1966), Cl. 7 Ker 38 C (C N 13) (FB)

—Art. 31 (2) — Kerala Rice and Paddy Levy Order, 1966 does not transgress limits of delegation conceded to State — See Kerala Rice and Paddy (Procurement by Levy) Order (1966), S. 7 Ker 38 E (C N 13) (FB)

—Art. 31 (2) — Compensation for rice and paddy requisitioned at controlled price under Cl. (4) of Kerala Paddy and Rice (Declaration and Requisitioning of Stocks, Order 1966) is "just equivalent" — See Kerala Paddy and Rice (Declaration and Requisitioning of Stocks) Order (1966), Cl. 4 Ker 38 S (C N 13) (FB)

—Art. 31 (5) (a) — Rules under S. 82, R. 35 — Taking over management of property under latter part of S. 65 (1) — Absence of definite time limit under R. 35 for such taking over — Latter part of S. 65 (1) is ultra vires Art. 31-A (1) (b) — See Constitution of India, Art. 31-A (1) (b) SC 168 C (C N 31)

—Art. 31-A (1) (a) — Bombay Tenancy and Agricultural Lands Act (67 of 1948), S. 65 (1) (as amended by S. 35 of Bombay Act 13 of 1956) and S. 61 — Taking over property by State under latter part of S. 65 (1) — Does not amount to acquisition or extinguishment or modification of rights under Art. 13-A (1) (a) —

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Latter part of S. 65 (1) cannot claim protection under Art. 31-A (1) (a) — ILR (1966) Guj 1113, Reversed SC 168 B (C N 31)

—Arts. 31-A (1) (b) and 31 (5) (a) — Bombay Tenancy and Agricultural Lands Act (67 of 1948), S. 65 (1) as amended by Bombay Act (13 of 1956), Ss. 61, 82 — Rules under Section 82, R. 35 — Taking over management of property under latter part of S. 65 (1) — Absence of definite time limit under R. 35 for such taking over — Latter part of S. 65 (1) is ultra vires Art. 31-A (1) (b). ILR (1966) Guj 1113, Reversed SC 168 C (C N 31)

—Art. 31-B — Ninth Schedule — Bombay Tenancy and Agricultural Lands Act (67 of 1948), S. 65 (1) (as amended by S. 35 of Bombay Act 13 of 1956), S. 44 and Preamble — Inclusion of Bombay Act (67 of 1948) under Ninth Schedule — Protection under Art. 31-B is available only to first part of amended S. 65 (1) and not to latter part SC 168 A (C N 31)

—Art. 72 (2) — Applicability — President exercising function in personal capacity i.e. under Articles of Association of statutory company — His acts should be authenticated by officer of his personal establishment and not by officer of a Ministry — See Constitution of India, Art. 311 (2) Cal 95 A (C N 18)

—Art. 102 — Person holding “office of profit under Government” and “holder of a post or service under Government” in Articles 309, 314 — There is distinction — See Constitution of India, Art. 311 (2) Cal 95 A (C N 18)

—Art. 132 — Service contract with Government still subsisting — Court holding that remedy of servant to redress any grievance under contract is under general law and not under Arts. 311 (2) and 226 — Question held though of public importance was not one which came within Art. 132 — See Constitution of India, Art. 311 (2) Cal 95 B (C N 18)

—Arts. 132, 311 (2) — Employee of Durgapur Steel Plant held does not hold civil post under the Union — Question already decided by Supreme Court — Certificate for leave to appeal refused Cal 95 C (C N 18)

—Art. 133 (1) (c) — Certificate of fitness — Question of sufficient public or private importance — One vehicle operating on two permits for two routes — Routes passing through two different States — Issue of through tickets to passengers travelling in the vehicles — Question whether issue of through tickets can be prohibited under Motor Vehicles Act (1939) — Construction of S. 48 (3) (xiv) of Motor Vehicles Act (1939) involved — Question is of sufficient private or public importance to justify certificate of fitness for appeal under Art. 133 (1) (c) Delhi 58 (C N 11)

—Art. 162 — Punjab Service Integration Rules, 1957 — Rules are valid — See Constitution of India, Art. 309 Punj 34 B (C N 7)

—Art. 183 (a) — Scope — Representation of the People Act (1951), Ss. 74, 67-A,

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157 — Notification under S. 74 — Effect of — Object of S. 67-A — Commencement of term — Deputy Chairman of legislative Council ceasing to be member by virtue of his election in 1962 and again becoming member by virtue of his election in 1968 — Notionally there was a break in the eye of law All 56 A (C N 9)

—Art. 191 — State Legislature Members (Prevention of Disqualifications) Act (U. P. Act 19 of 1951), S. 3 — State Legislature Members (Prevention of Disqualifications) (Second) Act (U. P. Act 13 of 1952), S. 3 (2) — Person appointed as Adjutant under executive orders in force prior to coming into force of U. P. Home Guards Adhiniyam (29 of 1963) — He holds ‘an office of profit’ within meaning of Art. 191, under Government of Uttar Pradesh — He is not exempted from disqualification attached to his office either under U. P. Act 19 of 1951 or under Act 13 of 1952 All 88 B (C N 17)

—Art. 191 — U. P. Zamindari Abolition and Land Reforms Act (1 of 1951), S. 127-B — U. P. Zamindari Abolition and Land Reforms Rules 1952, R. 114 — State Legislature Members (Prevention of Disqualifications) Act (U. P. Act 19 of 1951), S. 3 — State Legislature Members (Prevention of Disqualifications) (Second) Act (U. P. Act 13 of 1952), S. 3 (2) — Panel lawyer of Gaon Sabhas at Tahsil Headquarters — He holds an office of profit under Government within meaning of Art. 191 — Not exempted under U. P. Act 19 of 1951 and U. P. Act 13 of 1952 All 88 C (C N 17)

—Arts. 202 to 207 — Appointment of officers and servants of High Court — Power of Chief Justice — Power to frame rules regarding conditions of service — See Constitution of India, Art. 229 Assam 25 A (C N 7)

—Art. 226 — Dismissal of writ — Temporary injunction for facilitating institution of suit cannot be issued Andh Pra 39 B (C N 16)

—Art. 226 — Essential Commodities Act (1955), S. 7 — Andhra Pradesh Rice Procurement (Levy) Order (1964), Cl. 3 — Writ of prohibition — When issues — Notice by Grain Purchasing Officer to licensed rice miller to sell rice — Miller defaulting to sell — Miller prosecuted for default — Pleas e.g., non-liability to sell, because of alleged defects in requisitioning or omission to name the person to whom rice was to be delivered could be raised and tried at trial — Writ Petition not maintainable on such grounds Andh Pra 59 A (C N 22)

—Art. 226 — Writ of prohibition — When can be issued — See Andhra Pradesh Rice Procurement (Levy) Order (1964), Cl. 3 Andh Pra 59 B (C N 22)

—Art. 226 — Contract of service cannot be enforced — Remedy is under general law — See Constitution of India, Art. 311 (2) Cal 95 B (C N 18)

—Art. 226 — Writ jurisdiction — Scope of — Investigation of question of fact — Kutch

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award given by Tribunal appointed by India and Pakistan to decide boundaries — Court cannot consider whether territory awarded to Pakistan was part of Indian territory, by considering mass of evidence before tribunal

Delhi 61 A (C N 13)

—Art. 226 — Jurisdiction under — Nature of — Jurisdiction is extraordinary and has to be sparingly used

Goa 30 D (C N 4)

—Art. 226 — Writ of habeas Corpus — When can be issued — Custody of minor child — Proper remedy — Guardian's claim to custody of child — Nature of right — Welfare of minor should be paramount consideration

Madh Pra 23 A (C N 8)

—Art. 226 — Joint Plant Committee constituted after withdrawal of control on certain categories of iron and steel goods covered by Iron and Steel Control Order (1956) — Joint Plant Committee not amenable to writ jurisdiction — (Government of India Notification D/-29-2-1964 in Gazette of India Extraordinary D/- 1-3-1964) — See Iron and Steel (Control) Order, 1956

Madh Pra 25 (C N 9)

—Art. 226 — Quo warranta — See Specific Relief Act (1963), S. 34

Mad 42 B (C N 9)

—Art. 226 — Mandamus — Dismissed workmen staying on premises of factory and refusing to leave — It is not stay-in-strike — It is offence of criminal trespass — Complaint to police for removal of such workmen from premises — Police has power to take action under Criminal P. C. or Mysore Police Act — Inaction by police authorities — Mandamus can be issued against them — Criminal P. C. (1898), Ss. 155, 156 — Mysore Police Act, 1963 (4 of 1964), S. 55 — Industrial Disputes Act (1947), Ss. 2 (q), 25, 28, Sch. 2, Item 5 — Trade Unions Act (1926) (as amended by Act of 1947), S. 2 (1) — Penal Code (1860), Ss. 441 and 447

Mys 51 (C N 12)

—Arts. 226, 367, 31 — Word "person" — Managing Committee of School is a "person" — Application under Art. 226 can be filed by the Managing Committee claiming fundamental right to property

Orissa 30 A (C N 14)

—Art. 226 — Delay and laches — Validity of Punjab Service Integration Rules (1957) and order of Central Government passed in 1961 — Final order against representations communicated in October 1965 — Writ petition filed soon thereafter — Petition cannot be dismissed on ground of undue delay

Punj 34 A (C N 7)

—Art. 226 — Natural justice — States Reorganisation Act (1956), Ss. 115, 116 — Proceedings under — Persons making detailed representations — They are not entitled as of right to be heard orally — Central Government is not expected to act judicially — Oral hearing not asked for — No grievance of same can be made — Principles of natural justice held not violated

Punj 34 C (C N 7)

—Art. 226 — States Reorganisation Act (1956), Ss. 114, 115, 116 — Principles regard-

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ing equation of posts as determined at conference of Chief Secretaries in 1956 — Equation of gazetted posts of District Panchayat Officers in Pepsu with non-gazetted posts of District Panchayat Officers in Punjab — Allegation of violation of above principles — High Court cannot interfere with decision of Government in that behalf

Punj 34 D (C N 7)

—Art. 226 — Relief — States Reorganisation Act (1956), Ss. 115, 116 — Joint seniority list as result of integration — Junior illegally placed above petitioner — Representations against this illegality accepted by Central Government — Necessary directions made in that behalf — Revised list not corrected — Petitioner's name directed to be kept above junior

Punj 34 E (C N 7)

—Art. 226 — Certiorari — Administrative orders — Punjab Service Integration Rules (1957), Part IV, R. 11 (o) — Equation of gazetted posts of District Panchayat Officers in Pepsu with non-gazetted posts of District Panchayat Officers in Punjab — Representations of former rejected by Central Government — High Court cannot sit in appeal over that decision — Relief under Art. 226 is not open

Punj 34 F (C N 7)

—Art. 226 — Writ proceedings — Proceedings are civil proceedings — Even though provisions of Civil P. C. may not directly apply, such of the provisions as are not in conflict with Rajasthan High Court Rules can apply — Provisions of O. 9, R. 9 can be applied

Raj 41 (C N 10)

—Art. 227 — Error apparent on face of record — Petitioner aggrieved by a decree against him can invoke the jurisdiction of the High Court under Art. 227 if there is an error apparent on face of record though it may not be a jurisdictional error entitling him to file a revision under S. 115, Civil P. C.

Bom 49 A (C N 7)

—Arts. 229 and 202 to 207 — Rules under Art. 229 (2) — Assam High Court Appointment and Conditions of Service Rules (1956) R. 4 read with Sch. I — Appointment of officers and servants of High Court — Power of Chief Justice — Power to frame rules regarding conditions of service — Rules regarding salaries, allowances, leave or pensions only require previous approval of Governor — Appointment made within framework of Art. 229 read with rules duly made cannot be questioned by anybody — On facts held that appointment of petitioner not being in accordance with Article 229 read with rules thereunder was invalid

Assam 25 A (C N 7)

—Arts. 253, 19 (1) (d) and (e), Schedule VII, List I, Entry 14 — Scope of Art. 253 — Treaty made by India Government with Pakistan to abide by decision of Tribunal respecting boundary dispute — Implementation of award by Executive is valid — Legislation not necessary

Delhi 64 D (C N 13)

—Art. 265 — Unconstitutional tax and tax imposed without authority of law — Distinction — Substitution of coinage does not

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amount to enhancement of tax

Goa 30 A (C N 4)

—Art. 298 (as amended by Constitution 7th Amendment Act 1956) — Commercial Function of Govt. is not converted into governmental function — See Constitution of India, Art. 311 (2) Cal 95 A (C N 18)

—Arts. 301, 302 and 303 (1) — Scope — Freedom of trade, commerce and intercourse — Taxing law — Hampering flow of trade — Sales-tax — When has the effect of — Central Sales-tax Act (1956), S. 8 (2) (2-A) and (5) — Not ultra vires Arts. 301 and 303 (1). Writ Petn. No. 836 of 1966, D/-7-4-1967 (Mad), Reversed SC 147 (C N 29)

—Art. 302 — Scope — Freedom of trade, commerce and intercourse — Taxing law — Hampering flow of trade — Sales-Tax—When has the effect of — Central Sales-Tax Act (1956), S. 8 (2), (2-A) and (5) — Not ultra vires Arts. 301 and 303 (1) — See Constitution of India, Art. 301 SC 147 (C N 29)

—Art. 303 (1) — Scope — Freedom of trade, commerce and intercourse — Taxing law — Hampering flow of trade — Sales-tax —When has the effect of — Central Sales-tax Act (1956), S. 8 (2), (2-A) and (5) — Not ultra vires Arts. 301 and 303 (1) — See Constitution of India, Art. 301 SC 147 (C N 29)

—Art. 309 — Protection under — Cannot be taken away by any legislation or by Rule under Art. 309 — See Constitution of India, Art. 311 (1) Mys 41 B (C N 9)

—Arts. 309, 162, Sch. 7, List II, Entry 41 — States Reorganisation Act (1956), Ss. 129, 115 — Punjab Service Integration Rules (1957), R. 1 — Rules are valid — AIR 1961 Mys 210, Diss. from Punj 34 B (C N 7)

—Arts. 311 (1), 309 — Protection under — Cannot be taken away by any legislation or by Rule under Art. 309

Mys 41 B (C N 9)

—Art. 311 (1) — 'An authority subordinate' — Does not mean an existing subordinate — Authority appointing public servant ceasing to exist — Effect — Subordinate Officer cannot dismiss the servant — Such dismissal contravenes Art. 311 (1) — AIR 1960 Madh Pra 254 and AIR 1959 Madh Pra 43 and AIR 1958 Cal 356, Dissented from Mys 41 C (C N 9)

—Arts. 311 (2), 12, 298, 72, 102 — Employees of Durgapur Steel Plant, appertaining to Hindustan Steel Ltd., a non-statutory company registered under Companies Act, do not hold civil post under Government of the Union — Tests to see whether employee holds civil post under Government indicated — Companies Act (1956), Ss. 617, 34, 38

Cal 95 A (C N 18)

—Arts. 311 (2), 226, 132 — Not applicable to enforce contract of service with Government which is still subsisting — Whatever the grievance of the employee he must seek his remedy under general law and not under Article 226 in the absence of any statutory right or liability even where the contract is with the Government — (The question though of

CONSTITUTION OF INDIA (contd.)

public importance was not one which came within terms of Art. 132 — Leave refused)

Cal 95 B (C N 18)

—Arts. 311 (2), 132 — Employee of Durgapur Steel Plant does not hold Civil Post under Union — Question already decided by Supreme Court — Held no more substantial question of law — Certificate for leave to appeal to Supreme Court refused — See Constitution of India, Art. 132 Cal 95 C (C N 18)

—Art. 363 — Scope — Bar to jurisdiction of Civil Courts — Nature of — Emphasis is not on parties to dispute but on nature of dispute — Possibility of illusory defence being raised to invoke bar under the Article — Whether Court can undertake preliminary investigation in nature of dispute

Raj 52 (C N 12)

—Art. 367 — Word "person" — Managing Committee of School is a "person" — Application under Art. 226 can be filed by the Managing Committee claiming fundamental right to property — See Constitution of India, Art. 226 Orissa 30 A (C N 14)

—Arts. 368 and 1 — Dispute regarding boundaries between India and Pakistan — Reference to Tribunal by both countries — Transfer of certain territory to Pakistan in pursuance of award — It is not cession of Indian territory — No alteration in Art. 1 involved — Constitutional amendment under Art. 368 not necessary

Delhi 64 B (C N 13)

—Sch. VII, List 1, Entry 3 — Provision of S. 3 (1) (b) of Preventive Detention Act 1950 is not ultra vires the legislature — See Public Safety — Preventive Detention Act (1950), S. 3 (1) (a) and (b)

Delhi 45 B (C N 10) (FB)

—Sch. VII, List 1, Entry 14 — See Constitution of India, Art. 253

Delhi 64 D (C N 13)

—Sch. 7, List II, Entry 41 — Punjab Service Integration Rules 1957 — Rules are valid — See Constitution of India, Art. 309

Punj 34 B (C N 7)

—Sch. VII, List III Entry 9 — Provision of S. 3 (1) (b) of Preventive Detention Act is not ultra vires the legislature — See Public Safety — Preventive Detention Act (1950), S. 3 (1) (a) and (b) Delhi 45 B (C N 10) (FB)

CONTEMPT OF COURTS ACT (32 of 1952)

—S. 1 — Proceedings before Court involving question as to status of community — Public comments thereon, when amounts to contempt of Court All 68 A (C N 12)

—S. 3 — Civil P. C. (1908), O. 39, R. 7 — Account books required as piece of evidence by plaintiff to obtain order of permanent injunction — Court issuing order, under O. 39, R. 7 — Parties to the suit and who have notice of same will be liable for contempt for disobedience or for obstructing execution of the order — Whether order is valid or irregular unless it is vacated, it has got to be obeyed — Constitution of India, Art. 215

Andh Pra 47 A (C N 19)

CONTEMPT OF COURTS ACT (contd.)

—S. 3 — Conviction by Single Judge for disobedience of order of High Court in civil proceedings — Order is appealable — See Letters Patent (Lah), Cl. 10

Punj 60 A (C N 11)
—S. 3 — Conviction for contempt of High Court by Single Judge in a case initiated by private complaint — Appeal against — Parties — See Letters Patent (Lah), Cl. 10

Punj 60 B (C N 11)
—S. 3 — Person not let off on acceptance of apology but convicted of offence of committing contempt of Court — Appeal against conviction can be maintained

Punj 60 C (C N 11)
—S. 3 — State providing counsel to its official for his defence in contempt petition or for presenting and prosecuting appeal against conviction — There is nothing objectionable if State considers that Officer has not committed any contempt or his conviction is unjustified

Punj 60 D (C N 11)
—Section 3 — Complainant obtaining order staying recovery of sales-tax from him on furnishing bank guarantee within two months — Order extending period of two months — Taxation Inspector not knowing about order extending period visiting complainant's office to elicit information if any extension has been granted — Knowledge of order on part of inspector not proved — Held, there was no contempt of court: Criminal Original No. 111 of 1967, D/- 3-1-1968 (P and H), Reversed

Punjab 60 E (C N 11)

CONTRACT ACT (9 of 1872)

—S. 16 — Gift by a person to his counsel's wife — Validity — See T. P. Act (1882), S. 122 Cal 111 (C N 21)

—S. 73 — Tenant holding over — Damages to Landlord — Question of — See Transfer of Property Act (4 of 1882), S. 116

Delhi 59 (C N 12)

CO-OPERATIVE SOCIETIES**—MAHARASHTRA CO-OPERATIVE SOCIETIES ACT (24 of 1961)**

—S. 91 — Maharashtra Co-operative Societies Rules (1961), R. 76 — Appointment of nominees — Appointment is not for any particular period Bom 54 A (C N 8)

—MAHARASHTRA CO-OPERATIVE SOCIETIES RULES (1961)

—R. 76 — Appointment of nominees — Is not for any particular period — See Co-operative Societies — Maharashtra Co-operative Societies Act (24 of 1961), S. 91

Bom 54 A (C N 8)

—R. 77 — Is permissive and not peremptory Bom 54 B (C N 8)

CORPORATION

—Statutory — Powers of — Concept of — See Constitution of India, Art. 311 (2)

Cal 95 A (C N 18)

COURT-FEES ACT (7 of 1870)

See under Court-fees and Suits Valuations.

COURT FEES AND SUITS VALUATIONS**—ANDHRA PRADESH COURT FEES AND SUITS VALUATION ACT (7 of 1956)**

—Ss. 48 and 49 — No court-fee payable on cross-objection for interest claimed under S. 34 of Land Acquisition Act (1894) — AIR 1964 Andh Pra 216, Overruled

Andh Pra 55 A (C N 21) (FB)

—S. 48 — Cross-objections for interest payable under S. 34 L. A. Act — No court-fee payable on them — See Land Acquisition Act (1894), S. 23 Andh Pra 55 B (C N 21) (FB)

—S. 49 — No court-fee is payable on cross-objection for interest under S. 34 of Land Acquisition Act, 1894 — See Court Fees and Suits Valuations — Andhra Pradesh Court Fees and Suits Valuation Act (1956), S. 48

Andh Pra 55 A (C N 21) (FB)

—BOMBAY COURT-FEES ACT (36 of 1959)

—S. 6 (iv) (i), Sch. I, Arts. 1 and 7 — Declaratory suit by creditor under S. 53 T. P. Act — Declaration that deed of assignment executed by defendant was void — Proper Court-fees would be under Section 6 (iv) (i)

Bom 66 A (C N 10)

—Sch. I, Art. 1 — Declaratory suit by creditor under S. 53 T. P. Act — Proper Court-fee — See Court-fees and Suits Valuations — Bombay Court-Fees Act (36 of 1959), S. 6 (iv) (i)

Bom 66 A (C N 10)

—Sch. I, Art. 7 — Declaratory suit by creditor under S. 53, T. P. Act — Proper Court-fee — See Court-fees and Suits valuations — Bombay Court Fees Act (36 of 1959), S. 6 (iv) (i)

Bom 66 A (C N 10)

—COURT-FEES ACT (7 of 1870)

—Pre. — Interpretation of — Fiscal Statutes — Principles of construction — See Income-Tax Act (1922), S. 42 (1) Cal 71 (C N 14)
—S. 1 — Court-fees Act is a taxing statute and its provisions are to be strictly construed in favour of subject litigant

Bom 66 B (C N 10)

—S. 7 (iv) (c) — Declaratory suit by creditor under S. 53 T. P. Act — Proper Court-fee would be under S. 6 (iv) (i) of Bombay Court-Fees Act 1959 — See Court-fees and Suits Valuations — Bombay Court Fees Act (36 of 1959), S. 6 (iv) (i)

Bom 66 A (C N 10)

CRIMINAL PROCEDURE CODE (5 of 1898)

—S. 4 (1) (f) — Complaint under S. 198-B — Transfer of case — Charge of case handed over to another prosecutor — Such prosecutor must be deemed to be complainant — See Criminal P. C. (1898), S. 198-B

Raj 61 A (C N 13)

—S. 12 — Honorary Magistrate — Not disqualified from being elected as Adhyaksha of Z. P. — See Panchayats — U. P. Kshettra Samitis and Zila Parishads Adhinyam (U. P. Act 33 of 1961), S. 13 (c)

All 65 B (C N 11)

CRIMINAL P. C. (contd.)

—S. 14 — Honorary Magistrate — Not disqualified for being elected as Adhyaksha of Z. P. — See Panchayats — U. P. Kshettra Samitis and Zilla Parishads Adhiniyam (U. P. Act 33 of 1961), S. 13 (c)

All 65 B (C N 11)

—S. 145 — Reference to Civil Court under S. 146 (1) — Civil Court has jurisdiction and is legally competent to require the person whose affidavit was filed before Magistrate under S. 145 (1) to attend Court for purposes of cross-examination — See Criminal P. C. (1898), S. 146

All 82 A (C N 16)

—S. 146 — Reference to Civil Court — Civil Court refusing to summon deponent of affidavit before Magistrate for being cross-examined — It is 'case decided' within S. 115 C. P. C. — See Civil P. C. (1908), S. 115

All 65 B (C N 16)

—Ss. 146, 145 — Reference to Civil Court under S. 146 (1) — Civil Court has jurisdiction and is legally competent to require the person whose affidavit was filed before Magistrate under S. 145 (1) to attend Court for purposes of cross-examination — But this is discretionary — 'Evidence' here includes affidavit — Civil P. C. (1908), O. 19 — Evidence Act (1872), S. 1

All 82 A (C N 16)

—S. 155 — Dismissed worker refusing to leave premises — It is offence of criminal trespass — Police has power to take action under the Code or Mysore Police Act — See Constitution of India, Art. 226

Mys 51 (C N 12)

—Ss. 156 and 537 (2) — Defect in initiation of complaint — Curability

Andh Pra 41 C (C N 17)

—S. 156 — Dismissed worker refusing to leave premises — It is offence of criminal trespass — Police have power to take action in the matter under Criminal Procedure Code or Mysore Police Act — See Constitution of India, Art. 226

Mys 51 (C N 12)

—S. 195 (1) (a) — "Public servant concerned" — Superintendent in charge of Central Telegraph Office — Whoever happens to occupy that post at the time of filing complaint is the public servant concerned and can file complaint for offences under Sections 182, 417 and 471, Penal Code—(Penal Code (1860), Ss. 182, 417 and 471) — (Words and Phrases — "Public servant concerned")

Andh Pra 41 A (C N 17)

—Ss. 198-B, 4(1) (h), 4 (1) (f), 259, 270, 492 — Complaint under S. 198-B — Transfer of case — Charge of case handed over to another Public Prosecutor — Such Prosecutor must be deemed to be 'complainant'

Raj 61 A (C N 13)

—S. 198-B — Complaint under — Court's discretion as to discharge in absence of the complainant — See Criminal P. C. (1898), S. 259

Raj 61 B (C N 13)

—S. 198-B — Complaint under — Aggrieved person not required to sign nor his presence

CRIMINAL P. C. (contd.)

necessary as a complainant

Raj 61 C (C N 13)

—Ss. 200 (aa), 251 (b) and 251-A — Complaint filed by Superintendent Central Telegraph Office in his official capacity—He is public servant and need not be examined on oath before taking case on file — His successors examined as witnesses in case — It cannot be said that there was no evidence connected with complaint — Proceedings having been initiated by some one other than Police Officer proper procedure for trial was under S. 251 (b) and not under S. 251-A — Fact that Police had made investigation was not of any importance and could not affect validity of proceedings even if Police had investigated without proper authority under S. 155 (2)

Andh Pra 41 B (C N 17)

—S. 204 (3) — Dismissal of complaint under S. 204 (3) on failure of complainant to comply with direction — Appeal against order is competent as dismissal of complaint after charge has been framed amounts to acquittal — See Criminal P. C. (1898), S. 417

Madh Pra 20 A (C N 7)

—S. 204 (3) — "Talbana" ordinarily means process fee — Magistrate dismissing complaint for failure to pay diet money in accordance with Court's direction to pay "Talbana", interpreting the word to include diet money also — Order neither indicating any provision wherein that word has been used to include diet money or that it is the practice of that Court to so use it and that the parties were acquainted with that expression to include diet money as well — Held that the drastic action of the magistrate in 'dismissing' the complaint could not be justified or sustained — (Words and Phrases — "Talbana")

Madh Pra 20 B (C N 7)

—S. 251 (b) — Complaint filed by Superintendent C. T. O. in his official capacity — Proper procedure for trial was under S. 251 (b) and not under S. 251-A — See Criminal P. C. (1898), S. 200 (aa)

Andh Pra 41 B (C N 17)

—S. 251-A — Complaint filed by Superintendent C. T. O. in his official capacity — Procedure for trial is one prescribed under 251 (b) and not under Section 251-A — See Criminal P. C. (1898), S. 200 (aa)

Andh Pra 41 B (C N 17)

—S. 256 — Dismissal of complaint after framing of charge, on failure of complainant to comply with directions — Appeal against order is competent — See Criminal P. C. (1898), S. 417

Madh Pra 20 A (C N 7)

—S. 256 — Recall of prosecution witnesses for further cross-examination — Payment of expenses of prosecution witnesses — Offence charged bailable and non-cognizable — Held that in the case the complainant should bear the expenses — See Criminal P. C. (1898), S. 544

Madh Pra 20 C (C N 7)

—S. 259 — Complainant — Who is — See Criminal P. C. (1898), S. 198-B

Raj 61 A (C N 13)

CRIMINAL P. C. (contd.)

—Ss. 259 and 198-B — Complaint under S. 198-B — Court has ample discretion to discharge or not to discharge accused in the absence of complainant, Public Prosecutor — Refusal to discharge does not necessarily make his order illegal Raj 61 B (C N 13)

—S. 261 — Case tried summarily by competent Magistrate — Sentence — Legality — See Criminal P. C. (1898), S. 262 (2)

Cuj 62 B (C N 12)

—Ss. 262 (2), 362, 263, 264 and 261 — Ahmedabad City Courts Act (19 of 1961), S. 14 — Charge for offences under Ss. 279 and 337 I. P. C. — Case tried summarily by City Magistrate who was competent to try so and accused convicted for offences — Sentence of 4 months R. I. and to pay fine of Rs. 500 and in default to pay fine to undergo further R. I. of three months, for offence under S. 279, held, illegal as contravening S. 262 — (Penal Code (1860), S. 65)

Cuj 62 B (C N 12)

—S. 263 — Case tried summarily by city Magistrate who was competent to try so — Sentence passed — Legality — See Criminal P. C. (1898), S. 262 (2)

Cuj 62 B (C N 12)

—S. 264 — Case tried summarily by competent Magistrate — Sentence — Legality — See Criminal P. C. (1898), S. 262 (2)

Cuj 62 B (C N 12)

—S. 270 — Complainant — Who is — See Criminal P. C. (1898), S. 198-B

Raj 61 A (C N 13)

—S. 342 — Murder — Bad character of accused not a fact in issue in case — Sessions Judge held not justified in questioning accused to find out antecedents of his past life — He could examine him only about the evidence proposed to be used against him — In criminal proceedings, fact that accused has a bad character is irrelevant unless evidence is given that he has a good character — Evidence Act (1872), S. 54

All 61 C (C N 10)

—S. 362 — Case tried summarily — Sentence passed — Legality — See Criminal P. C. (1898), S. 262 (2)

Cuj 62 B (C N 12)

—Ss. 403 and 423 — Conviction on same charges barred in second trial once the accused is acquitted in first — If object of evidence in second trial is to corroborate charge in respect of offence which is subject matter of trial no question of disputing previous finding arises — Charges under Section 148 I. P. C. and S. 27 Arms Act — Acquittal for offence under S. 148 — Conviction under S. 27 Arms Act cannot be maintained

Orissa 23 B (C N 12)

—Ss. 417, 204 (3) and 256 — Accused pleading not guilty and desiring the presence of prosecution witnesses for further cross-examination — Magistrate ordering summons to be issued directing complainant to pay diet money — Dismissal of complaint under S. 204 (3) on failure of complainant to comply with direction — Appeal against order is competent as the

CRIMINAL P. C. (contd.)

dismissal of complaint after charge has been framed amounts to acquittal

Madh Pra 20 A (C N 7)

—S. 423 — Conviction on same charges barred in second trial once the accused is acquitted in first — See Criminal P. C. (1898), S. 403

Orissa 23 B (C N 12)

—S. 491 — Custody of minor — Application for — Availability of alternative remedy is not a bar

Madh Pra 23 B (C N 8)

—S. 492 — Complainant — Who is — See Criminal P. C. (1898), S. 198-B

Raj 61 A (C N 13)

—S. 517 — Penal Code (1860), S. 420 — Offence under S. 420 in respect of lorry — Ownership of lorry in dispute — Held, Court could direct parties to get dispute solved by Civil Court — Same could not be decided by Criminal Court

Andh Pra 54 (C N 20)

—S. 537 (2) — Defect in initiation of complaint — Curability — See Criminal P. C. (1898), S. 156

Andh Pra 41 C (C N 17)

—Ss. 544 and 256 — Recall of prosecution witnesses for further cross-examination — Payment of expenses of prosecution witnesses — Prosecution under S. 497, Penal Code — Offence being bailable and non-cognizable, having no direct nexus with public interest, question whether government should pay travelling allowances and subsistence allowance of witnesses summoned is under R. 558 (a) (ii) of Rules and Orders (Criminal) framed by the Madhya Pradesh High Court for the subordinate Courts to decide — Held that in the case the complainant should bear the expenses — Scope of R. 558 indicated — High Court Rules and Orders (Criminal) (Madhya Pradesh) R. 558

Madh Pra 20 C (C N 7)

—S. 561-A — Penal Code (1860), S. 441 — Striking workmen remaining in factory premises after working hours — Whether act of striking workmen amounts to criminal trespass under S. 441 — Power of High Court to direct executive to take appropriate action

Mad 33 (C N 8)

DEBT LAWS**—BOMBAY AGRICULTURAL DEBTORS' RELIEF ACT (28 of 1947)**

—S. 38 — Execution of award — Appeal — Maintainability of — See Debt Laws — Bombay Agricultural Debtors' Relief Act (28 of 1947), S. 43

Bom 74 A (C N 14)

—S. 38(3) — Award allowing debtor to make payments by instalments with direction that amount paid by instalments to be first utilised in discharging dues of mortgagees and then for satisfaction of unsecured creditors by rateable distribution of subsequent instalments — Failure by debtor to pay first instalment on stipulated date — Unsecured creditor not disentitled from applying for execution of award merely because mortgagees have not yet recovered amount due to them.

Bom 74 B (C N 14)

DEBT LAWS — BOMBAY AGRICULTURAL DEBTORS' RELIEF ACT (contd.)

—Ss. 43, 46 and 38 — Execution of award — Order that satisfaction alleged by debtor was not proved or that execution application is not maintainable is appealable — (1957) 59 Bom LR 610, **Overruled**

Bom 74 A (C N 14)

—S. 46 — Execution of award — Applicability of order holding execution application not maintainable — See Debt Laws — Bombay Agricultural Debtors' Relief Act (28 of 1947) S. 43

Bom 74 A (C N 14)

—CHOTANAGPUR ENCUMBERED ESTATES ACT (6 of 1876)

—S. 12A(1)(a) and (3) — Khorposh grant is alienation of property within meaning of S. 12A(1)(a) — Such grant is void under S. 12A(3) if it is made without previous sanction of Commissioner; Decision of Misra J. in Compensation Appeal No. 1 of 1964 (Pat) **Reversed**

Pat 48 A (C N 14)

DEED

—Construction — Will — Construction — Principles of — See Income Tax Act (1922) S. 42(1)

Cal 71 (C N 14)

DEFENCE SERVICES OFFICERS PROVIDENT FUND RULES

—R. 9 (viii) — Subscriber can dispose of provident fund by will — See Provident Funds Act (1925) S. 3

Punj 44 (C N 8)

DIVORCE ACT (4 of 1869)

—S. 10 — Marriage contravening Section 2 (3) of Special Marriage Act — Not void but voidable — See Special Marriage Act (1872) S. 2

Andh Pra 62 B (C N 23)

EDUCATION**—ORISSA EDUCATION CODE**

—Article 41 — Code has no statutory force — Articles are mere administrative instructions — Dissolution of Managing Committee of School — Not valid — Can be ignored by Committee — Newly constituted Managing Committee cannot claim any rights on the basis of the order of dissolution

Orissa 30 B (C N 14)

ELECTRICITY ACT (9 of 1910) —

—S. 3 — No provision in contract for supply of energy for revision of rates — Agreement is in conflict with Sch. VI, cl. 1 of Electricity Supply Act — Company can revise rates unilaterally — See Electricity (Supply) Act (1948) S. 57

Guj 40 (C N 8)

ELECTRICITY (SUPPLY) ACT (54 of 1948)

—S. 57 and Sch. VI, Cl. 1 — Electricity Act (1910), S. 3 — Agreement for supply of energy — No provision for revision of rates during period of contract — Agreement is

ELECTRICITY (SUPPLY) ACT (contd.)

in conflict with Sch. VI, Cl. 1 — Company can revise rates unilaterally. AIR 1955 Bom 182, held **overruled** in AIR 1964 SC 1598

Guj 40 (C N 8)

—Sch. VI Cl. 1 — Agreement for supply of energy — No provision for revision of rates during the period of contract — Agreement is in conflict with Sch. VI, Cl. 1 — See Electricity (Supply) Act (1948) S. 57

Guj 40 (C N 8)

ESSENTIAL COMMODITIES ACT (10 of 1955)

—S. 3 (2) (f) — Kerala Rice and Paddy Levy Order 1966 is constitutional — See Kerala Rice Paddy (Procurement by Levy) Order (1966)

Ker 38 G (C N 13) (FB)

—S. 3 (2) (f) — S. 3 is not invalid because it did not contain legislated guidance as to the scope and ambit of Govt's powers to make Orders under it

Ker 38 I (C N 13) (FB)

—S. 3 (2) (f) — "Person holding the stock" does not mean that he should have both possession and title — Two-fold idea cannot be imported in definition of "cultivator" in Cl. 2 (b) of Kerala Rice and Paddy (Procurement by Levy) Order (1966)

Ker 38 J (C N 13) (FB)

—Ss. 3 (2) (f) and 3 (3c) — Kerala Rice and Paddy (Procurement by Levy) Order (1966), because it deals with cultivators only has not travelled beyond the Act

Ker 38 K (C N 13) (FB)

—S. 3 (2) (f) — "Stock of foodgrains" does not mean stock for sale — Kerala Rice and Paddy (Procurement by Levy) Order (1966) is not ultra vires because it directs procurement as soon as paddy is harvested and before requirements of produce are ascertained

Ker 38 L (C N 13) (FB)

—S. 3 (2) (f) — "Person holding stock" does not postulate holding in quantities in excess of one's requirement — Kerala Rice and Paddy (Procurement by Levy) Order (1966), is not ultra vires

Ker 38 M (C N 13) (FB)

—S. 3 (2) (f) — Power of Officers to order stock-holder to sell specified quantity without inquiry as to stock in his possession under Cl. (4) of Kerala Paddy & Rice Declaration of Stocks Order 1966 is not arbitrary — See Kerala Paddy and Rice (Declaration and Requisitioning of Stocks) Order (1966), Cl. (4)

Ker 38 Q (C N 13) (FB)

—S. 3 (2) (f) — Classification of stock-holders under Cl. (4) of Kerala Paddy and Rice Declaration of Stocks Order, 1966, is not unreasonable — See Kerala Paddy and Rice (Declaration and Requisitioning of Stocks) Order (1966), Cl. 4

Ker 38 R (C N 13) (FB)

—S. 3 (3) and (3B) Cl. 7 of Kerala Rice and Paddy (Procurement by Levy) Order 1966, does not violate Art. 31 (2) of the Constitution — See Kerala Rice and Paddy (Procurement by Levy) Order (1966)

Ker 38 D (C N 13) (FB)

ESSENTIAL COMMODITIES ACT (contd.)

—S. 3 (3B) — Kerala Rice and Paddy Levy Order 1966 does not transgress limits of delegation conceded to the State — See Kerala Rice and Paddy (Procurement by Levy) Order (1966), S. 7

Ker 38 E (C N 13) (FB)
—S. 3 (3B) — Kerala Rice and Paddy Levy Order 1966 does not ignore direction in the section — See Kerala Rice and Paddy (Procurement by Levy) Order (1966), Cl. 7

Ker 38 F (C N 13) (FB)
—S. 3 (6) — Laying of Order before Parliament is not condition precedent for validity of Order — Kerala Rice and Paddy (Procurement by Levy) Order (1966) is not invalid Ker 38 H (C N 13) (FB)

—S. 7 — Writ of prohibition — When issues — See Constitution of India, Art. 226 Andh Pra 59 A (C N 22)

—S. 7 — Storing of foodgrains by dealer — Prosecution — Proof — Burden — Limited presumption — See Maharashtra Food Grain Dealers Licensing Order (1963), Cl. 3 (2) Bom 71 (C N 12)

—S. 7 (1) (a) (1) — Breach of condition of licence — Prosecution — Proof — Burden — See Maharashtra Food Grains Dealers Licensing Order (1963), Cl. 3 Bom 70 (C N 11)

EVIDENCE ACT (1 of 1872)

—S. 1 — 'Evidence' in the context of S. 146 (1) Cr. P. C. includes affidavit — See Criminal P. C. (1898), S. 146

All 82 A (C N 16)
—S. 3 — Conviction based on circumstantial evidence — Validity — See Penal Code (1860), S. 148 Orissa 23 A (C N 12)

—S. 13 — Question is to whether applicant's mark is identical or deceptively similar to trade mark of opponent — Judgments in other cases — Admissibility of in evidence — See Trade and Merchandise Marks Act (1958), S. 12 (1)

Cal 80 D (C N 15)
—S. 25 — Statements made before Customs officials — Not hit by S. 25

Raj 48 C (C N 11)
—S. 32 (3) — Statement of person that he is separated from joint family — Probative value. Orissa 18 B (C N 10)

—S. 43 — Question whether trade-mark is identical or deceptively similar to trade mark of opponent — Opponent citing judgments in which parties, facts and trade marks were entirely different — Such judgments or facts cannot be used against applicant — See Trade and Merchandise Marks Act (1958), S. 12 (1) Cal 80 D (C N 15)

—S. 45 — Opinion of expert — Expert should put before Court all the materials which induce him to come to the conclusion, so that Court, although not an expert, may form its own judgment on those materials Guj 48 C (C N 10)

—S. 52 — Lease or Licence — Absence of document — Surrounding circumstances and intention of parties to be considered — See

EVIDENCE ACT (contd.)

Transfer of Property Act (1882), S. 105 Ker 34 (C N 11)

—S. 54 — Bad character of accused — Relevance of in criminal proceedings — See Criminal P. C. (1898), S. 342

All 61 C (C N 10)
—S. 80 — Conviction based on statement made under S. 171-A — Recording of statement in English — Failure to interpret it to illiterate accused — Conviction improper — See Sea Customs Act (1878), S. 171-A Raj 48 A (C N 11)

—Ss. 101 to 104 — Inadequacy of compensation awarded for acquisition — Onus of proof is on claimant for higher compensation — See Land Acquisition Act (1894), S. 11 Madh Pra 28 A (C N 10)

—S. 105 — Grave and sudden provocation — Burden of proof — See Penal Code (1860), S. 300 Exception 1

All 61 A (C N 10)
—S. 111 — Gift by a person to his counsel's wife — Validity — Proof of spontaneity eliminates proof of independent legal advice — See T. P. Act (1882), S. 122

Cal 111 (C N 21)
—S. 112 — Hindu wife converting to Islam — Marriage does not stand automatically dissolved — Marriage with Muslim — Legitimacy of child born of that tie — Presumption — See Mahomedan Law

All 75 (C N 14)
—S. 114 — Charge of second marriage during subsistence of first one — Prior marriage must be proved to have been duly solemnised — There is presumption in favour of validity of marriage — See Hindu Marriage Act (1955) S. 17

Cal 55 B (C N 10)
—S. 114 — Service of notice of ejectment — Service by registered post — Returned with remark 'left' — Service held bad — Personal service was also bad — Presumption available for service under certificate of posting should not be given effect to, in the context — See Transfer of Property Act (1882), S. 105 Cal 109 B (C N 20)

—S. 116 — Tenant denying title of landlord — Permissible limits — If denial is in permissible limits, estoppel cannot be applied to tenant — Penalty of forfeiture when applies — See T. P. Act (1882), S. 111 (g) Madh Pra 32 D (C N 11)

—S. 120 — Gift by a person to his counsel's wife — Validity — See T. P. Act (1882), S. 122 Cal 111 (C N 21)

GENERAL CLAUSES ACT (10 of 1897)

—S. 3 (42) — Word "person" — Managing Committee of School is a "person" — Application under Art. 226 can be filed by the Managing Committee claiming fundamental right to property — See Constitution of India, Art. 226 Orissa 30 A (C N 14)

—S. 6 — Implied repeal — See Civil P. C. (1908), Preamble Goa 30 B (C N 4)

—S. 24 — U. P. Home Guards Adhiniyam (29 of 1963) S. 15 — Appointment made under executive orders in force prior to

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—S. 17 — Custody of minor child — Proper remedy — Nature of right — Considerations — See Constitution of India, Art. 226 Madh Pra 23 A (C N 8)

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—R. 105 — Date of institution of suit — Question of fact — See Civil P. C. (1908), Ss. 100-101 Bom 40 B (C N 6)

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—Adoption — Rights of adopted son — Person making a will as a sole survivor — Son adopted by his widow — Adopted son takes properties of his father subject to dispositions made by the adoptive father by his will — When there is adoption in testator's lifetime, the testator cannot bind the adopted son by disposing property by will Mys 64 C (C N 15)

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—Widow — Adoption — See Tenancy Laws — Oudh Estates Act (1869), S. 22 (7) SC 135 B (C N 28)

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—Ss. 5 (ii), 10 (1) (e), 11, 12, 13 (1) (iii) — Scope Guj 48 (C N 10)

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—S. 10 (1) (e) — Scope — See Hindu Marriage Act (1955), S. 5 (ii) Guj 48 A (C N 10)

—S. 11 — Scope — See Hindu Marriage Act (1955), S. 5 (ii) Guj 48 A (C N 10)

—S. 12 — Scope — See Hindu Marriage Act (1955), S. 5 (ii) Guj 48 A (C N 10)

—S. 13 — 'Incurably unsound mind' — What is Guj 48 B (C N 10)

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—S. 17 — Penal Code (1860), S. 494 — Applicability — There must be subsequent marriage during lifetime of spouse from stand-point that prior marriage was duly solemnised — Essential ingredient to prove charge under S. 494 — Presumption in favour of validity of marriage Cal 55 B (C N 10)

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—S. 3 (as amended in 1938) — Scope — Partition of joint Hindu family property — Share of a member continues to be interest in joint family property — Death of such member — Extent of widow's interest — Such interest will be according as whether she is sole claimant or there are other joint coparceners having a right with her — Living separated coparceners are excluded — (Hindu Law — Joint family) — (Hindu Law — Partition) — (Hindu Law — Widow) — (Hindu Law — Succession)

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—S. 15 (2) (as added in 1959) — Scope — Word 'tenant' includes a lawful sub-tenant — A sub-tenant of a contractual sub-tenant can claim protection of sub-section (2) of S. 15

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—Cl. 13 — Suit for eviction filed in 1958 when Control Order (1949) was in force — During pendency of suit Act 23 of 1955 came to be applied to Jabalpur region in 1959 — Suit filed without permission of Rent Controller held maintainable — Landlord at the most would liable for prosecution under Cl. 13 of the Control Order — See Houses and Rents — M. P. Accommodation Control Act (23 of 1955), S. 11

Madh Pra 32 B (C N 11)

—M. P. ACCOMMODATION CONTROL ACT (23 of 1955)

—S. 4 (f) — T. P. Act (1882), S. 11 (g) — Determination of lease — Second clause of S. 111 (g) T. P. Act in conflict with S. 4(f) — S. 4 (f) stands and second clause of S. 111 (g) stands abrogated after 1-1-1959

Madh Pra 32 C (C N 11)

—S. 11 — C. P. & Berar Letting of Houses and Rent Control Order (1949), Cl. 13 — Suit for eviction filed in 1958 when Control Order (1949) was in force — During pendency of suit Act 23 of 1955 came to be applied to Jabalpur region in 1959 — Suit filed without permission of Rent Controller held maintainable — Landlord at the most would be liable for prosecution under Cl. 13 of the Control Order

Madh Pra 32 B (C N 11)

—WEST BENGAL PREMISES TENANCY ACT (12 of 1956)

—S. 4 — Conditions for valid deposit — See Houses and Rents — West Bengal Premises Tenancy Act (1956), S. 21 (1)

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—HOUSES AND RENTS — W. B. PREMISES TENANCY ACT (contd.)

—Ss. 21 (1) & 4 — Scope and applicability — Conditions for valid deposit

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—S. 21 — Scope — Powers of Deputy Registrar — See Houses and Rents — West Bengal Premises Tenancy Act (12 of 1956), S. 26 (2), (4)

Cal 104 A (C N 19)

—Ss. 26(2), (4) and 21 — Scope — Powers of Deputy Registrar — Neither the Controller nor the Deputy Registrar can correct the rent challans

Cal 104 A (C N 19)

—WEST BENGAL PREMISES TENANCY (AMENDMENT) ACT (4 of 1968)

—S. 1 (2) — Date of commencement of the Act for purposes of S. 17B — See Houses and Rents — West Bengal Premises Tenancy (Amendment) Act (4 of 1968), Section 17-B (1)

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Cal 67 (C N 12)

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—Pre — Interpretation of — Fiscal Statutes — Principles of construction — See Income Tax Act (1922), S. 42(1)

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—S. 10(2)(vi) — Income Tax Rules (1922), R. 8 Prov. 2 — (Note under Item III) — Depreciation — Seasonal factories working triple shifts — Provision of extra shift depreciation is not applicable to seasonal factories

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—S. 10 (2) (xv) — Capital expenditure should bring enduring benefit — Contribution for building road — Contributions given by Sugar Mills and cane growers — Road built would be an enduring benefit to the assessee Mill — Contribution by assessee Mill held capital expenditure and not deductible under S. 10 (2) (xv)

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—S. 42 (1) — "Money in cash or in kind" — 'Money in kind' does not mean any and every article into which the money had been converted. (Interpretation of Statutes — Fiscal Statutes) — (Civil P. C. (1908), Preamble — Interpretation of Statutes) — (Income-tax Act (1922), Preamble — Interpretation of fiscal Statutes) — Court-fees Act (1870) Preamble — Interpretation of fiscal Statutes) — (Words and Phrases — "Money in kind") — (Succession Act (1925) S. 74 — (Will — Construction — Principles of construction of fiscal Statutes)

Cal 71 (C N 14)

INCOME TAX RULES (1922)

—R. 8, Prov. 2 — Provision as to depreciation for extra-shift — Not applicable to seasonal factories — See Income Tax Act (1922), S. 10 (2) (vi)

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INDUSTRIAL DISPUTES ACT (14 of 1947)

—S. 2 (a) — Dismissed workmen staying on premises refusing to leave them — It does not amount to stay-in-strike but is an

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offence of criminal trespass — See Constitution of India, Art. 226 Mys 51 (C N 12)
 —S. 25 — Dismissed workmen staying on premises and refusing to leave them — It is not stay-in-strike — See Constitution of India, Art. 226 Mys 51 (C N 12)

—S. 28 — Dismissed workmen staying on premises and refusing to leave them — It is not stay-in-strike — See Constitution of India, Art. 226 Mys 51 (C N 12)

—Sch. 2 Item 5 — Dismissed worker in a factory refusing to leave premises — It is not stay-in-strike — It is an offence of criminal trespass — See Constitution of India, Art. 226 Mys 51 (C N 12)

—Sch. III Item 5 — Retiring Gratuity Rules of Tisco company became an implied condition of service of all employees of Tisco Ltd. — But gratuity cannot be claimed as of right Pat 53 B (C N 15)

—Sch. III, Item 5 — Precedent — Right of employee under retiring Gratuity Rules of employer company — Interpretation of rules involved — Cases decided under Industrial Disputes Act are not a safe guide — See Civil P. C. (1908) Preamble

Pat 53 C (C N 15)

—Sch. III Item 5 and S. 15 — Retiring gratuity is no longer a gratuitous payment but only an earned money — Where rules do not enable employee to claim gratuity as of right, civil courts cannot enforce such claim — Tribunals can do so. (1884) ILR 6 All 173 & (1884) ILR 6 All 634 & AIR 1924 Bom 88 & AIR 1943 Bom 453 & AIR 1932 Pat 311 and AIR 1933 Cal 409, held no longer good law Pat 53 D (C N 15)

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—Preamble and S. 7 — Works Standing Orders of Tisco Ltd. — Standing Orders although primarily govern service conditions of workmen, are not inapplicable to employees who claim to be governed by them Pat 53 A (C N 15)

—S. 7 — Works Standing Orders of Tisco Ltd. — Standing Orders although primarily govern service conditions of workmen, are not inapplicable to employees who claim to be governed by them — See Industrial Employment (Standing Orders) Act (1946), Preamble Pat 53 A (C N 15)

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—Fiscal Statutes — Principles of construction — See Income Tax Act (1922), S. 42 (1) Cal 71 (C N 14)

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—Repeal and supersession — See Kerala Rice Paddy (Procurement by Levy) Order (1966) Ker 38 G (C N 13) (FB)

IRON AND STEEL (CONTROL) ORDER, 1956

—Joint Plant Committee not amenable to writ jurisdiction — (Govt. of India Notifica-

IRON & STEEL (CONTROL) ORDER (contd.)

tion dt. 29-2-1964 in Gazette of India Extraordinary dt. 1-3-1964) — Constitution of India, Art. 226 — Joint Plant Committee — Iron and Steel (Control) Order (1956) — Writ does not lie Madh Pra 25 (C N 9)

JAMMU AND KASHMIR CONSTITUTION ACT (1996)

—Ss. 1 to 8 and 5A and 5B (as amended in 2001) — Companies are excluded from purview of State subjects — They are not permanent residents — Mortgage of immovable property in their favour is invalid J & K 25 B (C N 8) (FB)

—S. 5A — See Jammu & Kashmir Constitution Act (1996), S. 1 J & K 25 B (C N 8) (FB)

—S. 5B — See J & K Constitution Act (1996), S. 1 J & K 25 B (C N 8) (FB)

—S. 6 — See J. & K. Constitution Act (1996), S. 1 J & K 25 B (C N 8) (FB)

—S. 7 — See J. & K. Constitution Act (1996), S. 1 J & K 25 B (C N 8) (FB)

—S. 8 — See J. & K. Constitution Act (1996), S. 1 J & K 25 B (C N 8) (FB)

KERALA HIGH COURT ACT (5 of 1959-66)

—S. 5 (1) — Constitutional validity of impugned provision decided as preliminary point and case posted for further hearing — It is preliminary judgment and appealable — Letters Patent (Bom. Cal. & Mad.) Cl. 15 — Civil P. C. (1908), Ss. 2 (2), 2 (9)

Ker 38 A (C N 13) (FB)

KERALA PADDY AND RICE (DECLARATION AND REQUISITIONING OF STOCKS) ORDER (1966)

—Cl. 3 (1) — Absence of provision to oblige officer to take excess paddy does not result in discrimination — Constitution of India, Art. 14. 1968 Ker LT 223, Reversed Ker 38 T (C N 13) (FB)

—Cl. (4) — Clause does not give arbitrary power to officers to order stock-holder to sell specified quantity of paddy without any enquiry as to stock in his possession — Essential Commodities Act (1955), S. 3 (2) (f). 1968 Ker LT 223, Reversed

Ker 38 Q (C N 13) (FB)

—Cl. 4 — Classification is not unreasonable — Essential Commodities Act (1955), S. 3 (2) (f) — Constitution of India, Art. 14 1968 Ker LT 223, Reversed

Ker 38 R (C N 13) (FB)

—Cl. 4 — Fixation of compensation for rice and paddy requisitioned at controlled price is "just equivalent" — Constitution of India, Art. 31 (2). 1968 Ker LT 223, Reversed

Ker 38 S (C N 13) (FB)

KERALA PADDY (MAXIMUM PRICES) ORDER (1965)

—Kerala Rice (Maximum Prices) Order (1965) — Maximum Prices fixed under conditions prevailing in 1965 — Absence of any data to show that under the present conditions in the State the maximum prices fixed by the Maximum Prices Orders, 1965, do not leave a fair margin of profit over the

KERALA PADDY (MAXIMUM PRICES) ORDER (contd.)

cost of production — No material to declare the maximum prices now in vogue to be unreal and arbitrary — Expression "the maximum price specified by the Government for the time being under the Kerala Paddy Rice (Maximum Prices) Order 1965" indicates categorically that the intention behind the Maximum Prices Orders is to revise the price from time to time as conditions may require — Orders cannot be attacked on ground that maximum price fixed in 1965 remains the same, in view of the undertaking by the Govt. that it will be checked from year to year

Ker 38 U (C N 13) (FB)

KERALA RICE AND PADDY (PROCUREMENT BY LEVY) ORDER (1966)

— Levy order is governed by S. 3 (3B) of Essential Commodities Act and not S. 3 (3) of the Act — Essential Commodities Act (1955), S. 3 (3) and (3B)

Ker 38 D (C N 13) (FB)

— Essential Commodities Act (1955), S. 3 (2) (f) — Levy Order is constitutional — Concurrence of Central Government was not necessary — Civil P. C. (1908), Preamble — Interpretation of Statutes — Repeal and supersession

Ker 38 G (C N 13) (FB)

— "Person holding the stock" does not mean that he should have both possession and title — See Essential Commodities Act (1955), S. 3(2)(f)

Ker 38 J (C N 13) (FB)

— Cl. 2 (b) — "Cultivator" — Definition is plain and simple — Does not include labourer through whom owner of land does the cultivation — "Actually" means "really" — Words and Phrases — "Actually"

Ker 38 B (C N 13) (FB)

— Cls. 3, 6, 3-C — Notification under Cl. 3 is not violative of rule of equal protection in Art. 14 of the Constitution — Levy is not unrelated to actual yield — Constitution of India, Art. 14

Ker 38 N (C N 13) (FB)

— Cl. 3 — Classification is not unreasonable — Constitution of India, Art. 14

Ker 38 O (C N 13) (FB)

— Cl. 3-C — Notification under Cl. 3 is not violative of Art. 14 of the Constitution — See Kerala Rice and Paddy (Procurement by Levy) Order (1966), Cl. 3

Ker 38 N (C N 13) (FB)

— Cl. 6 — Levy is not unrelated to actual yield — See Kerala Rice and Paddy (Procurement by Levy) Order (1966), Cl. 3

Ker 38 N (C N 13) (FB)

— Cl. 6 — Discretion of administrative officers under, is not unguided and arbitrary — See Kerala Rice and Paddy (Procurement by Levy) Order (1966), Cl. 13

Ker 38 P (C N 13) (FB)

— Cl. 7 — Clause does not violate Art. 31 (2) of the Constitution — Constitution of India, Art. 31 (2) — 1968 Ker LT 223, Reversed

Ker 38 C (C N 13) (FB)

KERALA RICE & PADDY (PROCUREMENT BY LEVY) ORDER (contd.)

— Cl. 7 — Essential Commodities Act (1955), S. 3 (3B) — Levy Order does not transgress limits of delegation conceded to State — The Order contains specification of price — Constitution of India, Art. 31 (2) — 1968 Ker LT 223, Reversed

Ker 38 E (C N 13) (FB)

— Cl. 7 — The order does not ignore direction in S. 3 (3B) of the Essential Commodities Act, that cultivator is to be given price specified in the Order having regard to the price "likely to prevail during the post-harvest period" — Essential Commodities Act (1955), S. 3 (3B), 1968 Ker LT 223, Reversed

Ker 38 F (C N 13) (FB)

— Cl. 11 — Discretion of administrative officers under Cl. 6 is not unguided or arbitrary — See Kerala Rice and Paddy (Procurement by Levy) Order (1966), Cl. 13

Ker 38 P (C N 13) (FB)

— Cls. 13, 6, 11 — Clause does not give Govt. unbridled power and is not arbitrary — Discretion of administrative officers under Cl. 6 is not unguided and arbitrary — Constitution of India, Art. 14

Ker 38 P (C N 13) (FB)

KERALA RICE (MAXIMUM PRICES) ORDER (1965)

— Intention behind the Order is to revise the prices from time to time as conditions may require — See Kerala Paddy (Maximum Prices) Order (1965)

Ker 38 U (C N 13) (FB)

KHADI VILLAGE INDUSTRIES COMMISSION ACT (61 of 1956)

— Ss. 15, 19 — Constitution of India, Arts. 14, 19 — Granting rebate to some and not to others, or giving rebate on one type of goods is not discrimination

Mys 47 (C N 10)

— S. 19 — Granting rebate to some and not to others or giving rebate on one type of goods — Not discrimination — See Khadi Village Industries Commission Act (1956), S. 15

Mys 47 (C N 10)

LAND ACQUISITION ACT (1 of 1894)

— S. 4 — Notification under mentioning that objection to acquisition could be filed within 30 days before L. A. Collector — Notification held to be not bad in law — See Land Acquisition Act (1894), S. 6

Punj 62 (C N 12)

— S. 5A — Validity of notification under S. 6 — Cannot be challenged on ground that no opportunity for filing objections under S. 5A was given — See Land Acquisition Act (1894), S. 6

Punj 62 (C N 12)

— Ss. 6, 5-A, 4 and 17 (1) — Proceedings for acquisition of land — Notification under S. 4 mentioning that objection to acquisition could be filed within 30 days before Land Acquisition Collector — Notification under Ss. 6 and 17(1) — Notification held to be not bad in law

Punj 62 (C N 12)

— Ss. 9, 13, 25 (1) — Claim for compensation in pursuance of notice under S. 9 —

LAND ACQUISITION ACT (contd.)

Award in excess of claim is wrong

Madh Pra 28 C (C N 10)

—Ss. 9 (1), 15, 16, 18, 23(1)—Reference under S. 18 — Claimant in pursuance of notice issued under S. 9 filing claim statement on 20-8-1959 — Plantain plants planted on land under acquisition after 20-8-1959 — Award given on 10-11-1959 and possession taken on 5-12-1959 — Plantain plants standing on land at the time — Held under S. 23 Court was bound to take into consideration damages sustained by claimant by reason of taking standing crops on land under acquisition at time of Collector's taking possession — Claimant could agitate this question in court in reference under S. 18

Guj 34 A (C N 7)

—Ss. 11 and 12 — Award under — Claim for enhanced compensation — Onus to prove inadequacy of award is on claimant

Madh Pra 20 A (C N 10)

—S. 12 — Claim for enhancement of compensation awarded — Onus of proof of inadequacy of award on claimant — See Land Acquisition Act (1894), S. 11

Madh Pra 28 A (C N 10)

—S. 13 — Award in excess of claim is wrong — See Land Acquisition Act (1894), S. 9

Madh Pra 28 C (C N 10)

—S. 15 — Reference under S. 18 — Question that can be agitated in — See Land Acquisition Act (1 of 1894) S. 9 (1)

Guj 34 A (C N 7)

—Ss. 15, 23, 24 — Scope — S. 23 deals with matters to be considered by Court in determining compensation — Court is obliged to take them into consideration — Collector has in view of S. 15 only to take guidance from Ss. 23 and 24 in determining compensation: (1955) 57 Bom LR 934 (938). Dissent. from

Guj 34 B (C N 7)

—S. 16 — Reference under S. 18—Question that can be agitated in — See Land Acquisition Act (1 of 1894) S. 9 (1)

Guj 34 A (C N 7)

—S. 16 — Scope

Guj 34 C (C N 7)

—S. 17 (1) — Notification under Ss. 6 and 17(1) — Notification held not bad in law — See Land Acquisition Act (1894), S. 6

Punj 62 (C N 12)

—S. 18 — Reference under — Compensation for plantain plants planted after service of notice under S. 9 — Claimant would agitate this question in Court in reference under S. 18 — See Land Acquisition Act (1 of 1894) S. 9 (1)

Guj 34 A (C N 7)

—Ss. 23, 26 and 34 — Andhra Pradesh Court Fees and Suits Valuation Act (1956), S. 48 — Civil P. C. (1908), S. 2 (2) and (9) — Interest is not part of compensation

Andh Pra 55 B (C N 21) (FB)

—S. 23 — Collector has in view of S. 15 only to take guidance from Ss. 23 and 24 in determining the compensation — See Land Acquisition Act (1 of 1894) S. 15

Guj 34 B (C N 7)

—S. 23 — Agricultural land, acquisition of — Claim for valuation as building site

LAND ACQUISITION ACT (contd.)

— Absence of evidence to prove such potentiality of land — Valuation as building site cannot be made

Madh Pra 28 D (C N 10)

—S. 23(1) — Compensation for plantain plants planted after issue of notice under S. 9—See Land Acquisition Act (1 of 1894), S. 9 (1)

Guj 34 A (C N 7)

—S. 23 (1) — Criterion for compensation is the damage and not the market value — Actual loss to owner by depriving him of harvest, is the basis, and not price of unripe crops

Guj 34 D (C N 7)

—S. 24 — Collector has in view of S. 15 only to take guidance from Ss. 23 and 24 in determining compensation — See Land Acquisition Act (1 of 1894) S. 15

Guj 34 B (C N 7)

—S. 25(1) — Award in excess of claim is wrong — See Land Acquisition Act (1894), S. 9

Madh Pra 28 C (C N 10)

—S. 26 — Interest is not part of compensation — See Land Acquisition Act (1894), S. 23

Andh Pra 55 B (C N 21) (FB)

—S. 34 — Cross objections for interest payable under — No court fee payable on them — See Court Fees and Suits Valuations — Andhra Pradesh Court Fees and Suits Valuation Act (1956), S. 48

Andh Pra 55 A (C N 21) (FB)

—S. 34 — Interest is not part of compensation — See Land Acquisition Act (1894), S. 23

Andh Pra 55 B (C N 21) (FB)

—S. 54 — Appeal under — Filing of appeal by Collector not in State's name but in his own as appellant — Appeal is not incompetent

Madh Pra 28 B (C N 10)

LETTERS PATENT

—(Lah.), Cl. 10 — Order of Single Judge convicting appellant for disobedience of orders of High Court in civil proceedings — Order is appealable

Punj 60 A (C N 11)

—(Lah.), Cl. 10 — Parties—Appeal against order of Single Judge convicting a person for contempt of High Court in a case initiated on complaint made by private person and not by Court on its own motion — Court is not made respondent to such appeal

Punj 60 B (C N 11)

—(Bom.), Cl. 15 — Date of institution of suit — Question of fact — Binding on party in second appeal — See Civil P. C. (1908), S. 100

Bom 40 B (C N 6)

—(Bom., Cal., Mad.), Cl. 15 — Decision on preliminary point as to constitutional validity of a provision — It is preliminary judgment and appealable — See Kerala High Court Act (1959-66), S. 5 (1)

Ker 38 A (C N 13) (FB)

LIMITATION ACT (9 of 1908)

—Sec. 1 and Arts. 142 and 144 — Applicability — Act does not apply to disputes between members of Garo tribe who are included amongst Scheduled Tribe — Adverse possession cannot therefore be applied

Assam 22 B (C N 6)

—S. 10 — Assigns — Term includes legal representatives of assigns — Gift of trust property to B by trustee A — After B's

LIMITATION ACT (1908) (contd.)

death C, his widow, in possession — Suit by other trustees for possession against C — S. 10 applies All 72 A (C N 13)

—S. 10, Art. 144 — Transfer without consideration of temple property by trustee — S. 10 applies — Transferee cannot hold adversely to deity All 72 B (C N 13)

—Arts. 142, 144 — Applicability to Garo Tribe included among Scheduled Tribe — See Limitation Act (1908), S. 1

Assam 22 B (C N 6)
—Art. 144 — Transfer without consideration of temple property by trustee — Transferee cannot hold adversely to deity — See Limitation Act (1908), S. 10

All 72 B (C N 13)
—Sch. I, Art. 182, Cl. 5 — "Application made in accordance with law" — Expression relates to the application as filed and not the order passed thereon — It must be in accordance with law as contemplated by the Article — (Civil P. C. (1908), O. 21, Rr. 11 to 17) Guj 55 B (C N 11)

—Sch. I, Art. 182 (5) — Step-in-aid of execution of decree — Application praying issue of notice on the judgment-debtor (Railway) under S. 82 and O. 21, R. 22 Civil P. C. — Issuance of notice accordingly — Application held, a step-in-aid towards execution of decree — Neither non-appearance of the judgment-debtor nor non-compliance with R. 12 of O. 21 of Civil P. C., held, affected the position Guj 55 D (C N 11)

LIMITATION ACT (36 of 1963)

—Art. 64 — Equity of redemption — Usufructuary mortgage — Admission by mortgagor that in default of payment on due date, the mortgagee has become absolute owner — Title by adverse possession cannot be claimed — Further unless both parties are cognizant of their rights there can be no acquiescence — See Transfer of Property Act (1882), S. 60 Pat 64 B (C N 16)

—Art. 65 — Equity of redemption — Usufructuary mortgage — Admission by mortgagor that in default of payment on due date, the mortgagee has become absolute owner — Title by adverse possession cannot be claimed — Further unless both parties are cognizant of their rights there can be no acquiescence — See Transfer of Property Act (1882), S. 60 Pat 64 B (C N 16)

LUNACY ACT (4 of 1912)

—Ss. 3(5), 65(2) — Lunatic — Meaning of — Distinction between lunacy as understood in the Act and mere weakness of intellect — Procedure laid down must be strictly followed Pat 33 C (C N 12)

—Ss. 18(1), 62 — Omission to give medical certificate in Form III of Schedule I — Effect Pat 33 D (C N 12)

—S. 62 — Application under — Need not be accompanied either by affidavit or medical certificate: AIR 1920 All 80, Dissent, from Pat 33 B (C N 12)

LUNACY ACT (contd.)

—S. 62 — Omission to give medical certificate as prescribed — Effect — See Lunacy Act (1912), S. 18(1) Pat 33 D (C N 12)

—S. 65(2) — Court must find that alleged lunatic is of unsound mind and incapable of managing himself and his affairs — High Court has power under S. 83 to correct a wrong finding under S. 65(2) — See Lunacy Act (1912), S. 3(5) Pat 33 C (C N 12)

—S. 83 — Who can appeal

Pat 33 A (C N 12)
—S. 83 — Order passed by Court about property in hands of manager after death of lunatic — Order is appealable under S. 83 Pat 33 E (C N 12)

MADHYA PRADESH ACCOMMODATION CONTROL ACT (23 of 1955)

See under Houses and Rents.

(MADHYA PRADESH) HIGH COURT RULES AND ORDERS (CRIMINAL) RULES

See under High Court Rules and Orders.

MADRAS HINDU RELIGIOUS AND CHARITABLE ENDOWMENTS ACT (19 of 1951)

—S. 49 — Dismissal of servant of religious institution — Dismissal set aside by Dy. Commissioner — Trustee not complying with the order — Declaration that dismissal is void can be granted by Civil Court — See Specific Relief Act (1877), S. 42, Proviso Ker 36 (C N 12)

MAHARASHTRA CO-OPERATIVE SOCIETIES ACT (24 of 1961)

See under Co-operative Societies.

MAHARASHTRA CO-OPERATIVE SOCIETIES RULES (1961)

See under Co-operative Societies.

MAHARASHTRA FOODGRAINS DEALERS LICENSING ORDER, 1963

—Cl. 3 — Breach of condition No. 7A of Licence requiring wholesaler who sells foodgrains to retailers to maintain register in form D — Before such breach is established, prosecution has to prove that the wholesaler was in fact selling to retailers — Unless it is so established, it is not obligatory on the part of dealer to maintain register in form D Bom 70 (C N 11)

—Cl. 3(2) — Presumption under — Sub-clause (2) raises a limited presumption as to the purpose for which foodgrains are stored namely that the stock found with a dealer was stored by him for sale — Prosecution is still required to prove that store of foodgrains was made for purpose of carrying on business of storing for sale Bom 71 (C N 12)

MAHOMEDAN LAW

—Marriage — Dissolution — Hindu wife converting to Islam — Marriage does not automatically stand dissolved — Marriage with a Mahomedan — Legitimacy of child — Evidence Act (1872), S. 112, AIR 1949 Cal 436 Diss. All 75 (C N 14)

MAXIMS

—Leges posteriores priores contrarias abrogant — See Civil P. C. (1908), Preamble
Goa 30 B (C N 4)

MINERAL CONCESSION RULES (1960)

—R. 37, Explanation 1 (A) — Revision before Central Government under after lapse of 9 months from the date of original application — Is competent — See Mineral Concession Rules (1960), R. 54

Andh Pra 39 A (C N 16)

—Rr. 54 and 37, Explanation 1 (A) — Application for transfer of mining lease filed on 24-7-1965 — No order passed by State Government within 9 months — Application must be deemed to have been refused — Revision filed before Central Government under R. 54 after 23-4-1966 i.e., lapse of 9 months from the date of original application is competent

Andh Pra 39 A (C N 16)

MOTOR VEHICLES ACT (4 of 1939)

—S. 48(3)(xiv) — Question whether issue of through tickets can be prohibited under Motor Vehicles Act (1939) — Construction of S. 48(3) involved — Question is of sufficient private or public importance to justify certificate of fitness for appeal under Art. 133(1)(c) of the Constitution — See Constitution of India, Art. 133(1)(c)

Delhi 58 (C N 11)

—Ss. 58 and 61 — Application for renewal of permit — Death of applicant during pendency of application and after date of expiry of permit to be renewed — Heir of deceased succeeding to possession of vehicle can continue renewal proceeding and get permit transferred to him — (Motor Vehicles Rules (Mad) (1940), Rr. 184, 185)

Mad 55 (C N 10)

—S. 61 — Death of applicant pending application for renewal of his permit — Proceeding whether abates — See Motor Vehicles Act (4 of 1939) S. 58

Mad 55 (C N 10)

MOTOR VEHICLES RULES (MAD) 1940

—R. 184 — Application for renewal of permit — Death of applicant pending application but after date of expiry of permit to be renewed — Continuation of application by heir — Permissibility — See Motor Vehicles Act (4 of 1939), S. 58 Mad 55 (C N 10)

—R. 185 — Death of applicant pending application for renewal of his permit — Heir can continue the renewal proceedings and get permit transferred to him — See Motor Vehicles Act (4 of 1939), S. 58

Mad 55 (C N 10)

MYSORE ABSORPTION OF INSTRUCTORS AND ASSISTANT INSTRUCTORS IN TAILORING RULES (1965)

—R. 2 — Rule does not violate Arts. 14 and 16 of Constitution — See Constitution of India, Art. 14 Mys 59 (C N 13)

MYSORE HIGH COURT RULES (1959)

See under High Court Rules and Orders.

MYSORE POLICE ACT 1963 (4 of 1964)

—S. 55 — Dismissed worker of factory refusing to leave premises — It is offence of criminal trespass — Police can take action in the matter — See Constitution of India, Art. 226 Mys 51 (C N 12)

ODDH ESTATES ACT (1 of 1869)

See under Tenancy Laws.

PANCHAYATS**—U. P. KSHETTRA SAMITIS AND ZILA PARISHADS ADHINIYAM (U. P. ACT 33 of 1961)**

—Ss. 13, 26 — Election of Adhyaksha of Zila Parishad — Act mentioning qualifications and disqualifications of being Adhyaksha — Person elected not qualified — Aggrieved person can present petition raising the question even though there are no provisions in the Act for the grounds to be set out in petition seeking to set aside election of Adhyaksha All 65 A (C N 11)

—S. 13(c) — Person performing duties of Honorary Magistrate — Sar Panch of Nyaya Panchayat is not such a person and is not disqualified from being elected as Adhyaksha of Zila Parishads — Criminal P. C (1898), Ss. 12 and 14 — U. P. General Clauses Act (1 of 1904), S. 3(32)

All 65 B (C N 11)

—S. 13(c) — Nomination paper of one of the candidates to the election of Adhyaksha of Zila Parishad improperly rejected — This is sufficient to invalidate the election of the only remaining candidate — The result of the election is materially affected — Fact that elected candidate belonged to majority party is of no avail — Panchayats — U. P. Zila Parishads (Election of Adhyaksha and Up-Adhyaksha and Settlement of Election Disputes) Rules (1961), R. 13 — Representation of the People Act (1951), S. 100

All 65 C (C N 11)

—S. 26 — Election of Adhyaksha of Zila Parishad — Elected person not qualified — Challenge to his election — Grounds for — Provision in the Act — See Panchayats — U. P. Kshettra Samitis and Zila Parishads Adhiniyam (U. P. Act 33 of 1961), S. 13

All 65 A (C N 11)

—U. P. ZILA PARISHADS (ELECTION OF ADHYAKSHA AND UP-ADHYAKSHA AND SETTLEMENT OF ELECTION DISPUTES) RULES (1961)

—R. 13 — Improper rejection of nomination paper — Effect on election — See Panchayats — U. P. Kshettra Samitis and Zila Parishads Adhiniyam (U. P. Act 33 of 1961), S. 13(c)

All 65 C (C N 11)

PARTITION ACT (4 of 1893)

—Ss. 2 and 6 — Partition suit — Power of Court to order sale — Sale has to be by public auction — Sale to co-sharers alone not warranted. Order of Datta J. D/- 15-6-1966 (Cal), Reversed. (1950) 86 Cal LJ 144 and (1952) 90 Cal LJ 147, Overruled

Cal 59 A (C N 11)

PARTITION ACT (contd.)

—S. 2 — Power of Court to direct sale — Conditions essential Cal 59 B (C N 11)

—S. 4 — Scope — Section should be liberally construed — Widely in favour of family members and strictly against stranger purchaser — Section 4 applies not only to suit by stranger purchaser but also to suit against him — Civil P. C. (1908), Pre. — (Interpretation of Statutes)

Cal 88 A (C N 16)

—S. 4 — Dwelling house — Question whether disputed land ceased to be so — Disappearance of structures thereon — Proof, not conclusive — Non-consideration of question by Courts below — Case remanded in second appeal — AIR 1959 Orissa 173, Diss. from — (Civil P. C. (1908), O. 41, R. 25)

Cal 88 B (C N 16)

—S. 6 — Partition suit — Power of Court to order sale — See Partition Act (1893), S. 2

Cal 59 A (C N 11)

PENAL CODE (45 of 1860)

—S. 65 — Case tried summarily by competent Magistrate — Sentence passed — Legality — See Criminal P. C. (1898), S. 262(2)

Guj 62 B (C N 12)

—S. 71 — Governs assessment of punishment — Does not indicate that separate punishment cannot be awarded and if it is awarded it is illegal — See Penal Code (1860), S. 279

Guj 62 A (C N 12)

—S. 148 — Conviction based on circumstantial evidence — Validity — Chain of circumstances must be complete — Falsity of defence plea would not establish prosecution case

Orissa 23 A (C N 12)

—S. 148 — Charges under S. 148 I. P. C. and S. 27, Arms Act — Acquittal of offence under S. 148 — Conviction under S. 27 Arms Act cannot be maintained — See Criminal P. C. (1898), S. 403

Orissa 23 B (C N 12)

—S. 182 — "Public Servant concerned" — Meaning — See Criminal P. C. (1898), S. 195 (1)(a)

Andh Pra 41 A (C N 17)

—Ss. 279 and 337 and 71 — Offences under Ss. 279 and 337 are distinct — Separate conviction for offences can be recorded at same time — Commission of offence in same transaction — Section 71 governs assessment of punishment. AIR 1939 Pat 388, Diss. from

Guj 62 A (C N 12)

—S. 300, Exception 1 — Murder — Grave and sudden provocation — What amounts to — Burden of proof — Evidence Act (1872), S. 105

All 61 A (C N 10)

—S. 302 — Murder — Sentence — Accused himself found responsible for giving provocation — He chased the woman, threw her on ground showered knife blows on vital parts of body and virtually butchered her to death on spot — Crime being committed in a most inhuman and brutal manner, death penalty awarded to accused, held was fully deserved — Accused could not claim any lenient consideration

All 61 B (C N 10)

PENAL CODE (contd.)

—S. 337 — Offences under Ss. 279 and 337 are different — See Penal Code (1860), S. 279

Guj 62 A (C N 12)

—S. 417 — "Public Servant concerned" — Meaning — See Criminal P. C. (1898), S. 195 (1) (a)

Andh Pra 41 A (C N 17)

—S. 420 — Offence under in respect of lorry — Ownership of lorry in dispute — Competency of Criminal Court to decide — See Criminal P. C. (1898), S. 517

Andh Pra 54 (C N 20)

—S. 441 — Act of striking workmen amounts to criminal trespass under the section — See Criminal Procedure Code (5 of 1898), S. 561A

Mad 33 (C N 8)

—S. 441 — Dismissed workmen staying on premises and refusing to leave — It is offence of criminal trespass — See Constitution of India, Art. 226

Mys 51 (C N 12)

—S. 447 — Dismissed workmen staying on premises and refusing to leave — It is offence of criminal trespass — See Constitution of India, Art. 226

Mys 51 (C N 12)

—S. 471 — Public servant concerned — Meaning — See Criminal P. C. (1898), S. 195 (1) (a)

Andh Pra 41 A (C N 17)

—S. 494 — Applicability — It must be shown that subsequent marriage was solemnised upon due performance of essential ceremonies whereupon only marriage becomes valid marriage

Cal 55 A (C N 10)

—S. 494 — Essential ingredient to prove charge under section — See Hindu Marriage Act (1955), S. 17

Cal 55 B (C N 10)

PRECEDENT

—Observations

Andh Pra 55 C (C N 21)(FB)

PRESIDENCY SMALL CAUSE COURTS ACT (15 of 1882)

—S. 41 — "Annual value of rack rent" — Meaning — Such value is to be based on "rent" and not on licence fees — It means only gross rent and not net rent

Bom 73 (C N 13)

PREVENTION OF FOOD ADULTERATION ACT (37 of 1954)

—S. 10(7) — Interpretation of — Requirement of presence of two witnesses is mandatory — Exception — Evidence must show impossibility in complying with the requirement

All 80 (C N 15)

—S. 20 — Interpretation — Prosecution under the Act — Sanction from authorities mentioned in the section, not contemplated

Raj 39 (C N 9)

PREVENTIVE DETENTION ACT (4 of 1950)

See under Public Safety

PROVIDENT FUNDS ACT (19 of 1925)

—Ss. 3, 4(1) (c) and 5 (as amended in 1946) — Defence Services Officers — Provident Fund Rules, R. 9 (viii) — Subscriber can dispose of provident fund by will — Subscriber appointing his parents as nominees and also making a will in favour of his father — Held though nomination in favour of parents was not valid widow of

PROVIDENT FUNDS ACT (contd.)

subscriber could not claim provident fund money either under S. 3 (2) or under the relevant rules when there was disposition by will in favour of father by the subscriber: Case law discussed. AIR 1947 Cal 176 and AIR 1936 Mad 477, held no longer good law
Punj 44 (C N 8)

—S. 4 (1) (c) — Subscriber can dispose of provident fund by will — See Provident Funds Act (1925), S. 3
Punj 44 (C N 8)

—S. 5 (as amended in 1946) — Subscriber can dispose of provident fund by will — See Provident Funds Act (1925), S. 3

Punj 44 (C N 8)

PUBLIC SAFETY**—PREVENTIVE DETENTION ACT (4 of 1950)**

—S. 3 (1) (a) — Subjective satisfaction of detaining authority subject to certain exceptions, is not justiciable — Such satisfaction cannot be tested by objective tests — Grounds on which order can be struck down, stated
Delhi 45 A (C N 10) (FB)

—S. 3 (1) (a) and (b) — Provisions have to be read independently — S. 3 (1) (b) authorises detention of a foreigner with a view to regulate his continued presence in India — Provision of S. 3 (1) (b) is not ultra vires the legislature and is well within Entry 9 List III and Entry 3 List I of Seventh Schedule to the Constitution
Delhi 45 B (C N 10) (FB)

—S. 3 (1) (a) and (b) — Detention order — Validity — Vagueness of some of the grounds would render the order invalid
Delhi 45 C (C N 10) (FB)

—S. 3 (1) (b) — Validity — Provisions do not give unlimited power to executive to pick and choose any foreigner for being subjected to preventive detention — Provisions do not violate Art. 14 of the Constitution
Delhi 45 D (C N 10) (FB)

PUNJAB SERVICE INTEGRATION RULES (1957)

See under Civil Services

RAJASTHAN HIGH COURT RULES

See under High Court Rules and Orders.

REPRESENTATION OF THE PEOPLE ACT (43 of 1951)

—S. 67A — Object of — See Constitution of India, Art. 183 (a)
All 56 A (C N 9)

—S. 74 — Notification under — Effect of — See Constitution of India, Art. 183 (a)
All 56 A (C N 9)

—Ss. 77 and 123(6) — Corrupt practice — Irregularity in maintaining accounts — Does not fall under S. 123(6)
All 88 D (C N 17)

—S. 79 (b) — Candidate — Meaning of — First condition is that person must either be duly nominated or claiming to be duly nominated — Significance of holding out lies in determining starting time of candidature and that only if he satisfies the first condition
Andh Pra 68 B (C N 25)

REPRESENTATION OF THE PEOPLE ACT (contd.)

—S. 79 (b) — Expression "other candidate" — Meaning of — See Representation of the People Act (1951), S. 82

Andh Pra 68 C (C N 25)

—Ss. 82, 79 (b), 86 and 99 — Expression "other candidate" — Meaning of — It includes all candidates who come within definition of candidate under S. 79 (b) and whose names were not included in list of contesting candidates prepared under S. 38

— Such candidates are necessary parties if there are allegations of corrupt practice against them — If they are not made parties, petition is to be dismissed in limine under S. 86 (1)
Andh Pra 68 C (C N 25)

—Ss. 82 (b) and 123 (1) (B) (a) — Scope and applicability — Mere allegations of corrupt practice are sufficient — Whether corrupt practice was committed by candidate in his own interest or as candidate, is immaterial
Andh Pra 68 A (C N 25)

—S. 82 (b) — Scope and applicability — See Representation of the People Act (1951), S. 87
Andh Pra 68 D (C N 25)

—S. 86 — Expression "other candidate" — Meaning of — See Representation of the People Act (1951), S. 82

Andh Pra 68 C (C N 25)

—S. 86 (1) — Scope and applicability — See Representation of the People Act (1951), S. 87
Andh Pra 68 D (C N 25)

—Ss. 87, 86 (1) and 82 (b) — Civil P. C. (1908), O. 1, Rr. 10 and 13 — Scope and applicability — Provisions of Civil P. C. apply only when there is no express provision in Act and there is no inconsistency with Act — Consequences of non-compliance with S. 82 (b) are provided in Act — Court cannot invoke power under Order 1 to avoid these consequences — Assuming that defect is removable it should be removed within limitation
Andh Pra 68 D (C N 25)

—S. 99 — Expression "other candidate" — Meaning of — See Representation of the People Act (1951), S. 82

Andh Pra 68 C (C N 25)

—S. 100 — Nomination paper — Improper rejection — Effect on election — See Panchayats — U. P. Kshettra Samitis and Zila Parishads Adhiniyam (U. P. Act 33 of 1961), S. 13 (c)
All 65 C (C N 11)

—S. 123 (1) (B) (a) — Scope and applicability — See Representation of the People Act (1951), S. 82 (b)

Andh Pra 68 A (C N 25)

—S. 123 (6) — Irregularity in maintaining accounts — Does not fall under S. 123(6) — See Representation of the People Act (1951), S. 77
All 88 D (C N 17)

—S. 157 — Elected persons — Commencement of terms — Dy. Chairman of Legislative Council ceasing to be member by virtue of his election in 1962 and again becoming member by virtue of election in 1968 — Notionally there was a break in the eye of law — See Constitution of India, Art. 183 (a)
All 56 A (C N 9)

RETIRING GRATUITY RULES OF TISCO LTD.

See under Civil Services.

SALES TAX**—CENTRAL SALES TAX ACT (74 of 1956)**

—S. 8(1)(4) — Central Sales Tax (Bihar) Rules (1957), Rr. 9(2)(a) and 9-B(3)(a) — Claim to be taxed at concessional rate — Filing of declaration in Form 'C' and certificates in Form 'D' — Rr. 9(2)(a) and 9-B(3)(a) imposing rigid time-limit are ultra vires rule-making power of State Government. AIR 1963 Mad 125 & AIR 1962 Mad 410, Diss. Pat 42 (C N 13)

—S. 8 (2) (2A) (5) — Scope — Freedom of trade, commerce and intercourse — Taxing law — Hampering flow of trade — Sales tax — When has the effect of — Not ultra vires Arts. 301 and 303(1) — See Constitution of India, Art. 301

SC 147 (C N 29)

CENTRAL SALES TAX (BIHAR) RULES (1957)

—R. 9(2)(d) — Claim to be taxed at concessional rate — Filing of declaration in Form 'C' and certificates in Form 'D' — Rr. 9 (2) (a) and 9-B (3) (a) imposing rigid time-limit are ultra vires rule-making power of State Government—See Sales Tax—Central Sales Tax Act (1956), S. 8 (1) (4)

Pat 42 (C N 13)

—R. 9-B(3)(a) — Claim to be taxed at concessional rate — Filing of declaration in Form 'C' and certificates in Form 'D' — Rr. 9(2)(a) and 9-B(3)(a) imposing rigid time-limit are ultra vires rule-making power of State Government — See Sales Tax — Central Sales Tax Act (1956), S. 8(1)(4)

Pat 42 (C N 13)

SEA CUSTOMS ACT (8 of 1878)

—S. 167 (81) — Conviction based on statement made under S. 171-A — Recording of statement in English — Failure to interpret it to illiterate accused — Conviction improper — See Sea Customs Act (1878), S. 171-A

Raj 48 A (C N 11)

—Ss. 171-A, 167(81) — Evidence Act (1872), S. 80 — Conviction based on statement made under S. 171-A — Recording of statement in English — Failure to interpret it to illiterate accused — Conviction improper

Raj 48 A (C N 11)

—S. 178-A — Presumption under, when can be raised — Neither application for issue of search warrant nor search memo mentioning possession by accused of smuggled gold — Reasonable belief not proved — Presumption cannot be raised

Raj 48 B (C N 11)

SPECIAL MARRIAGE ACT (43 of 1954)

—Ss. 2, 17 — Contravention of S. 2, Cl. (3) — Marriage not void but voidable — Court has large discretion in such matters under S. 17 — (Divorce Act (1869), S. 10)

Andh Pra 62 B (C N 23)

—S. 17 — Marriage in contravention of S. 2 (3) — Not void but voidable — See

SPECIAL MARRIAGE ACT (contd.)

Special Marriage Act (1954), S. 2

Andh Pra 62 B (C N 23)

—Ss. 24 and 34 (1) (e) — Delay in filing petition for declaring marriage null and void — Failure of spouse to induce other spouse for divorce — No explanation for delay — Individual cannot challenge validity of marriage when they like.

Andh Pra 62 A (C N 23)

—S. 34 (1) (c) — Provision has nothing to do with rights of party — Prescribes only manner in which Court's discretion is to be exercised

Andh Pra 62 C (C N 23)

—S. 34 (1) (e) — Delay in filing petition for declaration of marriage null and void — Effect — See Special Marriage Act (1954), S. 24

Andh Pra 62 A (C N 23)

SPECIFIC RELIEF ACT (1 of 1877)

—S. 42, Proviso — Dismissal of servant of religious institution — No compliance by trustee, in spite of order of Dy. Commissioner's setting aside dismissal — Declaration that dismissal is void can be granted by Civil Court — Proviso not attracted merely because second relief of reinstatement was refused

Ker 36 (C N 12)

SPECIFIC RELIEF ACT (47 of 1963)

—Ss. 34 and 37 — Elections to Executive Committee of Society — Party acquiescing in elections cannot be allowed to challenge validity of election

Mad 42 B (C N 9)

—S. 37 — Suit against society — Interim injunction — Principles — See Civil P. C (1908), O. 39, R. 1

Mad 42 A (C N 9)

—S. 37 — Elections to Executive Committee of a Society — Party acquiescing in election cannot be allowed to challenge them — See Specific Relief Act (1963), S. 34

Mad 42 B (C N 9)

STATE LEGISLATION MEMBERS (PREVENTION OF DISQUALIFICATIONS) ACT (U. P. ACT 19 of 1951)

—S. 3 — Person appointed Adjutant under executive orders prior to coming into force of U. P. Homeguards Act 1963 — Holds an "office of profit" under U. P. Govt. — See Constitution of India, Art. 191

All 88 B (C N 17)

—S. 3 — Panel lawyer of Gaon Sabhas at Tehsil H. Q. — Holds an office of profit within Art. 191 of the Constitution — See Constitution of India, Art. 191

All 88 C (C N 17)

STATE LEGISLATURE MEMBERS (PREVENTION OF DISQUALIFICATIONS) (SECOND) ACT (U. P. ACT 13 of 1952)

—S. 3(2) — Adjutant of Home Guards — Person appointed Adjutant under executive orders prior to enforcement of U. P. Home Guards Act 1963 — Holds an office of profit under U. P. Govt. — See Constitution of India, Art. 191

All 88 B (C N 17)

—S. 3(2) — Panel Lawyer of Gaon Sabha — Whether holds an office of profit — See Constitution of India, Art. 191

All 88 C (C N 17)

STATES REORGANISATION ACT (37 of 1956)

—S. 114 — Equation of posts — Decision of Govt. — Interference with by High Court — See Constitution of India, Art. 226
Punj 34 D (C N 7)

—S. 115 — Punjab Service Integration Rules (1957) — Rules are valid — See Constitution of India, Art. 309
Punj 34 B (C N 7)

—S. 115 — Proceedings under — Persons making detailed representations — They are not as of right entitled to be heard orally — See Constitution of India, Art. 226
Punj 34 C (C N 7)

—S. 115 — Joint Seniority List as result of integration — Illegality in — Interference by High Court — Constitution of India, Art. 226
Punj 34 E (C N 7)

—S. 115 — Equation of posts — Decision of Govt. — Interference by High Court — See Constitution of India, Art. 226
Punj 34 D (C N 7)

—S. 116 — Proceedings under — Persons making detailed representations — They are not entitled as of right to be heard orally — See Constitution of India, Art. 226
Punj 34 C (C N 7)

—S. 116 — Decision regarding Equation of posts — Interference with, by High Court — See Constitution of India, Art. 226
Punj 34 D (C N 7)

—S. 116 — Joint Seniority List as result of integration — Illegality in — Interference by High Court — Constitution of India, Art. 226
Punj 34 E (C N 7)

—S. 116(1) — Deemed to have been appointed — Meaning — (Words and Phrases — Deemed to have been appointed)
Mys 41 A (C N 9)

—S. 129 — Punjab Service Integration Rules, 1957, are valid — See Constitution of India, Art. 309
Punj 34 B (C N 7)

SUCCESSION ACT (39 of 1925)

—S. 2 (h) — Oral will — On death of husband, his wife acting on instructions of her husband giving away some properties to a relation under a deed — Deed mentioning motive of transfer being the wish of deceased husband — Wife acting against her own interest by giving away property which she could alienate for necessity — Oral will by deceased husband can be inferred
Mys 64 A (C N 15)

—S. 74 — Will — Construction — Principles of construction of Fiscal Statutes — See Income Tax Act (1922), S. 42 (1)
Cal 71 (C N 14)

TENANCY LAWS

—BIHAR LAND REFORMS ACT, 1950 (BIHAR ACT 30 of 1950)

—Ss. 3, 24-A, 4(a) — Issue of notification under S. 3 in respect of Gidhaur Estate — Effect on permanent Malikana payable to proprietors of estate — Held permanent malikana not being an interest in the estate, nor an incumbrance on it, did not cease on vesting of estate in Government and pro-

TENANCY LAWS — BIHAR LAND REFORMS ACT (contd.)

prietor could not claim compensation for malikana under S. 24-A SC 164 (C N 30)

—S. 4 (a) — See Tenancy Laws — Bihar Land Reforms Act 1950 (Bihar Act 30 of 1950), S. 3 SC 164 (C N 30)

—S. 20 — Principles of section not attracted to case of person in whose favour Khorposh grant is made: Decision of Misra, J. in Compensation Appeal No. 1 of 1964 (Pat), Reversed Pat 48 B (C N 14)

—S. 24(6) — Section does not apply to case of khorposh grant Pat 48 C (C N 14)

—S. 24A — Issue of notification under S. 3 in respect of Gidhaur Estate — Effect on permanent Malikana payable to proprietors of estate — Held permanent malikana not being an interest in the estate, nor an incumbrance on it, did not cease on vesting of estate in Government and proprietor could not claim compensation for Malikana under S. 24A — See Tenancy Laws — Bihar Land Reforms Act 1950 (Bihar Act 30 of 1950), S. 3 SC 164 (C N 30)

—BOMBAY TENANCY AND AGRICULTURAL LANDS ACT (67 of 1948)

—Preamble — Inclusion of Bombay Act (67 of 1948) under Ninth Schedule — Protection under Article 31-B is available only to first part of amended S. 65 (1) and not to latter part — See Constitution of India, Article 31B, Ninth Schedule
SC 168 A (C N 31)

—S. 44 — Inclusion of Bombay Act (67 of 1948) under Ninth Schedule — Protection under Article 31B is available only to first part of amended S. 65 (1) and not to latter part — See Constitution of India, Article 31B, Ninth Schedule
SC 168 A (C N 31)

—S. 61 — Taking over property by State under latter part of S. 65 (1) — Does not amount to acquisition or extinguishment or modifications of rights under Art. 31A(1)(a) — Latter part of S. 65(1) cannot claim protection under Art. 31A(1)(a) — See Constitution of India, Art. 31A(1)(b)
SC 168 B (C N 31)

—S. 61 — Rules under S. 82, R. 35 — Taking over management of property under latter part of S. 65(1) — Absence of definite time limit under R. 35 for such taking over — Latter part of S. 65(1) is ultra vires Art. 31A(1)(b) — See Constitution of India, Art. 31A(1)(b) SC 168 C (C N 31)

—S. 65(1) (as amended by S. 35 of Bombay Act 13 of 1956) — Inclusion of Bombay Act (67 of 1948) under Ninth Schedule — Protection under Article 31B is available only to first part of amended S. 65(1) and not to latter part — See Constitution of India, Article 31B, Ninth Schedule
SC 168 A (C N 31)

—S. 65 (1) (as amended by S. 35 of Bombay Act 13 of 1956) — Taking over property by State under latter part of S. 65(1) — Does not amount to acquisition or extinguishment or modifications of rights under

TENANCY LAWS — BOMBAY TENANCY AND AGRICULTURAL LANDS ACT (contd.)

- Art. 31A(1)(a) — Latter part of S. 65(1) cannot claim protection under Art. 31A (1) (a) — See Constitution of India, Art. 31A (1) (b) SC 168 B (C N 31)
- S. 65(1) (as amended by Bombay Act 13 of 1956) — Rules under S. 82, R. 35 — Taking over management of property under latter part of S. 65(1) — Absence of definite time limit under R. 35 for such taking over — Latter part of Section 65 (1) is ultra vires Article 31A(1)(b) — See Constitution of India, Art. 31A(1)(b) SC 168 C (C N 31)
- S. 82 — Rules under S. 82, R. 35 — Taking over management of property under latter part of S. 65(1) — Absence of definite time limit under R. 35 for such taking over — Latter part of S. 65(1) is ultra vires Art. 31A(1)(b) — See Constitution of India, Art. 31A(1)(b) SC 168 C (C N 31)

CALCUTTA THIKA TENANCY ACT (2 of 1949)

- S. 4 — Setting aside of order for ejectment of tenant — Held the petition could be allowed only subject to tenant depositing arrears of rent — See Civil P. C. (1908), S. 115 Cal 109 C (C N 20)
- S. 4 — Ejectment notice — Tenancy for manufacturing purpose — Six months' notice under S. 106 of the Transfer of Property Act and not one month's notice under S. 4 is to be given — (Transfer of Property Act (1882), S. 106) Cal 109 A (C N 20)

ODDH ESTATES ACT (1 of 1869)

- S. 13 (1) — Son adopted by widow of taluqdar in pursuance of authority of husband would be a person who would have succeeded to estate or to interest therein within meaning of S. 13(1) SC 135 A (C N 28)
- S. 22 (7) — Widow of taluqdar — Nature of estate — Adoption by widow — Doctrine of relation back does not apply ILR (1964) 2 All 191, Reversed SC 135 B (C N 28)

U. P. ZAMINDARI ABOLITION AND LAND REFORMS ACT (1 of 1951)

- S. 127-B — Panel Lawyer of Gaon Sabhas at Tehsil H. Q. — Holds an office of profit within Art. 191, of Constitution — See Constitution of India, Art. 191 All 88 C (C N 17)

U. P. ZAMINDARI ABOLITION AND LAND REFORMS RULES 1952

- R. 114 — Panel Lawyer of Gaon Sabhas at Tehsil H. Q. — Holds an office of profit within Art. 191 of the Constitution — See Constitution of India, Art. 191 All 88 C (C N 17)

TRADE AND MERCHANDISE MARKS ACT (43 of 1958)

- S. 12 (1) — Similarity of marks — Test for determining — On facts held that appellations of 'Lion Brand' chaffcutter blades

TRADE AND MERCHANDISE MARKS ACT (contd.)

- and 'Ma Durga Brand' were entirely distinct and separate Cal 80 B (C N 15)
- Ss. 12 (1), 31, 32 — Application for registration — Opponent cannot rely on mere circumstance of his prior mark on the register — Only presumption that follows from registration of mark is its prima facie evidentiary value about its validity and no other presumption is recognised Cal 80 C (C N 15)

- S. 12 (1) — Evidence Act (1872), Ss. 13, 43 — Question whether applicant's mark is identical or deceptively similar to trade mark of opponent — Opponent citing judgments in which parties, facts and trade marks were entirely different — Such judgments of their facts cannot be used against applicant Cal 80 D (C N 15)

- Ss. 18, 19, 20, 21, 22 — Trade Mark Rules — Rr. 37 to 43, 51 to 55 — Nature of onus of proof (obiter) Cal 80 F (C N 15)
- S. 19 — Nature of onus of proof (obiter) — See Trade and Merchandise Marks Act (1958), S. 18 Cal 80 F (C N 15)
- S. 20 — Nature of onus of proof (obiter) — See Trade and Merchandise Marks Act (1958), S. 18 Cal 80 F (C N 15)

- S. 21 — "Any person" — Need not be only a prior registered trade mark owner — Even customer, purchaser or member of public likely to use goods may object to registration on ground of possible deception or confusion Cal 80 E (C N 15)

- S. 21 — Nature of onus of proof (obiter) — See Trade and Merchandise Marks Act (1958), S. 18 Cal 80 F (C N 15)

- S. 22 — Nature of onus of proof (obiter) — See Trade and Merchandise Marks Act (1958), S. 18 Cal 80 F (C N 15)

- S. 23 — Reasonable diligence and expedition at every stage throughout process of registration is necessary Cal 80 A (C N 15)

- S. 31 — Prior registration of trade mark by opponent — Presumption therefrom — See Trade and Merchandise Marks Act (1958), S. 12 (1) Cal 80 C (C N 15)

- S. 32 — Prior registration of trade mark by opponent — Presumption therefrom — See Trade and Merchandise Marks Act (1958), S. 12 (1) Cal 80 C (C N 15)

TRADE MARK RULES

- Rr. 37 to 43 — Nature of — Onus of proof (obiter) — See Trade and Merchandise Marks Act (1958), S. 18 Cal 80 F (C N 15)

- Rr. 51 to 55 — Nature of — Onus of proof (obiter) — See Trade and Merchandise Marks Act (1958), S. 18 Cal 80 F (C N 15)

TRADE UNIONS ACT (16 of 1926)

- S. 2 (1) (as amended by Act of 1947) — Act of dismissed workmen of remaining on premises and refusing to leave — Does not amount to "stay-in-strike" or "sit-down-strike" — See Constitution of India, Art. 223 Mys 51 (C N 12)

TRANSFER OF PROPERTY ACT (4 of 1882)

—S. 53 — Declaratory suit by creditor under for a declaration that deed of assignment executed by defendant was void — Proper Court-fee would be under S. 6(iv)(j) of Bombay Court Fees Act 1959 — See Court Fees and Suits Valuations — Bombay Court Fees Act (36 of 1959), S. 6(iv)(j)

Bom 66 A (C N 10)

—Ss. 58 and 60 — Usufructuary mortgage — Sudbharna bond providing that in default of payment on due date of repayment the money covered by the bond is to be treated as consideration money for sale deed — Stipulation is a clog on equity of redemption and is void — Rights and title of parties are not changed — Relations of mortgagor and mortgagee continue, after due date, as creditor and debtor

Pat 64 A (C N 16)

—S. 60 — Usufructuary mortgage — Sudbharna bond providing that in default of payment on due date of repayment the money covered by the bond is to be treated as consideration money for sale deed — Stipulation is a clog on equity of redemption and is void — Rights and title of parties are not changed — Relations of mortgagor and mortgagee continue, after due date, as creditor and debtor — See Transfer of Property Act (1882), S. 58

Pat 64 A (C N 16)

—S. 60 — Equity of redemption — Usufructuary mortgage — Admission by mortgagor that in default of payment on due date, the mortgagee has become absolute owner — Title by adverse possession cannot be claimed — Further unless both parties are cognizant of their rights there can be no acquiescence

Pat 64 B (C N 16)

—S. 105 — Lease or licence — Absence of document — Intention of parties and surrounding circumstances to be considered — A engaged as karaistha of illom entrusted with disputed property — Subsequently A ceasing to be Karaistha but out of consideration for him property not resumed and he was allowed to be in enjoyment of property — On A's nephews trespassing on property, illom filing suit for their ejection — After recovery of property in execution illom again putting A in possession on same terms — Possession of A held not that of licensee but of lessee

Ker 34 (C N 11)

—S. 106 — Notice — Period — Tenancy for manufacturing purpose — Six month's notice necessary — See Tenancy Laws — Calcutta Thika Tenancy Act (2 of 1949), S. 4

Cal 109 A (C N 20)

—S. 106 — Ejectment notice — Service by registered post, under certificate of posting and in person — Held on facts all the three modes were bad — (Evidence Act (1872), S. 114)

Cal 109 B (C N 20)

—S. 111 (g) — Determination of lease — Second clause of S. 111 (g) T. P. Act in conflict with S. 4 (f) — S. 4 (f) stands and second clause of S. 111(g) stands abrogated

TRANSFER OF PROPERTY ACT (contd.)
after 1-1-1959 — See M. P. Accommodation Control Act (23 of 1955), S. 4 (f)

Madh Pra 32 C (C N 11)

—S. 111 (g) — Tenant denying title of landlord — Permissible limits — If denial is in permissible limits, estoppel cannot be applied to tenant — Penalty of forfeiture when applies: (1913) ILR 35 All 145 and AIR 1953 All 797 Not followed — (Evidence Act (1872), S. 116)

Madh Pra 32 D (C N 11)

—S. 116 — Holding over by tenant — Effect of — Tenant not liable to pay double the rent — Liability of tenant is that of a trespasser — Tenant required to pay mesne profits — Damages to landlord limited to mesne profits — AIR 1924 Lah 648 and 1904 Pun Re 5 and 1898 Pun Re 33 and AIR 1919 Lah 72 and AIR 1924 Lah 643 and Civil Revn. No. 248 of 1948, D/- 3-9-1948 (Lah) and FA No. 190 of 1944 D/- 8-9-1948 (Lah) Dissented from

Delhi 59 (C N 12)

—S. 122 — Gift by a person to his counsel's wife — Validity — Proof of spontaneity eliminates proof of independent legal advice

Cal 111 (C N 21)

TRUSTS ACT (2 of 1882)

—S. 38 — Applicability — Gift by a person to his counsel's wife — Validity — See T. P. Act (1882), S. 122

Cal 111 (C N 21)

—S. 39 — Applicability — Gift by a person to his counsel's wife — Validity — See T. P. Act (1882), S. 122

Cal 111 (C N 21)

U. P. GENERAL CLAUSES ACT (1 of 1904)

—S. 3 (32) — Honorary Magistrate — Not disqualified for being elected Adhyaksha of Z. P. — See Panchayats — U. P. Kshettra Samitis and Zila Parishadas Adhiniyam (U. P. Act 33 of 1961), S. 13(c)

All 65 B (C N 11)

U. P. HOME GUARDS ADHINIYAM (29 of 1963)

—Appointment of person as Adjutant prior to Act — Person holds an office of profit with Art. 191 of the Constitution — See Constitution of India, Art. 191

All 88 B (C N 17)

—S. 15 — Appointment made under Executive orders in force prior to enforcement of Adhiniyam — Not appointment under Adhiniyam — See General Clauses Act (1897), S. 24

All 88 A (C N 17)

U. P. KSHETTRA SAMITIS AND ZILA PARISHADS ADHINIYAM (U. P. ACT 33 of 1961)

See under Panchayats.

U. P. ZAMINDARI ABOLITION AND LAND REFORMS ACT (1 of 1951)

See under Tenancy Laws

U. P. ZAMINDARI ABOLITION AND LAND REFORMS RULES 1952

See under Tenancy Laws.

U. P. ZILLA PARISHADS (ELECTION OF ADHYAKSHA AND UPADHYAKSHA AND SETTLEMENT OF ELECTION DISPUTES) RULES (1961)

See under Panchayats.

WEST BENGAL PREMISES TENANCY ACT (12 of 1956)

See under Houses and Rents.

WEST BENGAL PREMISES TENANCY (AMENDMENT) ACT (4 of 1968)

See under Houses and Rents.

WORDS AND PHRASES

— "Actually" — See Kerala Rice and Paddy (Procurement by Levy) Order (1966), Cl. 2(b) Ker. 38 B (C N 13) (FB)

— Cession of territory — See Constitution of India, Art. 368 Delhi 64 B (C N 13)

— "Deemed to have been appointed" — See States Reorganisation Act (1956), S. 116 (1) Mys 41 A (C N 9)

— Expression customary rites and ceremonies — Meaning — See Hindu Marriage Act (1955), S. 7 Cal 55 C (C N 10)

WORDS AND PHRASES (contd.)

— Money in kind — See Income Tax Act (1922), S. 42(1) Cal 71 (C N 14)

— "Public Servant concerned" — See Criminal P. C. (1898), S. 195(1)(a) Andh Pra 41 A (C N 17)

— "Rack-rent" — Meaning — See Presidency Small Cause Courts Act (1882), S. 4 Bom 73 (C N 13)

— Special Duty — Meaning of — See Constitution of India, Art. 191 All 88 B (C N 17)

— "Talbana" — See Criminal P. C. (1898) S. 204(3) Madh Pra 20 B (C N 7)

SUBJECTWISE LIST OF CASES OVERRULED, REVERSED AND DISSENTED FROM, ETC., IN A. I. R. 1969 FEBRUARY

DISS.=Dissented from in; OVER.=Overruled in; REVERS.=Reversed in

CIVIL PROCEDURE CODE (5 of 1908)

— S. 47 — AIR 1961 All 1 (FB) — DISS. AIR 1969 Orissa 32 (C N 15)

— O. 21, R. 2 — AIR 1961 All 1 (FB) — DISS. AIR 1969 Orissa 32 (C N 15).

CONSTITUTION OF INDIA

— Arts. 31-A (1) (b) and 31 (5) (a) — ILR (1966) Guj 1113 — REVERS. AIR 1969 SC 168 E (C N 31).

— Art. 31-A (1) (a) — ('66) ILR (1966) Guj 1113 — REVERS. AIR 1969 SC 168 B (C N 31).

— Art. 162 — AIR 1961 Mys 210 — DISS. AIR 1969 Punj 34 B (C N 7).

— Art. 183 (a) — (1914) 2 Ch 376 — NOT APPLD. AIR 1969 All 56 A (C N 9).

— Art. 183 (a) — (1879) 4 QBD 230 — NOT APPLD. AIR 1969 All 56 A (C N 9).

— Art. 301 — ('67) Writ Petn. No. 836 of 1966, D/- 7-4-1967 (Mad) — REVERS. AIR 1969 SC 147 (C N 29).

— Art. 302 — ('67) Writ Petn. No. 836 of 1966, D/- 7-4-1967 (Mad) — REVERS. AIR 1969 SC 147 (C N 29).

— Art. 303 (1) — ('67) Writ Petn. No. 836 of 1966, D/- 7-4-1967 (Mad) — REVERS. AIR 1969 SC 147 (C N 29).

— Art. 309 — AIR 1961 Mys 210 — DISS. AIR 1969 Punj 34 B (C N 7).

— Art. 311 (1) — AIR 1960 MP 254 — DISS. AIR 1969 Mys 41 C (C N 9).

— Art. 311 (2) — AIR 1959 MP 43 — DISS. AIR 1969 Mys 41 C (C N 9).

— Art. 311 (1) — AIR 1958 Cal 356 — DISS. AIR 1969 Mys 41 C (C N 9).

— Sch. 7, List II, Ent. 41 — AIR 1961 Mys 210 — DISS. AIR 1969 Punj 34 B (C N 7).

CONTEMPT OF COURTS ACT (32 of 1952)

— S. 3 — ('68) Cri. Original No. 111 of 1967, D/- 3-1-1968 (P. and H.) — REVERS. AIR 1969 Punj 60 E (C N 11).

COURTS FEES AND SUITS VALUATIONS

— ANDHRA PRADESH COURT FEES AND SUITS VALUATIONS ACT (7 of 1956)

— S. 48 — AIR 1964 A. P. 216 — OVER. AIR 1969 Andh Pra 55 A (C N 21) (FB).

COURT FEES AND SUITS VALUATIONS**— CONTEMPT OF COURTS ACT (contd.)**

— S. 49 — AIR 1964 A. P. 216 — OVER. AIR 1969 Andh Pra 55 A (C N 21) (FB).

DEBT LAWS**— BOMBAY AGRICULTURAL DEBTOR'S RELIEF ACT (28 of 1947)**

— Ss. 38, 43, 46 — (1957) 59 Bom LR 610 — OVER. AIR 1969 Bom E4 A (C N 14).

— CHOTANAGPUR ENCUMBERED ESTATES ACT (6 of 1876)

— Ss. 12-A (1) (a) and (3) — ('64) Decision of Misra J. in compensation Appeal No. 1 of 1964 (Pat) — REVERS. AIR 1969 Pat 48 A (C N 14).

ELECTRICITY (SUPPLY) ACT (54 of 1945)

— S. 57 — AIR 1955 Bom 182 — HELD OVERRULED in AIR 1964 SC 1598 as interpreted AIR 1969 Guj 40 (C N 8).

— Sch. VI, Cl. 1 — AIR 1955 Bom 182 — HELD OVERRULED in AIR 1964 SC 1598 as Interpreted AIR 1969 Guj 40 (C N 8)

INDUSTRIAL DISPUTES ACT (14 of 1947)

— S. 15 — AIR 1943 Bom 453 — HELD NO LONGER GOOD LAW AIR 1969 Pat 53 D (C N 15).

— S. 15 — AIR 1933 Cal 409 — HELD NO LONGER GOOD LAW AIR 1969 Pat 53 D (C N 15).

— S. 15 — AIR 1932 Pat 311 — HELD NO LONGER GOOD LAW AIR 1969 Pat 53 D (C N 15).

— S. 15 — AIR 1924 Bom 88 — HELD NO LONGER GOOD LAW AIR 1969 Pat 53 D (C N 15).

— S. 15 — ('84) ILR 6 All 634 — HELD NO LONGER GOOD LAW AIR 1969 Bom 53 D (C N 15).

— S. 15 — ('84) ILR 6 All 173 — HELD NO LONGER GOOD LAW AIR 1969 Pat 53 D (C N 15).

— Sch. III, Item 5 — ('84) ILR 6 All 634 HELD NO LONGER GOOD LAW AIR 1969 Bom 53 D (C N 15).

INDUSTRIAL DISPUTES ACT (contd.)

—Sch. III, Item 5 — ('84) ILR 6 All 173
HELD NO LONGER GOOD LAW AIR 1969
 Pat 53 D (C N 15).
 —Sch. III Item 5 — AIR 1924 Bom 88
HELD NO LONGER GOOD LAW AIR 1969
 Pat 53 D (C N 15).
 —Sch. III, Item 5 — AIR 1932 Pat 311
HELD NO LONGER GOOD LAW AIR 1969
 Pat 53 D (C N 15).
 —Sch. III, Item 5 — AIR 1933 Cal 409
HELD NO LONGER GOOD LAW AIR 1969
 Pat 53 D (C N 15).
 —Sch. III, Item 5 — AIR 1943 Bom 453
HELD NO LONGER GOOD LAW AIR 1969
 Pat 53 D (C N 15).
**KERALA PADDY AND RICE (DECLARA-
 RATION AND REQUISITION OF STOCKS)
 ORDER (1966)**
 —Cls. 3 (1), 4 — 1968 Ker LT 223 —
REVERS. AIR 1969 Ker 38 T (C N 13) (FB).
**KERALA RICE AND PADDY (PROCURE-
 MENT BY LEVY) ORDER (1966)**
 —Cl. 7 — 1968 Ker LT 223 — **REVERS.**
 AIR 1969 Ker 38 C, E, F (C N 13) (FB).

LUNACY ACT (4 of 1912)

—S. 62 — AIR 1920 All 80 — **DISS.** AIR
 1969 Pat 33 B (C N 12).

MAHOMEDAN LAW

—AIR 1949 Cal 436 — **DISS.** AIR 1969
 All 75 (C N 14).

PARTITION ACT (4 of 1893)

—S. 2 — Order of Datta, J. D/- 15-6-1966
 (Cal) — **REVERS.** AIR 1969 Cal 59 A
 (C N 11).

—S. 2 — (1952) 90 Cal LJ 147 — **OVER.**
 AIR 1969 Cal 59 A (C N 11).

—S. 2 — (1950) 86 Cal LJ 144 — **OVER.**
 AIR 1969 Cal 59 A (C N 11).

—S. 4 — AIR 1959 Orissa 173 — **DISS.**
 AIR 1969 Cal 88 B (C N 16).

—S. 6 — (1950) 86 Cal LJ 144 — **OVER.**
 AIR 1969 Cal 59 A (C N 11).

—S. 6 — (1952) 90 Cal LJ 147 — **OVER.**
 AIR 1969 Cal 59 A (C N 11).

—S. 6 — Order of Datta, J., D/- 15-6-1966
 (Cal) — **REVERS.** AIR 1969 Cal 59 A
 (C N 11).

PENAL CODE (45 of 1860)

—S. 71 — AIR 1939 Pat 388 — **DISS.** AIR
 1969 Guj 62 A (C N 12).

—S. 279 — AIR 1939 Pat 388 — **DISS.** AIR
 1969 Guj 62 A (C N 12).

—S. 337 — AIR 1939 Pat 388 — **DISS.**
 AIR 1969 Guj 62 A (C N 12).

PROVIDENT FUNDS ACT (19 of 1925)

—S. 3 — AIR 1947 Cal 395. — **HELD NO
 LONGER GOOD LAW** AIR 1969 Punj 44
 (C N 8).

—S. 3 — AIR 1936 Mad 477 — **HELD NO
 LONGER GOOD LAW** AIR 1969 Punj 44
 (C N 8).

—S. 4 (1) (c) — AIR 1936 Mad 477 —
HELD NO LONGER GOOD LAW AIR 1969
 Punj 44 (C N 8).

—S. 4 (1) (c) — AIR 1947 Cal 395 —
HELD NO LONGER GOOD LAW AIR 1969
 Punj 44 (C N 8).

—S. 5 (as amended in 1946) — AIR 1936
 Mad 477 — **HELD NO LONGER GOOD LAW**
 AIR 1969 Punj 44 (C N 8).

—S. 5 (as amended in 1946) — AIR 1947
 Cal 395 — **HELD NO LONGER GOOD LAW**
 AIR 1969 Punj 44 (C N 8).

SALES TAX

—CENTRAL SALES TAX ACT (74 of 1956)

—S. 8 (1) (4) — AIR 1962 Mad 410 —
DISS. AIR 1969 Pat 42 (C N 13).

—S. 8 (1) (4) — AIR 1963 Mad 125 —
DISS. AIR 1968 Pat 42 (C N 13).

TENANCY LAWS

—BIHAR LAND REFORMS ACT (30 of 1950)

—S. 20 — Decision of Misra, J. in
 Compensation Appeal No. 1 of 1964 (Pat)
REVERS. AIR 1969 Pat 48 B (C N 14).

—**ODDH ESTATES ACT (1869)**

—S. 22 (7) — ('64) ILR (1964) 2 All 191
REVERS. AIR 1969 SC 135 B (C N 28).

TRANSFER OF PROPERTY ACT (4 of 1882)

—S. 111 (g) — AIR 1953 All 797 — **NOT
 F.** AIR 1969 Madh Pra 32 D (C N 11).

—S. 111 (g) — (13) ILR 35 All 145 — **NOT
 F.** AIR 1968 Madh Pra 32 D (C N 11).

—S. 116 — ('48) F. A. No. 190 of 1944, D/-
 3-9-1948 (Lah) — **DISS.** AIR 1969 Delhi 59
 (C N 12).

—S. 116 — ('48) Civil Revn. No. 248 of
 1948, D/- 3-9-1948 (Lah) — **DISS.** AIR 1969
 Delhi 59 (C N 12).

—S. 116 — AIR 1924 Lah 643 — **DISS.**
 AIR 1969 Delhi 59 (C N 12).

—S. 116 — AIR 1919 Lah 72 — **DISS.** AIR
 1969 Delhi 59 (C N 12).

—S. 116 — 1904 Pun Re 5 — **DISS.** AIR
 1969 Delhi 59 (C N 12).

—S. 116 — 1898 Pun R. 33 — **DISS.** AIR
 1969 Delhi 59 (C N 12).

COURTWISE LIST OF CASES OVERRULED, REVERSED AND DISSENTED FROM, ETC., IN A.I.R. 1969 FEBRUARY

DISS.=Dissented from in; OVER.=Overruled in; REVERS.=Reversed in

ALLAHABAD

('84) ILR 6 All 173: 1884 All WN 16, Bawan
 Das v. Mul Chand—**HELD NO LONGER
 GOOD LAW.** AIR 1969 Pat 53 D
 (C N 15).

('84) ILR 6 All 634: 1884 All WN 210, Janki
 Das v. East Indian Rly. Co. — **HELD
 NO LONGER GOOD LAW.** AIR 1969
 Pat 53 D (C N 15).

ALLAHABAD (contd.)

('13) ILR 35 All 145: 11 All LJ 115, Prag
 Narain v. Kadir Baksh — **NOT F.** AIR
 1969 Madh Pra 32 D (C N 11).

('20) AIR 1920 All 80: ILR 40 All 504, Maho-
 med Yaqub v. Nazir Ahmad — **DISS.**
 AIR 1969 Pat 33 B (C N 12).

('53) AIR 1953 All 797, Ram Das v. Shre

ALLAHABAD (contd.)

- Ram — NOT F. AIR 1969 Madh Pra 32 D (C N 11).
 (61) AIR 1961 All 1: 1960 All LJ 967; 1960 All WR (HC) 607 (FB), Mahmud Hasan Khan v. Motilal Banker — DISS. AIR 1969 Orissa 32 (C N 15).
 (64) ILR (1964) 2 All 191 — REVERS. AIR 1969 SC 135 B (C N 28).

ANDHRA PRADESH

- (64) AIR 1961 Andh Pra 216; (1964) 1 Andh WR 185, Dodla Mallalaiah v. State — OVER. AIR 1969 Andh Pra 55 A (C N 21) (FB).

BOMBAY

- (24) AIR 1924 Bom 88; 25 Bom LR 599 Natha Gulab and Co. v. W. C. Shaller — HELD NO LONGER GOOD LAW. AIR 1969 Pat 53 D (C N 15).
 (43) AIR 1943 Bom 453; 45 Bom LR 816, Usman Abubakar v. Chief Accounts Officer G.P. Rly. — HELD NO LONGER GOOD LAW. AIR 1969 Pat 53 D (C N 15).
 (55) AIR 1955 Bom 182; ILR (1955) Bom 42: 56 Bom LR 994, Babulal Chaganlal v. Chopda Electric Supply Co. Ltd. — HELD OVERRULED in AIR 1964 SC 1598 as Interpreted. AIR 1969 Guj 40 (C N 8).
 (1957) 59 Bom LR 610, Jankibai Abaji v. Bhikaji Raghunath — OVER. AIR 1969 Bom 74 A (C N 14).

CALCUTTA

- (33) AIR 1933 Cal 409; ILR 60 Cal 909, Secy. of State v. Bhola Nath — HELD NO LONGER GOOD LAW. AIR 1969 Pat 53 D (C N 15).
 (47) AIR 1947 Cal 176; 50 Cal WN 872, Keshab Lal v. Ivarani Rudra — HELD NO LONGER GOOD LAW. AIR 1969 Punj 44 (C N 8).
 (49) AIR 1949 Cal 436; 49 Cal WN 439, Mt. Ayesha Bibi v. Subodh Ch. Chakravarty — DISS. AIR 1969 All 75 (C N 14).
 (1950) 86 Cal LJ 144, Pannalal Dutt v. Hrishikesh Dutt — OVER. AIR 1969 Cal 59 D (C N 11).
 (1952) 90 Cal LJ 147, Narendra Nath Das v. Juanendra Nath Das — OVER. AIR 1969 Cal 59 A (C N 11).
 (58) AIR 1958 Cal 356; 62 Cal WN 531, Dualal Ranjan Adetya v. R. K. Bose — DISS. AIR 1969 Mys 41 C (C N 9).
 (66) Order of Datta, J., D/- 15-6-1966 (Cal) REVERS. AIR 1969 Cal 59 A (C N 11).

GUJARAT

- (66) ILR (1966) Guj 1113 — REVERS. AIR 1969 SC 163 B, C (C N 31).

KERALA

- 1968 Ker LT 223, Narayana Panicker v. District Supply Officer, Palghat — REVERS. AIR 1969 Ker 38 C, E, F, Q, R, S, T (C N 13) (FB).

MADHYA PRADESH

- (59) AIR 1959 Madh Pra 43; 1959 MPLJ 423, Raghunath Singh v. State — DISS. AIR 1969 Mys 41 C (C N 9).
 (60) AIR 1960 Madh Pra 254; 1960 MPLJ

MADHYA PRADESH (contd.)

- 85, Antar Singh v. State — DISS. AIR 1969 Mys 41 C (C N 9).
MADRAS
 (36) AIR 1936 Mad 477; ILR 59 Mad 855, Mon Singh v. Moti Bai — HELD NO LONGER GOOD LAW. AIR 1969 Punj 44 (C N 8).
 (62) AIR 1962 Mad 410; (1962) 13 STC 686, Dy. Commr. of Commercial Taxes v. Manohar Bros. — DISS. AIR 1969 Pat 42 (C N 13).
 (63) AIR 1963 Mad 125; (1962) 13 STC 680, Dy. Commr. (Commercial Taxes) v. Parokutti Hajee Sons — DISS. AIR 1969 Pat 42 (C N 13).
 (67) Writ Petn. No. 836 of 1966, D/- 7-4-1967 (Mad) — REVERS. AIR 1969 SC 147 (C N 29).

MYSORE

- (61) AIR 1961 Mys 210, M. A. Jaleel v. State of Mysore — DISS. AIR 1969 Punj 34 B (C N 7).

ORISSA

- (59) AIR 1959 Orissa 173; 25 Cut LT 133, Bikal Swain v. Ishwar Swain — DISS. AIR 1969 Cal 88 B (C N 16).

PATNA

- (32) AIR 1932 Pat 311; ILR 11 Pat 584, Secy. of State v. Jamuna Das — HELD NO LONGER GOOD LAW. AIR 1969 Pat 53 D (C N 15).
 (39) AIR 1939 Pat 388; 40 Cri LJ 759, Ragho Prasad v. Emperor — DISS. AIR 1969 Guj 62 A (C N 12).
 (64) Decision of Misra, J. in Compensation Appeal No. 1 of 1964 (Pat) — REVERS. AIR 1969 Pat 48 A, B (C N 14).

PUNJAB

- (1898) Pun Re 33, Ganga Singh v. Mst. Shib Devi — DISS. AIR 1969 Delhi 59 (C N 12).
 (1904) Pun Re 5; 42 Pun LR 1904, Pirthhu Dial v. Ram Chand — DISS. AIR 1969 Delhi 59 (C N 12).
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1969 FEBRUARY

REDUCTION OF SHARE CAPITAL OF A LIMITED COMPANY

(A Comparative Study of Indian and English Law)

(By SURENDRA NATH *)

(Continued from Page No. 7.)

(B) Common law:

(1) Prima facie a reduction of capital should be an all round one and must fall rateably on all classes of shares(25).

Exception to the prima facie rule:

(a) There is an exception to the prima facie rule, mentioned above. If preference shares have priority to the repayment of capital in a winding up, the losses should be borne by that class or those classes which have last claim on the assets of the company on its winding up (26).

This exception carries more importance in India than in England, because in India every preference share will have a priority to the repayment of capital on a winding up, after the commencement of the Act of 1956(27). Therefore, in the case of reduction the loss of assets would be thrown first on the holders of equity shares—which is of course a heterogeneous group consisting of ordinary shareholders having no preferential rights, preference shares issued before 1956 and having either of the two preferential rights as to dividend and as to capital(28).

(25) *Bannatyne v. Direct Spanish Telegraph Co.*, (1886) 34 Ch D 287; *Re, Barrow Haematite Steel Co.*, (1888) 39 Ch D 582; *Re, Union Plate Glass Co.*, (1889) 42 Ch D 513; *Re, Quebrada Rail Land & Copper Co.*, (1889) 40 Ch D 353; *Re, Mackenzie and Co.*, (1916) 2 Ch 450, *Re, Credit Assurance and Guarantee Corporation* (1902) 2 Ch 601. *Per North. J.*, in *Re, Barrow Haematite Steel Co.*, supra, at p. 595 — "Prima facie it must be made on all the shares of the company, unless there is some express provision to the contrary."

Per Astbury, J., in *Re Mackenzie and Co.*, supra, at p. 457:

"Prima facie where there are ordinary shares and preference shares with a preferential dividend a reduction ought to fall upon both sets of shares equally."

(26) *Re American Pastoral Co.*, (1890) 62 LT 625; *Re Floating Dock Co. of St. Thomas*, (1895) 1 Ch 691; *Re London and New York Investment Corporation*, (1895) 2 Ch 860. — *Stirling, J.*

(27) (Indian) Companies Act, 1956, Section 85 (1).

Indian law is not clear with regard to those preference shareholders whose shares were issued before 1956 and carried only a preferential right to capital. Should the principle applied in England and which can be safely applied to the present so-called Indian preference shares be applied to these shares? The answer in the affirmative is doubtful because these shares are now equity shares. Although it is true that the right as to the repayment of capital is saved by the statutory provision(29), no other right is saved under that section. The word "otherwise" in S. 90 cannot be interpreted as referring to this right which has been given to the preference shareholders by the judiciary. This word only refers to those other rights which are specifically mentioned in the 'terms of issue' of those shares, and not the rights granted to them as preference shareholders under common law. The better view in this regard seems to be that they (the pre-1956 preference shareholders carrying only one preferential right as to repayment of capital) should also share the loss along with the other members and classes of the group — called equity shareholders.

English law has no such problem because the holders of preference shares having a priority of repayment of capital on a winding up are 100 per cent preference shareholders irrespective of the fact whether they carry a preferential right to dividend or not. In England, there may also be various classes in the preference shares itself, e.g., first preference, second preference, and so on. In such cases, the loss will be borne according to the preference starting from those who have last claim on the assets(30).

(b) The second exception to the prima facie Rule(31) is that it does not apply where the reduction is fair and equitable.

11. Many judicial authorities are in favour of the principle that if there is nothing unfair or inequitable in the transaction, the shares of one or more

(28) *Ibid.*, S. 85(2).

(29) *Ibid.*, S. 90.

(30) *Re Floating Dock Co. of St. Thomas*, (1895) 1 Ch 696, particularly the dictum of Chitty, J., at p. 699.

(31) See, supra, note 25.

* M. A., LL. B. (Banaras), LL. M. (Northwestern, U. S. A.); Advocate; Lecturer; Banaras Law School Banaras Hindu University, Varanasi-5.

shareholders may be extinguished without affecting other shares of the same or a different class(32). Three sets of rules can be mentioned on the basis of the cases.

(i) Where there is no priority as to return of capital, the reduction need not be always rateable. So long as the reduction is fair, it is not contrary to the *prima facie* rule(33).

(32) *British and American Trustee and Finance Corporation v. Couper*, (1894) AC 399 (HL) at pp. 406, 415, 417; *Re National Dwelling Society Ltd.*, (1898) 98 LT 144; *Re Direct Spanish Telegraph Co.*, (1886) 34 Ch D 307; *Re Thomas de la Rue and Co. Ltd.* and reduced, (1911) 2 Ch 361; *Re Showell's Brewery Co., Ltd.* and Reduced, (1914) 30 TLR 428.

(33) *Re Quebrada Rail, Land and Copper Co.*, supra. In this case there were no preferential rights to capital repayments. Therefore, *prima facie* any loss should have fallen on all classes rateably. But the Court approved a reduction by which only ordinary shareholders had to bear the whole loss.

See also *Re Gatling Gun*, (1890) 43 Ch D 628. In both cases the justification was given that the members of the class had consented to the reduction.

However, one year before the decision of *Re Gatling Gun*, in the case of *Re Union Plate Glass Co.*, (1889) 42 Ch D 513, the learned Justice Kay refused to sanction such reduction. The ground was given that since there was no priority rights to capital repayment the Court had no jurisdiction to confirm a reduction falling solely on the ordinary shareholders and not all classes rateably. But this view was expressly rejected by North, J., in *Re Gatling Gun*, pp. 629-630. Note the contrary views of the two justices:

Kay, J.: "I cannot find the smallest intimation that the 'Act' gives a company power to reduce' certain of its shares without reducing the others."

North, J.: "I..... cannot find the smallest intimation that 'the Act prevents a company' from reducing some of its shares without reducing the others." (Emphasis (here in ' ' added).

Although the counsel for the company in *Re Gatling Gun* tried to distinguish the case from *Re Union Plate Glass Co.*, on the ground that in the latter case, one class of the shares was to be reduced against the will of the others by the vote of a majority of the shareholders, whereas in the present case the shares which were to be cancelled, were cancelled with the consent of the others. But this argument is of not much force because in *Re*

(ii) The application of the rule of "fair and equitable" is even extended to the cases where there are preference shareholders carrying a priority to capital repayment on a winding up(34).

(iii) The company may discriminate even between the holders of the same class on the ground that it is fair and equitable. It need not reduce always a whole class(35). There are two cases in which the decision of *British and American Trustee and Finance Corporation v.*

Union Plate Glass Co., the resolution to reduce otherwise than rateably was carried unanimously there being present holders, to a large amount, of both ordinary and preference shares.

(34) *Re Allsopp and Sons*, (1903) 51 WR 644; *Re Showell's Brewery Co.*, (1914) 30 TLR 428. But these cases should not be considered conclusive on the point because in both cases, the reduction had been approved by all classes of members and thus it was fair. Further the proposed reduction, in fact, received the sanction in accordance with the terms of "variation of rights" clause in the articles; and thus the rights of other class should be considered as duly modified.

(35) That a reduction of capital by affecting only some of the shares is legal, has been approved by the House of Lords in *British and American Trustee and Finance Corporation v. Couper*, (1894) AC 399. In this case the reduction involved the cancellation of the shares of all the American shareholders who were to take over the American investments of the company in consideration for which the company which would then consist of only English shareholders, was to retain the English assets.

Actually this particular case is, strictly speaking, of a 'compromise and arrangement' among shareholders, and if the shareholders concerned had agreed to such compromise, there is no reason why it should not be allowed. It should not be considered as a very good authority for the cases of reduction of capital, in the strict sense, because in this case the shareholders whose shares were cancelled got some other shares in place of the cancelled shares. Although the above case has been followed in numerous unreported decisions, as stated in the note (t) of S. 330, *Halsbury Laws of England* (3rd Edn.), in every case the shareholders thus affected by the reduction had been offered some consideration for the reduced shares, and, of course, they accepted the consideration.

Couper(36) was followed in Poole v. National Bank of China Ltd.(37), and Re Thomas de la Rue and Co.(38). In the latter case, Eve, J., after referring to the two House of Lords' cases, said(39):

"It is established that in a scheme for the reduction of share capital a company may differentiate between the holders of the same class of shares at least to the extent of paying off some, and not paying off others."

The contrary view:

12. We usually find that in most cases where the rule of 'fair and equitable' was applied and the *prima facie* rule was discarded, mostly the consent of the class concerned was taken(40). Further, there are numerous cases which are comparatively recent and hold the view that the reduction must be fair and equitable between the different classes of shareholders and due regard should be given to the comparative rights of various classes of shareholders as regards dividend, capital, etc.(41). Lord Simmons in *Scottish Insurance Corporation v. Wilson and Clyde Coal Co.*, (42) opined:

".....the Court's task is to see that the procedure, by which a reduction is carried through, is formally correct and that creditors are not prejudiced, 'it has the further duty of satisfying itself that the scheme is fair and equitable between the different classes of shareholders'(43)". (Emphasis (here in ' ') added)

In *Re Old Silkstone Collieries, Ltd.*, (44) the Court of Appeal held that it had no power to confirm the reduction, although it may be fair, if it involved a variation of the rights enjoyed by different classes of shareholders and there had been no previous compliance with the terms of a 'variation of rights' clause, if such a clause existed.

13. These principles are also followed in India. In a recent case, it is held that the Court while confirming the reduction is not necessarily confined to seeing that the creditors are properly protected,

(36) (1894) AC 399.

(37) (1907) AC 229.

(38) (1911) 2 Ch 361.

(39) *Ibid.*, at p. 365.

(40) See, *supra*, Notes 33, 34 and 35.

(41) *Re Floating Dock Co. of St. Thomas Ltd.*, (1895) 1 Ch 691; *Re Agricultural Hotel Co.*, (1891) 1 Ch 396; *Re London and New York Investment Corporation*, (1895) 2 Ch 860; *Re Union Plate Glass Company*, (1889) 42 Ch 513; see *infra*, Notes 42, 44 and 45.

(42) (1949) AC 462 (HL).

(43) *Ibid.*, p. 486.

(44) (1954) Ch 169 (CA).

but it may also take into account whether the reduction will work injustice between the different classes of shareholders(45). Reasons for these two different points of view:

14. The authorities who confirmed the reduction of capital against the *prima facie* rule and against the interests of various classes of shareholders mainly based their judgment on the strict interpretation of the statutory provision of both countries, India and England, which provides for the reduction of share capital and the Court's confirmation. The reasons why they overlooked the interests of shareholders while confirming the reduction of share capital seem to be thus: First, they were of the view that the power of the Courts to confirm the reduction was unlimited except that it had to be satisfied that the creditors had either consented to the reduction or were being paid or secured. This point of view gets support from the wording of S. 102 of the Indian Companies Act, 1956(46), which runs as follows:

"The Court, if satisfied with respect to every creditor of the company who under S. 101 is entitled to object to the reduction, that either his consent to the reduction has been obtained or his debt or claim has been discharged, or has determined or has been secured, may make an order confirming the reduction on such terms and conditions as it thinks fit".

It should be noted here that there is no mention about shareholders in this provision. Secondly, the Courts thought that the intention of the Legislature, in enacting these provisions regarding reduction of capital, was to entrust the prescribed majority of the shareholders with the decision regarding the reduction of capital. As in the section, no duty is imposed upon the Courts to see whether the shareholders' rights are affected by such a reduction or not, the legislature wished that, in such a case, the majority's decision should be carried out against the wishes of the dissenting minority shareholders (if any). The dissenting shareholders have already been protected by providing additional safeguards such as the requirement of a special resolution, and the Court's confirmation, which are not required in the case of alteration of share capital by other modes. Had the legislature's intention been of giving some other rights to dissenting minority shareholders, it would have made some sort of provisions for them too, as it made for the creditors. This view finds some support in the judgments of the two

(45) In *re, Panruti Industrial Co., Ltd.* AIR 1960 Mad. 537.

(46) English provision: (English) - Companies Act, 1948, S. 68.

cases(47). In one case, Lord Herschell, L. C. said(48):

"It will be observed that neither of these statutes prescribes the manner in which the reduction of capital is to be effected. Nor is there any limitation of the power of the Court to confirm the reduction, except that it must be satisfied that the creditors entitled to object to the reduction have either consented or been paid or secured....."

In the same case, he further said(49):

"I think it was the policy of the Legislature to entrust the prescribed majority of the shareholders with the decision whether there should be a reduction of capital, and if so, how it should be carried into effect. The interests of the dissenting minority of the shareholders (if there be such) are properly safeguarded by this: that the decision of the majority can only prevail if it be confirmed by the Court".

In another case, Lord Macnaughten observed(50):

"That condition that gives jurisdiction (to confirm a reduction of capital) is not proof of loss of capital or proof that capital is unrepresented by available assets, or that capital is in excess of the wants of the company. The jurisdiction arises whenever the company seeking reduction has duly passed a special resolution to that effect".

15. It is true that provisions of the Act which deal with the reduction of share capital do not mention anything about the rights of dissenting shareholders or the rights of various classes of shareholders whose rights are affected thereby; the test of 'fairness among various classes of shareholders' in a reduction was originated in the common law and it is a comparatively recent development. The authorities which plead for such test base their judgment on 'equitable principles'. In other words, the right of shareholders to object against the reduction of capital is not a statutory one, it is granted under common law. In such cases, even if there are very few chances of success, they can object to the reduction on the grounds that it causes a variation of their rights(51), or is a fraud on the minority(52).

(47) British American Trustee and Finance Corporation v. Couper, (1894) AC 399; Poole v. National Bank of China, (1907) AC 229.

(48) British American Trustee and Finance Corporation v. Couper, supra, p. 403.

(49) Ibid., p. 405.

(50) Poole v. National Bank of China, (1907) AC 229.

(51) (Indian) Companies Act, 1956, Section 106 and S. 107.

(52) (Indian) Companies Act, 1956, Section 397; (English) Companies Act, 1948, S. 210.

These conflicting opinions must be reconciled and the law should be clarified in this regard. The better view, which is based on the equitable grounds, seems to be that it should also be provided in Section 102(53) that the Court, before confirming the reduction, should also be satisfied that the reduction will not work any injustice among the shareholders or between various classes of shareholders. The reduction should be fair and equitable and it should be done for the benefit of the company as a whole. The majority should not be allowed to take any undue benefit or advantage at the cost of minority only due to the fact that the Act does not provide any remedy or right to the minority.

16. It seems that the present provisions in the statute have been enacted keeping in view the interests of creditors only. The Legislature had contemplated that by a reduction of capital only creditors' interests may be affected. Had they examined the consequences of reduction of capital from the point of view of those shareholders whose rights and interests are adversely affected by such reduction where the majority votes are controlled by a few persons and they want to squeeze out the minority, they would have certainly provided some remedy for them. It is submitted here that the present requirements of special resolution and the Court's confirmation are not sufficient to safeguard the interests of shareholders. The shareholders should be given a statutory right to file a petition to the Court and should be given an opportunity to put their cases that the reduction would be unfair to them if it were confirmed. However, in England, shareholders can appear and object, on their own accord, on the hearing of the petition(54). Under Indian law, such a right is only given to the creditors(55). Furthermore, if there are various classes of shareholders, the consent of the members of every class whose rights are affected should be taken by permitting them to vote on the resolution of reduction of capital.

Indian Preference Shareholders Are Slightly Better Placed:

17. It is heartening to note that this point was considered by the Legislature in India while enacting the Companies Act of 1956. They expressly granted a right to vote to the preference shareholders in the case of repayment or reduction of the share capital of the company. A reduc-

(53) (Indian) Companies Act, 1956; (English) Companies Act, 1948, Section 68.

(54) Rules of the Supreme Court, O. 102, R. 5 (England);

(55) (Indian) The Companies (Court) Rules, 1959, R. 60.

tion of capital is deemed to affect the rights attached to preference shares, and thus the holders of such shares are allowed to vote (56). In England, the preference shareholders have no right to vote on a resolution for repayment of capital or reduction of capital, unless this right has been granted to them expressly, by the articles or the terms of issue. In this regard the preference shareholders of India are better off than those of England.

18. Even if there is a 'variation of rights' clause in the articles, in most of the cases of reduction of capital, it has been held by the English Courts that the reduction of capital does not vary the class rights of the shareholders in a strict sense. Thus, the variation of rights clause also does not provide any safeguard in the case of reduction of capital. In this regard too, the Indian law offers better protection to the shareholders than the English law, by expressly providing in the Act that the 'repayment of capital or reduction of share capital' is the variation of rights attached to the preference shares. Therefore, the reduction of capital can also fall under the scope of Section 106(57), and if there is a 'variation of rights' clause, the requirements of Section 106 will have to be complied with; and, the safeguards provided in the case of variation of rights under S. 106 are reasonably adequate(58).

(56) (Indian) Companies Act, 1956, Section 87 (2) (a):

"Subject as aforesaid and save as provided in Cl. (b) of this sub-section every member of a company limited by shares and holding any preference share capital therein shall, in respect of such capital, have a right to vote only on resolutions placed before the company which directly affect the rights attached to his preference shares

Explanation— Any resolution for winding up the company or for the repayment or reduction of its share capital shall be deemed directly to affect the rights attached to preference shares within the meaning of this clause".

(57) (Indian) Companies Act, 1956.

(58) (Indian) Companies Act, 1956, Section 107 (1): "If, in pursuance of any provision such as is referred to in S. 106, the rights attached to any class of shares are at any time varied, the holders of not less in the aggregate than ten per cent. of the issued shares of that class, being persons who did not consent to or vote in favour of the resolution for the variation, may apply to the Court to have the variation cancelled, and where any such application is made, the variation shall not have effect unless and

Modes of Reduction:

19. The question of the modes of reduction of capital is considered to be a matter of domestic concern, and for the decision of the majority of the shareholders of the company. This is one of the matters which has not been specified by S. 100 of the company statute(59). The Courts of India and England are of the view that, subject to the necessity of obtaining the confirmation of the Court, the company is left to choose the mode in which the reduction is to be made. In *British and American Trustee and Finance Corporation v. Couper*, Lord Macnaughten remarked:

".....the Act apparently leaves the company to determine the extent, the mode, and the incidence of the reduction, and the application or disposition of any capital moneys which the proposed reduction may set free(60)."

In India, recently, in *Re Panruti Industrial Co. (Pvt) Ltd.* (61), the same principles of law were reiterated. In that case, it was held that it was the policy of the Legislature to entrust the prescribed majority of the shareholders with the decision as to whether there should be a reduction, and if so, how it should be carried into effect. It is also the right of the prescribed majority to decide the extent of the reduction and all other questions concerning the reduction including the application of the moneys which may be set free as a result of the reduction(62).

20. Section 100(63) provides that a company may reduce its share capital 'in any way'(64). The phrase 'in any way' expressly leaves the field wide open, and gives unlimited power to the companies as regards the modes of reduction of capital. However, certain ways in which the reduction of capital may be effected have been mentioned in S. 100(63), but it has also been stated that this is to be 'without prejudice to the generality of the power' of the company to reduce its capital in any way it likes. The prescribed modes by the statutory provisions are given below.

(a) Where the company is over-capitalised:

In the case where the company is over-

until it is confirmed by the Court."

See also S. 107 (2), (3), (4) and (5).

(59) (Indian) Companies Act, 1956; (English) Companies Act, 1948, Section 66.

(60) (1894) AC 399 (HL) 411, 412.

(61) AIR 1960 Mad 537.

(62) Ibid. p. 539.

(63) (Indian) Companies Act, 1956; (English) Companies Act, 1948, Section 66

(64) Underlining (here in ' ') added.

capitalised and it has the capital in excess of the wants of the company, it can reduce its capital by mainly two methods:

(i) by extinguishing or reducing the liability of the shareholders in respect of unpaid capital.

The shareholders are liable to the company for the amount which is unpaid on the shares taken by them. If a prescribed majority desires to relieve them (which of course includes themselves) from this liability, it can do so by extinguishing or reducing the unpaid capital, which also includes uncalled capital by virtue of Section 100 (1) (a) (65).

(ii) by paying off any paid-up share capital which is in excess of the wants of the company. The company may extinguish or reduce the liabilities of any of its shares or may pay off these shares on the understanding that it may be called up again any time (66).

(b) Where the company has suffered a loss of capital:

In such a case the company by a prescribed majority:

(i) may cancel any paid-up share capital which is lost or is unrepresented by available assets without extinguishing or reducing liability on any of its shares (67), and

(ii) may also cancel paid-up shares with extinguishing or reducing liability on any of the shares (68).

(65) Surrender of partly paid-up shares not liable to forfeiture in consideration of release by the company of the surrendering shareholder from his liabilities in respect of the shares surrendered is a case in illustration of the mode of reducing capital by extinguishing or reducing the liability on shares not fully paid-up. *Indian Iron and Steel Co., Ltd. v. Dalhousie Holdings Ltd.*, AIR 1957 Cal 293 (308).

(66) 'Payment of dividend' out of paid-up share capital or purchase by the company of its own shares (which is now the subject matter of express legislative enactment) is the illustration of this mode of reduction of capital: *Indian Iron and Steel Co., Ltd. v. Dalhousie Holdings Ltd.*, AIR 1957 Cal 293. There may be a reduction of share capital if the company returns part of the capital money to the preference shareholders in cash. So also, the conversion of issued preference shares into redeemable preference shares is equivalent to a reduction of share capital, and simultaneous increase of share capital: AIR 1956 Pat 364, 367.

(67) (Indian) Companies Act, 1956, S. 100 (1)(b); (English) Companies Act, 1948, S. 66(1)(b).

(68) Ibid.

21. Though the modes mentioned above are stated in S. 100 which authorises the reduction of capital, they are not exhaustive; the section itself states that the ways of reducing the capital are not restricted to only these methods. This general power has given a wide discretion to the majority shareholders in respect of choosing the mode of reduction, e.g. capital can be reduced even though not lost. There are certain other modes of reducing share capital, for instance by purchasing its own shares, or by paying off interest, etc., from the share capital, some of which are prohibited by the statutes of both countries (69). The phrase 'in any way' used in S. 100(70) has made the law uncertain to some extent, and gives too much discretionary power to the shareholders. The Jenkins Committee of England was of the view that 'terms in which S. 66 permits a reduction of capital impliedly prohibit a limited company from reducing its share capital except as expressly permitted by the Act', (71) and thus it recommended that the Act should provide that save as expressly permitted, a limited company must not reduce its capital (72). Though the recommendation of the Jenkins Committee may be accepted for the sake of clarity and certainty in law, the reasons given by the Committee on which it arrived at this conclusion are not acceptable. The words 'without prejudice to the generality of the power of the company to reduce its capital in any way', mentioned in Section 66(73) clear out any possibility of implied prohibition as regards the mode of reduction of capital.

LIABILITIES OF MEMBERS IN RESPECT OF REDUCED SHARES:

22. After the reduction of capital, the members of the company, past or present, cease to be liable in respect of any shares, to any call or contributions as regards the amount by which the nominal amount of their shares has been reduced. (74)

EXCEPTION: If the company is unable to pay, after the reduction, the amount of

(69) (Indian) Companies Act, 1956, Ss. 77; 76; 78; 205; (English) Companies Act, 1948, Ss. 53, 54 and 57.

(70) (Indian) Companies Act, 1956; (English) Companies Act, 1948, S. 66.

(71) Report of the Company Law Committee (London), 1962, Cmnd. 1749, Para 157.

(72) Ibid, para 187(a).

(73) (English) Companies Act, 1948; (Indian) Companies Act, 1956, S. 100.

(74) (Indian) Companies Act, 1956, S. 104(1); (English) Companies Act, 1948, S. 70(1).

the debt or claim of any such creditors who by reason of their ignorance of the reduction were not entered in the list of creditors, every person who was a member of the company at the date of the registration of the order for reduction and minute, shall be liable to contribute for the payment of that debt or claim in the way as if no reduction has taken place. (75)

OTHER REQUIREMENTS TO BE FULFILLED TO SECURE THE COURT'S SANCTION AND OTHER FORMALITIES:

23. The procedure which has to be followed by a company which wants to reduce its share capital and the requirements to be fulfilled in order to secure the Court's sanction have been mentioned in Sections 101, 102 and 103 of the Indian Companies Act, 1956. (76) They are themselves self-explanatory and need no further elaboration and thus are not discussed here. The penalty for conceal-

(75) Proviso of Section 104(1); (Indian) Companies Act, 1956; (English) Companies Act, 1948, S. 70(1).

(76) Provisions of the (English) Companies Act, 1948, are Ss. 67, 68 and 69.

ing names of creditors, etc., has been dealt with in Section 105 of the Act of 1956. (77) In this connection, it may be mentioned that, as suggested earlier, the Court while confirming the reduction of capital must also be satisfied that the proposed reduction would not work any injustice among various classes of shareholders or among shareholders of the same class. As there is no mention of this condition in the statutory provisions, it is suggested that Section 102 should be suitably amended. (78)

(77) (English) Companies Act, 1948, S. 71.

(78) See Supra. A provision on the lines of section 107 of the Indian Companies Act, 1956, may be made in the Act authorising shareholders whose rights are affected by the reduction to file a petition on their own accord to the court at the time of the consideration of the application of the company with regard to the confirmation of the reduction. Further, a duty should be imposed upon the courts to safeguard the interests of shareholders to the same extent as it does at present the interests of creditors.

REVISIONAL JURISDICTION UNDER SECTION 115, C. P. C.

(By MAHENDRA GILL, M.A. LL.B., Advocate Supreme Court, Bombay.)

But for the recent judgment of the Supreme Court in Prem Raj v. D. L. F. Housing and Construction (Pvt.) Ltd., AIR 1968 SC 1355 the law on the scope of revisional jurisdiction of the High Court under S. 115 C. P. C. was settled beyond any doubt. There are, however, some dicta in Prem Raj's case, AIR 1968 SC 1355 supra, which seem to tend to water down the well-established principles, create a serious conflict and sound a discordant note.

2. Before advertng to the Prem Raj's case, AIR 1968 SC 1355, it would be necessary to call attention to the fact that as far back as 1883 the Privy Council in Amir Hassan Khan v. Sheo Baksh Singh, (1883) ILR 11 Cal 6=11 Ind App 237 (PC) had laid down that if once it is found that the subordinate Court had jurisdiction to decide a particular question, even if it decided it wrongly, it could not be said that it exercised its jurisdiction illegally or with material irregularity. This view was reiterated in a subsequent pronouncement of the Privy Council in Balakrishna Udayar v. Vasudeva Iyer, AIR 1917 PC 71 where it was categorically laid down that Section 115 applies to jurisdiction alone and that there is nothing contained in that section which is directed to correct conclusions

of law or fact in which question of jurisdiction is not involved. Later, in Venkatagiri Iyengar v. Hindu Religious Endowments Board, AIR 1949 PC 156 the Privy Council made it clear that sub-clause (c) of Section 115, C. P. C. only empowered the High Court to correct 'errors of procedure' (emphasis there in ' ') which the subordinate Court may have fallen into while exercising its jurisdiction. Thereafter, in Joy Chand v. Kamalaksha, AIR 1949 PC 239 the Privy Council further stated that if by a wrong decision on a question of limitation or res judicata the Court assumed jurisdiction, it was open to revision under clauses (a) and (b) of Section 115, C. P. C. and that clause (c) in such a context may well be ignored. It observed that error in decision of a subordinate Court does not by itself involve that the subordinate Court had acted illegally or with material irregularity so as to justify interference in revision under clause (c) of Section 115 C. P. C.

3. Various conflicting interpretations continued to be put upon the aforesaid pronouncements of the Privy Council by the Indian High Courts. To give but only two instances: Madras High Court justified revisional interference if the lower

Court had decided the case perversely, AIR 1915 Mad 1223; the Calcutta High Court justified it on the ground that revisional jurisdiction could be directed against the correction of gross and palpable errors or to remedy manifest injustice in non-appealable matters, AIR 1935 Cal 102.

4. But the Supreme Court in *Keshardeo v. Radha Kishen*, AIR 1953 SC 23 set at rest the conflict by restating the law and approving fully and expounding the dicta laid down by the Privy Council in the aforesaid cases. Mahajan, J. (as he then was) lamented that the High Courts have not always appreciated the limits of the jurisdiction conferred by this section. His Lordship expressly disagreed with the Calcutta view in *Mohunt Bhagwan Ramanuj Das v. Khetter Moni Dassi*, (1897) 1 Cal WN 617 that clause (c) of Section 115, C. P. C. was intended to authorise the High Courts to interfere and correct gross and palpable errors of subordinate Courts, so as to prevent grave injustice in non-appealable cases.

5. In *Keshardeo's* case, AIR 1953 SC 23 supra, there was a bitter and frivolous litigation protracted over 30 years and the parties appeared to have fought out more for prestige than for the settlement of any genuine disputes between them. After a round to the Privy Council over execution proceedings, the decree-holder had applied to the trial Court for an adjournment of the execution case, which was refused and without giving any opportunity to the pleader of the decree-holder to take any alternative course that may have been available to him, the execution case itself was dismissed, despite the fact that the stakes were very heavy. Fresh application for execution at that stage was time-barred. Therefore the decree-holder applied to the trial Court invoking its inherent jurisdiction under S. 151, C. P. C. that the order dismissing the execution case be set aside. The trial Court fairly conceded that it had fallen in error in dismissing the execution case after the application for adjournment was rejected and, therefore, set aside the order of dismissal and restored the execution case to file. This order of restoration was challenged in the High Court in its revisional jurisdiction under Section 115, C. P. C. The High Court interfered and ordered a remand to the trial Court to determine certain collateral facts. While setting aside the High Court's order the Supreme Court observed that the order before the subordinate Judge was one that he had jurisdiction to make, that in making that order he neither acted in excess of his jurisdiction nor did he assume jurisdiction which he did not possess and that it could not be said that in the exercise of his jurisdiction he acted with

material irregularity or committed any 'breach of the procedure' (quotation mine) laid down for reaching the result. The Supreme Court entered into a long discussion as to the scope of section 115 and in terms approved the extracted ratio of the aforesaid Privy Council decisions, which for want of space need not be set out here.

6. Then came the famous case of *Vora Abbasbhai v. Gulam Nabi*, AIR 1964 SC 1341 which arose from the Gujarat High Court, where the Supreme Court found it as a fact that the error corrected by the High Court in its revisional jurisdiction was a gross error of law resulting in grave injustice and yet the Supreme Court allowed the appeal on the ground that the High Court had no jurisdiction under Section 115, C. P. C. to correct errors of law howsoever grave or palpable. The Supreme Court observed that the District Court no doubt had taken a grossly erroneous view of the law, yet the High Court had no authority under its revisional powers to set aside the order merely because the judgment of the District Court was assailable on the ground of gross error of law or fact and that it could not be said that the subordinate Court acted in the exercise of its jurisdiction illegally or with material irregularity.

7. The same view was affirmed by the subsequent judgments of the Supreme Court in *Misrilal v. Sadasiviah*, AIR 1965 SC 553 and in *Pandurang v. Maruti*, AIR 1966 SC 153 by a larger Bench of five Judges and in *Ratilal v. Ranchhodbhai* AIR 1966 SC 439.

8. It seems that this settled position in law has been given a go-by by the observations of Ramaswami J. in *Prem Raj's* case, AIR 1968 SC 1355 supra. It may, however, be noted that in *Prem Raj's* case, AIR 1968 SC 1355 the Bench consisted only of two Judges, viz. J. C. Shah and Ramaswami JJ. and further that none of the earlier Privy Council and Supreme Court authorities were referred to in the said judgment. It seems that actuated by the exigencies of the case and motivated by expediency the observations of the Supreme Court, to which I will presently make a reference, have tended to water down the well-settled principles governing the revisional jurisdiction of the High Courts under Section 115, C. P. C.

9. In *Prem Raj's* case, AIR 1968 SC 1355 the plaintiff had sued firstly for a declaration that the contract for the sale of land was void on account of undue influence and had secondly, in the alternative, asked for the specific performance of the very same contract. In the trial Court a preliminary objection was raised

to the effect that the alternative prayer for the specific performance of the contract was thoroughly inconsistent with the prayer for the avoidance of the said contract and that the prayer for the specific performance should be struck down and the suit as regards that prayer be dismissed. The trial Court rejected the preliminary objection, whereupon the High Court of Punjab was approached in its revisional jurisdiction under Section 115, C. P. C. The High Court interfered and upheld the preliminary objection and dismissed the suit so far as it related to the prayer for specific performance. No fault, however, can be found with the view taken by the High Court that the plaintiff could not claim specific performance when he was not ready and willing to perform his part of the contract as was unequivocally embodied in his prayer for the avoidance of the contract. In effect, the High Court held, with which the Supreme Court concurred, that the suit, so far as the specific prayer for specific performance was concerned, was liable to be dismissed on the ground that it showed no cause of action. It can be assumed from the decision of the Supreme Court that the High Court exercised powers analogous to those laid down in Order 7 Rule 11 (a) C. P. C. whereunder the trial Court is enjoined to reject the plaint if it discloses no cause of action.

10. Applying the well-settled principles, it appears that the trial Court had undoubtedly jurisdiction to decide whether the plaint disclosed a cause of action or it did not and if the Court took one view out of the two possible views, it cannot be said that it acted in the exercise of its jurisdiction illegally or with material irregularity and thus rendered itself amenable to the revisional jurisdiction of the High Court under S. 115, C. P. C. An eminent Counsel, Mr. M. C. Chagla (who was once the Chief Justice of the Bombay High Court and is admittedly an eminent jurist) canvassed in all sincerity before the Supreme Court on behalf of the appellant that the High Court had no jurisdiction to interfere in the order of the trial Court under section 115 C. P. C. He further urged that the finding of the trial Court did not involve any question of jurisdiction and that the High Court had fallen into an error in reversing the finding of the trial Court on the issue as to whether the relief for specific performance was open to the opponent in the alternative or not. The argument of the

learned Counsel was repelled by the Supreme Court by the following observations which are the subject matter of the present article:—

Said Ramaswami J.:

"In our opinion, there is no warrant for the argument put forward on behalf of the appellant. It is manifest that in holding that the appellant was entitled in the alternative to ask for the relief of specific performance, the trial Court had committed an error of law and so had acted with material irregularity or illegality in the exercise of its jurisdiction within the meaning of section 115(c) of the Civil Procedure Code. It was therefore competent to the High Court to interfere in revision with the order of the trial Court on this point. To put it differently the decision of the trial Court on this question was not a decision on a mere question of law but it was a decision on a question of law upon which the jurisdiction of the trial Court to grant the particular relief depended. The question was therefore one which involved the jurisdiction of the trial Court; the trial Court could not, by an erroneous finding upon that question, confer upon itself a jurisdiction which it did not possess and its order was therefore liable to be set aside by the High Court in revision."

In other words, the observations lend themselves to this view that in a suit where the plaintiff prays for a decree on a debt due by the defendant the trial Court has jurisdiction to pass such a decree only if such debt is proved and would have no jurisdiction to pass a decree if such debt is not proved. If the trial Court errs in the finding as to whether a debt existed, such an error could be corrected by the High Court in its revisional jurisdiction. If this view were correct, the revisional jurisdiction would be as wide as the jurisdiction exercisable by the High Court in the First Appeal; there will be no limit of whatever nature on the scope of such jurisdiction, for anything under the sun could be done by the High Court under clause (c) of section 115, C. P. C.

11. In my respectful submission, therefore, the decision of the Supreme Court in Prem Raj's case, AIR 1968 SC 1355 and the trenchant observations extracted above are completely antagonistic to the well settled law on the scope of section 115, C. P. C. and require to be expressly reversed by the Supreme Court at the earliest opportunity.

DOES THROWING SEPARATE PROPERTY INTO COMMON HOTCHPOT OF H. U. F. AMOUNT TO "TRANSFER"?

(By VALLABHDAS MORTA, *Advocate, Akola*.)

The question as to whether an act of throwing separate property of a coparcener of a joint Hindu family under the Mitakshara Law into joint stock and blending it with family property, constitutes transfer or not, has evoked considerable debate in the Courts and among Jurists.

2. The High Court of Madras in the case of *M. K. Stremman v. Commr. of I. T.*, Madras, AIR 1962 Mad 26 has made the following observations:

"A transfer is essentially a contract, a bilateral transaction. The transaction by which a property ceases to be the property of a coparcener and becomes impressed with the character of coparcenary property does not itself amount to transfer. No transfer need precede the change. No transfer ensues either".

3. The High Court of Bombay in the case of *Kisansingh v. Vishnu*, AIR 1951 Bom 4 has held to the effect that blending of self-acquired property by an individual with his joint family property, does not amount to transfer and consequently, it is not a gift requiring registration under law. The High Court of Mysore in the case of *Smt. Laxmibai v. C. I. T. Bangalore* reported in 1967 Taxation 85, has observed in this connection, as under :—

"It would follow, therefore, that even in the case of father's self-acquired property throwing the same into the common stock or blending it with other undoubted joint family properties, would be an act of "Pitruprasad" and not a creation of new right in the son or transference of a new right by a father to a son. It was only removal of a limitation placed on an exercise of a right recognised as always existing from the birth."

4. However, the High Court of Gujarat has taken a different view in the case of *K. L. Patel v. Commr. of I. T. Gujarat* reported in AIR 1962 Guj 6. The learned Judges observed as under :—

"We are inclined to accept the view urged before us by the learned Advocate General that by reason of operation of Law, a transfer of property takes place when a member of a joint Hindu family throws his separate property into the the hotch-pot of the family property. The real question which we have to consider, is whether there has been a transfer of assets directly, or indirectly, by the assessee to his wife and minor son. The assessee while throwing the property into the hotchpot has effected a change of ownership of the property".

5. The High Court of Andhra Pradesh has also taken a similar view in *Commr. of Gift-tax v. Satyanarayana Murthy*,

reported in AIR 1965 AP 95. The learned Judges observe:

"There can be little doubt that by this transaction the owner of the property has divested himself of it and vested it completely in the joint Hindu family. He has thus effected a change of ownership of the property."

6. When the controversy was indirectly referred to the Supreme Court of India, the Supreme Court has made only the following observations in the case of *Commr. of Income-tax Gujarat v. Keshavlal Lallubhai*, reported in AIR 1965 SC 866:

"There is some difference of opinion whether the act of throwing self-acquired property into hotchpot is a transfer or not. We need not settle this controversy in this case."

It is learnt that this specific question is now pending before the Supreme Court of India, for decision, and the final law of the land on this subject will be determined only at the time of judgment. However, on closer examination of this question and on sober consideration, one is inclined to accept the view that such a transaction is not transfer in any sense of the term. Section 5 of the Transfer of Property Act IV of 1882 gives a definition of transfer of property. The well-known authority on Hindu Law Mr. D. F. Mulla had following observations to make on the subject which can be found in clause 227 of the 12th Edition of his treatise on Hindu Law:

"Property which was originally the separate or self-acquired property of a member of a joint family may become joint family property if it has been voluntarily thrown into the common stock with the intention of abandoning all separate claims upon it..... Separate property thrown into common stock is subject to all incidents of a joint family property."

Thus, it would be seen that a person might impress his self-acquired property wholly or partly with the joint family character. He might throw it into the hotchpot or declare his clear intention to convert the self-acquired property into the family property, and this can be done merely by declaration of a clear intention to waive his separate rights. It is also not necessary that he should convert his entire property into joint family property, nor is it necessary that the family should have the property in existence. No formalities of any nature are essential for converting the nature of the property. Once the unequivocal intention is proved, the effect is that all the properties so blended become the joint family property.

7. Severance in status with the resulting change in the nature of ownership of the property, is one of the incidents of coparcenary. Coparcenary property vests in the separated members as tenant-in-common after severance in status. This result can be achieved by unilateral exercise of the volition of the separating member or members of the family. This change does not by itself amount to transfer as has been now almost unanimously accepted. These are the incidents of coparcenary under the Mitakshara Law that on partition the coparcenary property ceases to be joint and the property of a coparcener becomes property of the coparcenary. Either event can happen by the unilateral action of any of the coparceners. Transfer is essentially a contract i.e. bilateral transaction and it is obvious that such a transaction is unilateral.

8. Under Hindu Law coparcenary interest consists of unity of possession, unity of ownership, and unity of enjoyment. The ownership is in the whole body of coparcenary and, therefore, by putting the self-acquired property in the joint family hotchpot a coparcener is only changing his mode of enjoyment of the property. While previously he was enjoying the said property as his exclusive pro-

perty, after blending it with the family property, he still enjoys the whole of it, as a member of coparcenary and his share is not restricted to a particular share so long as there is no division. Under the circumstances, it is difficult to accept that in cases of this type, there is any transfer from one person to the other. The owner of the personal property still remains as much owner of every bit of the said property as any other coparcener. The totality of the property is not diminished only by the antecedents attaching to a particular part.

9. There is one more angle to this question, and that is that blending need not necessarily be a result of a single act or single declaration of intention by a person. It may be brought about and generally it is brought about by a continuous course of conduct commencing either with the act of acquisition itself, or at a subsequent point of time, by way of enjoyment or mode of enjoyment. The considerations applicable to the process of partition in Mitakshara family, apply with all force to the process of throwing property into a common hotchpot. If the partition cannot be a transfer, the act of impressing self-acquired property with the character of the joint property cannot also be a transfer.

REVIEWS

CLAIMS TRIBUNALS & COMPENSATION — By G. N. Sabahit — with a foreword by Hon. Mr. Justice, A. Narayan Pai, High Court, Mysore.

Section 110 of the Motor Vehicles Act empowers the State Government to constitute by notification in Official Gazette, one or more Motor Accidents Claims Tribunals for a specified area, for adjudicating upon claims in respect of accidents involving the death of or bodily injury to persons arising out of the use of Motor Vehicles. Sections 110A to 110F deal with various stages through which the claim is processed and finally awarded.

Although creation of new forum for claims relating to death or bodily injury resulting from accidents by use of motor vehicles, provides a cheaper and speedier remedy, the substantive rights or principles of liability or the principles governing the computation of compensation have remained unchanged.

The book under review exhaustively deals with not only the working of Motor Accidents Claims Tribunals, but also with the principles of actionable negligence as a specific tort and the principles of law under which the Tribunal fixes and awards damages for personal injuries as well as

for fatal accidents. These topics have been dealt with in different parts. There are separate chapters dealing respectively with the Statutory Rules (Mysore Motor Vehicles Rules) and Pleadings and Practice. Illustrative English and Indian cases have been given in separate chapters in respect of damages for personal injury. There are illustrative Indian cases dealing with award of damages in cases of fatal accidents.

There is a List of Cases and an Index.
G. G. M.

"CIVIL COURT PRACTICE AND PROCEDURE" — By A. C. Ganguly, 8th Edition (1968). Edited by Shambhudas Mitra, Advocate. Author of "A Treatise on Vendor and Purchaser" and other books, Published by Eastern Law House Pvt. Ltd., Calcutta. Pages 1050, Price Rs. 25=00.

For a law book running into 8 editions is no mean achievement. With each edition, the popularity of the book has grown, in spite of the fact that the author of the original edition died long ago. The demand for this book has persisted and the present editor Shri Shambhudas Mitra has

brought out three more editions, the latest being the 8th which is under review.

The present edition is not a "reprint" but has a good deal of hard work and constant alertness behind it. Latest enactments, latest case law have been studied, and on that basis various portions of the book have been rewritten, and some excised. The book deals with the procedural and practical side of civil law, arranged topicwise. The book is essentially meant for juniors, at the Bar, attorneys and lay litigants. Even the busy seniors will find the book helpful.

A quick glance through the first Chapter will enable a young lawyer to know his correct duties and responsibilities towards his client and the client will also know what he should expect of his lawyer and how far he can go with him.

Chapters are assigned to pleadings, reliefs, issues, evidence, commission, injunction, receiver, attachments, compromise and so on. The subject-matter is thoroughly simplified and the junior judge, or a lawyer or a litigant, is not likely ever to go wrong if he follows the tips given in these Chapters.

In Part Two, the author has given useful notes on important Sections, Orders and Rules of the C. P. Code, important portions of Constitution, T. P. Act, Prov. Small Cause Courts Act, Succession Act, Lunacy Act, Insolvency Act, Hindu Law, Mahomedan Law, Limitation, Stamp Act a few local Acts of Bengal and extracts from Rules and Orders of different High Courts. The Author has dealt with every aspect and branch of procedural law, which a practitioner has generally to go through in his practice.

The book contains 35 model complaints and written statements and forms of various draft petitions and applications, draft notices, and conveyances. The editor has left no subject which a junior will not require.

A detailed 'Contents' and a copious Index have enhanced the utility of this book. BDB/R.G.D.

"RIGHTS AND RESPONSIBILITIES OF GOVERNMENT SERVANTS" — By Kalicharan Patnaik, B. A., B. L. Retired Under Secretary, Law Department, Government of Orissa, 3rd Edition (1968), Published by Smt. V. Patnaik C/o Shri P. N. Das M. A. Satichaura Road, Cuttack 2, Pages 359. Price Rs. 10=00.

We have had occasion to review both the previous editions of this book (See AIR 1960 Jour 39 and AIR 1963 Jour. 95). We have much pleasure in welcoming this 3rd edition which is enlarged inasmuch as it contains much new material.

A fact that could not escape us is that the author has enlarged this edition by

putting 359 pages as against 244 in the first edition, which naturally means more material and latest information.

The author has done an excellent job, in bringing together innumerable rules, Central and State, relating to Government servants in one place and consolidating them. This work is unique in its handling of the problem with the help of judicial precedents. Though the book deals mostly with rules and regulations framed by the Government of Orissa, it is bound to be useful to all Governments and their servants, as the basic principles governing them are almost identical.

The scope of inquiry undertaken by the author is very wide as the title of the book suggests. It deals with legal formulas arising out of the dispute relating to the Government servants' conduct so far as they give them rights and subject them to responsibilities.

The conduct rules are frequently added to or amended. It is not possible for Government servants to keep track of them up-to-date. Shri Patnaik, by publication of this book has done a great service not only to Government servants but also to those who have to enforce and work out the rules. BDB/R.G.D.

"MAHAJAN REPORT UNCOVERED" —

By A. Rahman Antulay, Bar-at-law, M.L.A. Author of "Parliamentary Privilege". Published 1968 by Allied Publishers Private Limited, 15 Graham Road, Ballard Estate, Bombay 1. Pages 192. Price Rs. 14=00.

The book is a brilliant study of the report submitted by Shri M. C. Mahajan, Ex-Chief Justice of India as a one-man Commission appointed with a view to resolving the border dispute between the States of Maharashtra and Mysore and Mysore and Kerala.

Naturally every one expected that the Commission would give fair justice in a good measure to both the sides, by adopting such rules and yardsticks that would govern all equally.

This searching study of the report is a masterly analysis on the part of the author to show how unjust, unfair and how prejudiced the Commission was to one side and how partial it was to the other. In fact on reading this book, no doubt is left in one's mind that the commission instead of pursuing its enquiry impartially, objectively and judicially has allowed itself to be swayed. In this examination of the Report, Shri Antulay has masterly exposed the fallacies in the reasonings of the commission and how accepted rules have been conveniently side-tracked by the Ex-Chief Justice. The author has referred to various documents and has reproduced various maps, to substantiate his criticism. All the vital aspects of the problem are subject-

ed to an acute analysis by the author, in a manner as to do away with the need of referring to the original report of the Mahajan Commission.

We would recommend that this book should be thoroughly read by every member of the Parliament to understand the case of Maharashtra before giving his verdict on the report. B.D.B./R.G.D.

"THE BOMBAY PREVENTION OF FRAGMENTATION AND CONSOLIDATION OF HOLDINGS ACT (52 of 1947), WITH RULES—By R. M. Tagare, Advocate Tilak Road, Poona-2. Pages 128. Price Rs. 7=00—Published by author himself.

This booklet contains a Bombay State statute passed in 1947 with notes. This is probably the first book written on the statute since the Act was passed. During all the twenty years very few cases appear to have been taken to High Court, inasmuch as only two cases have been cited by the author in his notes and one of them is an unreported case (Pages 21 and 53). This itself suggests that the enactment is one which is accepted by the tenants as useful and where controversial points are few.

The book also reproduces numerous Government Resolutions.

The book seems to have been rushed through the press, since it is replete with printing errors. Even the "errata appended at the beginning needs another errata to correct the "errata".

At the end the author has dealt with a few decided cases from other High Courts on similar statutes from other States. It would have been better if these cases were incorporated in proper places in the body of the notes under the Bombay Act, for their persuasive value.

BDB/R.G.D.

"THE EAST GERMAN ARMY" (A pattern of Communist Military Establishment) — By Thomas M. Forster with an Introduction by Brigadier W. F. K. Thompson, C. B. E. Translated by Antony Buzek. Published by George Allen & Unwin Ltd., Ruskin House, Museum Street, London. 1967. Pages 254. Price 50 Shillings.

It is in the last two decades that the Iron Curtain is showing some chinks through which one can peep in to see the working in the Communist Block of Nations. These nations are following a set pattern established by the United States of Soviet Russia of keeping everything to themselves. Naturally, it is more so when the matter concerns Military Affairs.

Yet, through "intelligence" sources, the free democratic world is learning enough not only of the Communists affairs but also of their Military pattern.

After the Second World War when Germany came to be divided, Soviet Union lost no time in segregating "National People's Army" but at the same time keeping the same subservient to Russian Military Junta.

Few men fight for a cause. Most men fight for their homeland. As Brig. Thompson has observed "Even the Russians in the last World War did not fight for the cause but fought and died for Russia". East German forces may be no exception to this principle and it is doubtful if the National People's Army will long remain loyal to the Communist ideology of the Soviet Union.

The book gives detailed information on many facts of Military preparedness of the East German Army including political training and education of National People's Army, a sector which even today, is a source of constant concern to the rulers of the German Democratic Republic. The book, though technical, is sure to be welcomed by readers from the non-communist nations for the information it gives, about the doings behind the iron curtain. The information gathered by the author is from the East German Official sources

BDB/R.G.D.

THE GOVERNMENT LAW COLLEGE MAGAZINE (JOURNAL SECTION): Volume 35 No. 2 1966-67. Published by Prof. S. D. Balsara, Government Law College, Bombay 1. Pages 105.

The magazine follows a set pattern. This issue is dedicated to the respectful memory of late Dr. Radha Binode Pal, an eminent jurist on International Law. An article on the life and work of late Dr. Radha Binode Pal is instructive, inspiring and informative. Some of the articles written by teachers are good. We, however, feel that greater space should be devoted to contributions by students, written under the guidance of teachers. This will inculcate in them a researching attitude, which is the need of the day.

BDB/R.G.D.

ANNUAL SURVEY OF COMMONWEALTH LAW, 1966 AND 1967 — Editor H. W. R. Wade, — Published by Butterworth and Co., London (Price £ 8.85 (Rs. 126=00) net per volume).

These are the second and third volumes published respectively in years 1966 and 1967 in a series which was begun in 1965. The first volume, which this journal did not review, was published in 1965.

Prepared under the auspices of the British Institute of International and Comparative Law and the Faculty of Law in the University of Oxford and edited by Professor H. W. R. Wade with the assistance of Harold L. Cryer and Barbara Lillywhite (for 2nd Volume) these two volumes are really great. There are no appropriate words to correctly evaluate the utility of this series.

Dealing with almost all topics arising under the Common Law, these volumes cover the latest available rulings. It is indeed commendable that the 3rd volume published in 1967 covers the Supreme Court (India) decisions given in 1967.

The series will help maintaining acquaintance with legal developments elsewhere in the Commonwealth particularly in topics of common interest like Constitutional Law, Fundamental Rights and Civil Liberties and International Law.

G.G.M.

PRINCIPLES OF CRIMINOLOGY, CRIMINAL LAW AND INVESTIGATION.

Vol. I. By R. Deb. B. A. (Hons.), B. L. Second Edition. S. C. Sarkar and Sons (Private) Ltd., 1-C, College Square Calcutta-12. Price Rs. 17=00.

This second edition has followed the earlier edition of 1958 and this itself is the indication of its being in demand.

This edition is being published in 2 Volumes. Volume I under review deals with principles of Criminology, Criminal Law and Investigation. The proposed second volume would, as the author says, deal with prosecution and investigation of specific offences. This arrangement which is really convenient has been necessitated due to addition of case law and introduction of a few new chapters.

"Lie-detector" is the subject of second chapter. It is very illuminating as well as interesting. In recent times there is quite a good deal of talk about the desirability of using lie-detector for the purpose of criminal investigation. Strangely, however, few people in this country have a correct idea as to what is a lie-detector and what are its functions. Some even have a peculiar misconception that lie-detector is an instrument that can readily distinguish truth from falsehood and thereby give a lay investigator an accurate idea as to when the suspect is telling a lie. There is, however, no such machine in existence; nor does there exist a machine that can ring a bell or light a bulb to indicate that a suspect under interrogation is telling a lie. There is also no such instrument as such which can speak out like a radio or gramophone machine that this portion of this statement is true. But when a man tells a lie there occurs some physiological changes, which if correctly read, give an indication of his mind. Such changes may be

reflected not only in the expression of his face but also in the variations of his respiration, blood pressure and skin resistance. The lie-detector merely records such physiological changes.

Thus the machine popularly known as the lie-detector can only record some physiological reactions of the suspect with regard to some crucial and non-crucial questions and thereby give the expert interpreter some data for drawing certain inferences with regard to the statement made by a suspect during interrogation.

The learned author then describes in detail the Keeler's Polygraph Model with its various constituents and their functions and further deals with limitations of lie-detector, the evidentiary value of lie-detector's test and the utility of this test as an investigation aid.

Other topics dealt with in further chapters are Modus Operandi, Interrogation of witnesses, Interrogation of Suspects, Employment of Sources, Inter-State Crimes and Criminals. Appreciation of Evidence in course of Investigation and Prosecution of Cases and Investigation and Prosecution of Corruption Cases.

The learned author has made a scientific approach to the subject. Besides being useful to the legal profession, the book is indispensable to Police and those who are entrusted with the duty of investigation of offences.

It is hoped that second volume will come out soon.

G.G.M.

THE CENTRAL SALES TAX LAWS.

VOLS. I & II (SECOND REVISED EDITION), June 1968 — By Kharag-Ram Chaturvedi, B. L. Advocate, published by Eastern Law House Private Ltd., Calcutta; Vol. I, Pages 430, Vol. II pages 592. Price Rs. 40/- per set.

These two volumes are not a mere reprint of the first edition of 1965. But both of them have been so revised as not only to serve an up-to-date compendium on the subject but also to be a ready guide eminently suited to the everyday needs of a practising lawyer.

The First volume has in most parts been "thoroughly revised and rewritten" as respects the annotation portion. The Act portion has, of course, been brought up-to-date. In the annotations, all important judicial decisions have been discussed at length in their appropriate contexts. As the author himself puts it, in the preface, the task of an humble book writer, especially dealing with the frequently changing tax-laws of this country is neither easy nor enviable. Yet it may rightly be said that these volumes are an outstanding testimony to the sedulousness with which the author has tried to make these volumes a valuable up-to-date guide on the sales tax laws.

The First volume begins with the text of the Central Sales Tax Act, amended upto May 1968. The original Act as well as the various subsequent Amending Acts have also been separately included in Section 5 so that not only the trend of amendments but also the exact effect of each amendment could also be obtained on a mere reference. Section 4 running nearly into 300 pages, is devoted to commentary of the Act, section by section. And the commentary itself is a veritable exercise of erudition in that it covers every conceivable aspect including historical position, territorial application, constitutional authority, interpretational intricacies and even trade technicalities.

And yet the most valuable part, one should think, is Section 3 which deals with the historical background. The discussion how the nebulous nexus theory held paramount sway over sales tax cases in the pre-Constitution period, and how the explanation to Art. 286 (a) of the Constitution gave rise to various conflicting interpretations, how the Sales Tax Laws Validation Act itself generate a variety of complications and how ultimately its exact scope came to be authoritatively clarified by the Supreme Court in State of Madras v. A. Habibur Rahman Sons (in 1967) make an enchanting reading. The table of cases in the beginning and the index at the end add to its usefulness.

The Second volume has all the merits of lay-out as in the first. Besides, the sales tax geography in the beginning, Central and Statewise Rules framed under the Act and the Statewise lists of goods — Tax free rates for the purposes of Sections S. 8(2) and 2 (2A) — will certainly make it a most useful book of reference.

A.G.D.

CURRENT LEGAL PROBLEMS, 1967 —

Edited by G. W. Keeton and G. Schwarzenberger (Stevens and Sons Ltd., London, Agents in India, N. M. Tripathi (P) Ltd., Bombay) Pages 240, £ 3 15 s. net.

The 20th volume of Current Legal Problems like its predecessors provides a veritable collection of articles characterised by their scholarly treatment of current law in various fields.

This number opens with Lord Kilbrandon's Presidential Address to the Bentham Club followed by ten other articles which are the public lectures delivered in the Faculty of Laws of University College, London, during the Session 1966-1967.

In the article captioned 'the Honest Merchant', Lord Kilbrandon has traced

the Scottish Law regarding implied warranty of the quality of goods sold by a trader as well as its price-worthiness, from early eighteenth century to date with amendments undergone according to exigencies of changing times.

In his article "Care of Cargo under the Hague Rules" Mr. F. J. J. Cadwallader deals with the duties of common carriers in regard to Carriage of Goods by Sea and how the recommendation of the International Law Committee to incorporate the basic set of rules framed by it at the Hague in 1921, in all the bills of lading were adopted after suitable amendments as part of the law of Great Britain and Northern Ireland by the Carriage of Goods by Sea Act, 1924. The article further deals with Article III Rule 2 under which there is a paramount duty imposed to safely carry and take care of the Cargo.

The danger of unbounded liberty and the danger of bounding it have produced a problem in the science of government which human understanding seems hitherto unable to solve. The aspect of this problem posed by the conflict between the interest which we all have in human freedom and the interest which all have in the security against crime has aroused human passions ever since Peel first proposed the foundation of the modern Police force in 1829. The article "Police Powers and the Citizen" by Denys C. Holland has touched upon only one or two issues affecting the conflict between civil liberty and security and has suggested the need to take into account the needs both of the citizens and of the Police in settlement of these and other issues.

The Volume also contains following articles singularly marked by scholarly treatment and clearly exhibit the erudition of their Contributors.

"Information Agreements and the Reform of the Restrictive Trade Practices" by Valentine Korah, Ph. D.; "The Law Commissions", by Prof. O. R. Marshall; "Control by Licensing" by Prof. Glanville L. Williams; "Matrimonial Assets" by Prof. E. H. Scamell; "Equity Deserts the Wife" by Margaret G. Buckley; "No Liability without Fault — "The Soviet View" by E. L. Johnson; "The 1966 South West Africa Judgment of the World Court" by B. Cheng and "Decolonisation and the Protection of Foreign Investments, by Prof. G. Schwarzenberger.

The Volume also contains a very useful Table of Cases, Table of Statutes, Table of Treaties and an exhaustive Index.

G.G.M.

good condition, he advised his removal to Poona for treatment. On May 8, 1953, Dr. Risbud procured Mac Intyres splints and substituted them for the said wooden planks. A taxi was thereafter called in which the boy Ananda was placed in a reclining position and he along with respondent 2 and Dr. Risbud, started for Poona at about 1 a. m. They reached the city after a journey of about 200 miles at about 11.30 a. m. on May 9, 1953. By that time respondent 1 had come to Poona from Dhond where he was practising as a medical practitioner. They took the boy first to Tarachand Hospital where his injured leg was screened. It was found that he had an overlapping fracture of the femur which required pin-traction. The respondents thereafter took the boy to the appellant's hospital where, in his absence, his assistant, Dr. Irani, admitted him at 2.15 p. m. Sometime thereafter the appellant arrived and after a preliminary examination directed Dr. Irani to give two injections of 1/8th grain of morphia and 1/200th grain of Hyoscine H. B. at an hour's interval. Dr. Irani, however, gave only one injection. Ananda was thereafter removed to the x-ray room on the ground floor of the hospital where two x-ray photos of the injured leg were taken. He was then removed to the operation theatre on the upper floor where the injured leg was put into plaster splints. The boy was kept in the operation theatre for a little more than an hour and at about 5.30 p. m., after the treatment was over, he was removed to the room assigned to him. On an assurance given to respondent 1 that Ananda would be out of the effect of morphia by 7 p. m., respondent 1 left for Dhond. Respondent 2, however, remained with Ananda in the said room. At about 6.30 p. m., she noticed that he was finding difficulty in breathing and was having cough. Thereupon Dr. Irani called the appellant who, finding that the boy's condition was deteriorating, started giving emergency treatment which continued right until 9 p. m. when the boy expired. The appellant thereupon issued a certificate, Ext. 138, stating therein that the cause of death was fat embolism.

3. The case of the respondents, as stated in para 4 of the plaint, was that the appellant did not perform the essential preliminary examination of the boy before starting his treatment that without such preliminary examination a morphia injection was given to him that the boy

soon after went 'under morphia'; that while he was 'under morphia' the appellant took him to the x-ray room, took x-ray plates of the injured leg and removed him to the operation theatre. Their case further was that

"While putting the leg in plaster the defendant used manual traction and used excessive force for this purpose, with the help of three men although such traction is never done under morphia alone, but done under proper general anaesthesia. This kind of rough manipulation is calculated to cause conditions favourable for embolism or shock and prove fatal to the patient. The plaintiff No. 1 was given to understand that the patient would be completely out of morphia by 7 p. m. and that he had nothing to worry about. Plaintiff No. 1 therefore left for Dhond at about 6 p. m. the same evening."

In his written statement the appellant denied these allegations and stated that the boy was only under the analgesic effect of the morphia injection when he was taken to the x-ray room and his limb was put in plaster in the operation theatre. Sometime after the morphia injection the patient was taken to the x-ray room where x-ray plates were taken. The boy was co-operating satisfactorily. He was thereafter removed to the operation theatre and put on the operation table. The written statement then proceeds to state:

"Taking into consideration the history of the patient and his exhausted condition, the defendant did not find it desirable to give a general anaesthetic. The defendant, therefore, decided to immobilise the fractured femur by plaster of paris bandages. The defendant accordingly reduced the rotational deformity and held the limb in proper position with slight traction and immobilised it in plaster spica. The hospital staff was in attendance. The patient was co-operating satisfactorily. The allegation that the defendant used excessive force with the help of three men for the purpose of manual traction is altogether false and mischievous and the defendant does not admit it."

The appellant further averred that "the defendant put the patient's limb in plaster as an immediate preliminary treatment on that day with a view to ameliorate the patient's condition."

4. His case further was that at about 6.30 p. m. it was found that the boy's breathing had become abnormal whereupon the appellant immediately went to

attend on him and found that his condition had suddenly deteriorated, his temperature had gone high, he was in coma, was having difficulty in breathing and was showing signs of cerebral embolism and that notwithstanding the emergency treatment he gave, he died at about 9 p. m. The parties led considerable evidence, both oral and documentary, which included the correspondence that had ensued between them following the death of Ananda, the appellant's letter dated July, 17, 1953 to respondent 1, the complaint lodged by respondent 1 to the Bombay Medical Council, the appellant's explanation thereto and such of the records of the case as were produced by the appellant. The oral testimony consisted of the evidence of the two respondents, Dr. Gharpure and certain other doctors of Poona on the one side and of the appellant and his assistant, Dr. Irani, on the other. The nurse who attended on the boy was not examined. At the time of the arguments the parties used extensively well-known works on surgery, particularly with reference to treatment of fractures of long bones such as the femur.

5. On this evidence, the trial court came to the following findings: (a) The accident resulting in the fracture of femur in the left leg of Ananda occurred at about 7 p. m. on May 6, 1953 at the sea beach of village Palshet. That place was about one and a quarter mile away from the place where he and respondent 2 had put up. Arrangement had to be made for the cot to remove him and the boy was brought home between 8.30 and 9 p. m. (b) Dr. Risbud was called within ten minutes but except for tying three planks to immobilise the leg he gave no other treatment. This was not enough because the fracture was in the middle third of the femur and, therefore, the hip joint and the knee joint ought to have been immobilised. (c) On May 8, 1953, Dr. Risbud removed the planks and put the leg in Mac Intyres splints. There was on that day swelling in the thigh and that part of the thigh had become red. The Mac Intyres protruded a little beyond the foot. (d) At about midnight on 8/9 May 1953, a taxi was brought to Palshet. Ananda was lifted into it and made to lie down in a reclining position. The party left at 1 a. m. and reached Poona at about 11.30 a. m. The journey took nearly eleven hours. The boy was first taken to Tara-

chand hospital and from there to the appellant's hospital where he was admitted by Dr. Irani at about 2.15 p. m. (e) After the appellant was summoned to the hospital by Dr. Irani, he first examined his heart and lungs, took temperature, pulse and respiration and the boy was thereafter taken to the x-ray room where two x-ray plates were taken. The appellant then directed Dr. Irani to give two morphia injections at an hour's interval but Dr. Irani gave only one injection instead of two ordered by the appellant. The trial court found that the appellant had carried out the preliminary examination before he started the boy's treatment. (f) The morphia injection was given at 3 p. m. The boy was removed to the x-ray room at about 3.20 p. m. He remained in that room for about 45 minutes and was then removed to the operation theatre at about 4 p. m. and was there till about 5 p. m. when he was taken to the room assigned to him. The boy was kept in the operation theatre for a little over an hour. (g) Respondent 1 was all throughout with Ananda and saw the treatment given to the boy and left the hospital for Dhond at about 6 p. m. on the assurance given to him that the boy would come out of the morphia by about 7 p. m. (h) At about 6.30 p. m. respondent 2 complained to Dr. Irani that the boy was having cough and was finding difficulty in breathing. The appellant, on being called, examined the boy and found his condition deteriorating and, therefore, gave emergency treatment from 6.30 p. m. until the boy died at 9 p. m.

6. On the crucial question of treatment given to Ananda, the trial Court accepted the eye-witness account given by respondent 1 and came to the conclusion that notwithstanding the denial by the appellant, the appellant had performed reduction of the fracture; that in doing so he applied with the help of three of his attendants excessive force, that such reduction was done without giving anaesthetic, that the said treatment resulted in cerebral embolism or shock which was the proximate cause of the boy's death. The trial court disbelieved the appellant's case that he had decided to postpone reduction of the fracture or that his treatment consisted of immobilisation with only light traction with plaster splints. The trial Judge was of the view that this defence was an afterthought and was contrary to the evidence and the circumstances of the case. On

these findings he held the appellant guilty of negligence and wrongful acts which resulted in the death of Ananda and awarded general damages in the sum of Rs. 3,000.

7. In appeal the High Court came to the conclusion that though the appellant's case was that a thorough preliminary examination was made by him before he started the treatment, that did not appear to be true. The reason for this conclusion was that though Dr. Irani swore that the patient's temperature, pulse and respiration were taken, the clinical chart, Ext. 213, showed only two dots, one indicating that pulse was 90 and the other that respiration was 24. But the chart did not record the temperature. If that was taken, it was hardly likely that it would not be recorded along with pulse and respiration.

8. As regards the appellant's case that he had decided to delay the reduction of the fracture and that he would merely immobilise the patient's leg for the time being with light traction, the High Court agreed with the trial court that that case also was not true. The injury was a simple fracture. The reasons given by the appellant for his decision to delay the reduction were that (1) there was swelling on the thigh, (2) that two days had elapsed since the accident, (3) that there was no urgency for reduction and (4) that the boy was exhausted on account of the long journey. The High Court observed that there could not have been swelling at that time for neither the clinical notes, Ext. 213, nor the case paper, Ext. 262, mentioned swelling or any other symptom which called for delayed reduction. Ext. 262 merely mentioned one morphia injection, one x-ray photograph and putting the leg in plaster of paris. The reference to one x-ray photo was obviously incorrect as actually two such photos were taken. This error crept in because the case paper, Ext. 262 was prepared by Dr. Irani some days after the boy's death after the x-ray plates had been handed over on demand to respondent 1 and, therefore, were not before her when she prepared Ext. 262. Her evidence that she had prepared that exhibit that very night was held unreliable. Exhibit. 262, besides, was a loose sheet which did not even contain either the name of the appellant or his hospital. It was impossible that a hospital of that standing would not have printed forms for clinical diagnosis.

9. The next conclusion that the High

Court reached was that if the appellant had come to a decision to postpone reduction of the fracture on account of the reasons given by him in his evidence he would have noted in the clinical chart Ext. 213 or the clinical paper, Ext. 262, the symptoms which impelled him to that decision. The High Court agreed that the medical text books produced before it seemed to suggest that where time has elapsed since the occurrence of the fracture and the patient has arrived after a long journey, deferred reduction is advisable. But the High Court observed, the question was whether the appellant did defer the reduction and performed only immobilisation to give rest to the injured leg. After analysing the evidence, it came to the conclusion that what the appellant actually did was to reduce the fracture, that in doing so he did not care to give anaesthetic to the patient, that he contented himself with a single morphia injection, that he used excessive force in going through this treatment, using three of his attendants for pulling the injured leg of the patient, that he put that leg in plaster of paris splints, that it was this treatment which resulted in shock causing the patient's death, and lastly, that the appellant's case that the boy died of cerebral embolism was merely a cloak used for suppressing the real cause of death, viz. shock.

10. These findings being concurrent, this Court, according to its well established practice, would not ordinarily interfere with them. But Mr. Purshotam urged that this was a case where we should reopen the findings, concurrent though they were, and reappraise the evidence as the courts below have arrived at them on a misunderstanding of the evidence and on mere conjectures and surmises. In order to persuade us to do so, he took us through the important parts of the evidence. Having considered that evidence and the submissions urged by him, we have come to the conclusion that no grounds are made out which could call for our interference with those findings.

11. The duties which a doctor owes to his patient are clear. A person who holds himself out ready to give medical advice and treatment impliedly undertakes that he is possessed of skill and knowledge for the purpose. Such a person when consulted by a patient owes him certain duties, viz., a duty of care in deciding whether to undertake the

case, a duty of care in deciding what treatment to give or a duty of care in the administration of that treatment. A breach of any of those duties gives a right of action for negligence to the patient. The practitioner must bring to his task a reasonable degree of skill and knowledge and must exercise a reasonable degree of care. Neither the very highest nor a very low degree of care and competence judged in the light of the particular circumstances of each case is what the law requires: (cf. Halsbury's Laws of England, 3rd ed. vol. 26 p. 17). The doctor no doubt has a discretion in choosing treatment which he proposes to give to the patient and such discretion is relatively ampler in cases of emergency. But the question is not whether the judgment or discretion in choosing the treatment he exercised was right or wrong, for, as Mr. Purshottam rightly agreed, no such question arises in the present case because if we come to the same conclusion as the High Court, viz., that what the appellant did was to reduce the fracture without giving anaesthetic to the boy, there could be no manner of doubt of his being guilty of negligence and carelessness. He also said that he was not pressing the question whether in this action filed under the Fatal Accidents Act (XIII of 1855) the respondents would be entitled to get damages. The question, therefore, is within a small compass, namely, whether the concurrent findings of the trial court and the High Court that what the appellant did was reduction of the fracture without giving anaesthetic to the boy and not mere immobilisation with light traction as was his case, is based on evidence or is the result of mere conjectures or surmises or of misunderstanding of that evidence.

12. While considering the rival cases of the parties, it is necessary to bear in mind that respondent 1 is a medical practitioner of considerable standing and though not an expert in surgery, he is not a layman who would not understand the treatment which the appellant gave to the boy. It is not in dispute that he was present all throughout and saw what was being done, first in the X-ray room and later in the operation theatre. The trial court and the High Court had before them his version on the one hand and that of the appellant on the other and if they both found that his version was more acceptable and consistent with the facts and circumstances of the case

than that of the appellant, it would scarcely be legitimate to say that they acted on sheer conjecture or surmise.

13. It is not in dispute that the appellant had directed Dr. Irani to administer two morphia injections. Admittedly only one was given. Dr. Irani said that it was not that she omitted to give the second injection on the appellant's instructions but that she forgot to give the other one. That part of her evidence hardly inspires confidence for, in such a case as the present it is impossible to believe that she would forget the appellant's instructions. The second one was probably not given because the one that was given had a deeper effect on the boy than was anticipated. The evidence of respondent 1 was that after the boy was brought from the operation theatre to the room assigned to him, he was assured by the appellant that the boy was alright and would come out of the morphia effect by about 7 p. m. and that thereupon he decided to return to Dhond and did in fact leave at 6 p. m. Both the courts accepted this part of his evidence and we see no reason to find any fault with it. What follows from this part of his evidence, however, is somewhat important. If respondent 1 was assured that the boy would come out of the effect of morphia by about 7 p. m., it must mean that the appellant's version that the boy was co-operating all throughout in the operation theatre and was even lifting his hand as directed by him cannot be true. Though the morphia injection of the quantity said to have been administered to the boy would ordinarily bring about drowsiness and relief from pain, the evidence, was that the boy was unconscious. It seems that it was because of that fact that Dr. Irani had refrained from giving the second injection. The second result that follows from this part of the evidence of respondent 1 is that if the fracture had not been reduced but that the appellant had only used light traction for immobilising the injured leg and had postponed reduction of the fracture, it was hardly likely that he would not communicate that fact to respondent 1. In that event, it is not possible that respondent 1 would decide to leave for Dhond at 6 p. m. There would also be no question of the appellant in that case giving the assurance that it was alright with the boy. That such an assurance must have been given is borne out by the fact that respondent 1 did in fact leave Poona for

Dhond that very evening. That would not have happened if reduction of the fracture had been postponed and only immobilisation had been done. The assurance given by the appellant upon which respondent 1 left Poona for Dhond implies, on the contrary, that whatever was to be done had been done and that the presence of respondent 1 was no longer necessary as the boy's condition thereafter was satisfactory and he would come out of the morphia effect in an hour or so. This conclusion is fortified by the fact that it was never put to respondent 1 that the appellant had at any time told him that he had postponed reduction of the fracture and that the only thing he had done was immobilisation by way of preliminary treatment.

14. The letter of the appellant to respondent 1 dated July 17, 1953, was, in our view, rightly highlighted by both the courts while considering the rival versions of the parties. In our view, it was not written only to express sympathy towards respondent 1 for the death of his son but was the result of remorse on the appellant's part. If the only treatment he had given was to immobilise the boy's leg and he had postponed putting the fractured ends of the bone right at a later date, it is impossible that he would write the letter in the manner in which he did. If he was certain that fat embolism had set in and the boy's death was due to cerebral embolism, it is impossible that he would write in that letter that it was difficult for him even after one and a half months to piece together the information which could explain the reasons why the boy died. If his version as to the treatment given to the boy were to be correct, there was hardly any need for him in that letter to ask forgiveness for any mistake, either of commission or omission, which he might have committed. It is significant that until he filed his written statement, he did not at any stage come out in a forthright manner that what he had done on that day was only to immobilise the boy's leg by way only of preliminary treatment and that he had postponed to perform reduction of the fracture at a later date. In the complaint which respondent 1 filed before the Medical Council he had categorically alleged that while putting the boy's leg in plaster splints the appellant had used excessive manual force for about an hour, that what he did was reduction of the fracture without administering anaesthetic

and that that was the cause of the boy's death. It is strange that in his explanation to the Council, the appellant did not answer specifically to those allegations and did not come out with the version that there was no question of his having used excessive force and that too for about an hour as he had postponed reduction and had only given rest to the boy's leg by immobilising it in plaster splints.

15. As we have already stated, both sides used a number of medical works both at the stage of evidence and the arguments in trial court. Certain passages from these books were shown to the appellant in cross-examination which pointed out that plaster casts are used after and not before reduction of the fracture. The following passage from Magnuson's Fractures (5th ed.) P. 71, was pointed out to him:

"It is important to reduce a fracture as promptly as possible after it occurs before there is induration, defusion of blood and distension of fascia".

The appellant disagreed with this view and relied on an article by Moore, Ext. 295, where the author advocates delayed reduction. But in that very article the author further on points out that "if teams which provide well trained supervision are available for immediate reduction" it should be made. The author also states that where plaster cast is used for immobilisation before reduction a cylindrical section 3" to 4" in width at the site of the fracture should be removed leaving the rest of the cast intact. The appellant did not follow these instructions though he placed considerable reliance on the above passage for his theory of delayed reduction. Counsel for the appellant complained that the High Court perused several medical works, drew inspiration and raised inferences therefrom instead of relying on Dr. Charpure's evidence, an expert examined by the respondents. We do not see anything wrong in the High Court relying on medical works and deriving assistance from them. His criticism that the High Court did not consider Dr. Charpure's evidence is also not correct. There was nothing wrong in the High Court emphasising the opinions of authors of these works instead of basing its conclusions on Dr. Charpure's evidence as it was alleged that that doctor was a professional rival of the appellant and was, therefore, unsympathetic towards him. From the

elaborate analysis of the evidence by both the trial court and the High Court, it is impossible to say that they did not consider the evidence before them or that their findings were the result of conjectures or surmises, or inferences unwarranted by that evidence. We would not, therefore, be justified in reopening those concurrent findings or reappraising the evidence.

16. As regards the cause of death, the respondents' case was that the boys' condition was satisfactory at the time he was admitted in the appellant's hospital; that if fat embolism was the cause of death, it was due to the heavy traction and excessive force resorted to by the appellant without administering anaesthetic to the boy. The appellant's case, on the other hand, was that fat embolism must have set in right from the time of the accident or must have been caused on account of improper or inadequate immobilisation of the leg at Palshet and the hazards of the long journey in the taxi and that the boy died, therefore, of cerebral embolism. In the death certificate issued by him, the appellant no doubt had stated that the cause of death was cerebral embolism. It is true that some medical authors have mentioned that fat embolism is seldom recognised clinically and is the cause of death in over twenty per cent of fatal fracture cases. But these authors have also stated that diagnosis of fat embolism can be made if certain physical signs are deliberately sought by the doctor. Mental disturbance and alteration of coma with full consciousness occurring some hours after a major bone injury should put the surgeon on guard. He should examine the neck and upper trunk for petechial haemorrhages. He should turn down the lower lid of the eye to see petechiae; very occasionally there would be fat in the sputum or in the urine, though these are not reliable signs. In *British Surgical Practice*, Vol. 3, (1948 ed.) p. 378, it is stated,

"a fracture of a long bone is the most important cause of fat embolism, and there is an interval usually of 12 — 48 hours between the injury and onset of symptoms during which the fat passes from the contused and lacerated marrow to the lungs in sufficient quantity to produce effects."

"The characteristic and bizarre behaviour noted in association with multiple cerebral fatty emboli usually begins within 2 or 3 days of the injury. The preced-

ing pulmonary symptoms may be overlooked, especially in a seriously injured patient. The patient is apathetic and confused, answering simple questions with difficulty; soon he becomes completely incoherent. Some hours later delirium sets in, often alternating with stupor and progressing to coma. During the delirious phase the patient may be violent."

In an article in the *Journal of Bone Joint Surgery* by Newman, (Ext 291), the author observes that the typical clinical picture is that of a man in the third or fourth decade who in consequence of a road accident has sustained fracture of the femur and is admitted to hospital perhaps after a long and rough journey with the limb improperly immobilised, suffering a considerable shock. None of the symptoms noted above were found by the appellant. The appellant is a surgeon of long experience. Knowing that two days had elapsed since the accident, that the leg of the patient had not been fully or properly immobilised and that the patient had journeyed 200 miles in a taxi before coming to him, if he had felt that there was a possibility of fat embolism having set in, he would surely have looked for the signs. At any rate, if he had thought that there was some such possibility, he would surely have warned respondent 1, especially as he happened to be a doctor also of long standing. The evidence shows that the symptoms suggested in the aforesaid passages were not noticed by the appellant or respondent 1. The assurance that the appellant gave to respondent 1 which induced the latter to return to Dhond, the appellant's apologetic letter of July 17, 1953 in which he confessed that he had even then not been able to gauge the reasons for the boy's death, the fact that while giving treatment to the boy after 6-30 P. M. he did not look for the symptoms above-mentioned, all go to indicate that in order to screen the real cause of death, namely, shock resulting from his treatment, he had hit upon the theory of cerebral embolism and tried to bolster it up by stating that it must have set in right from the time the accident occurred. The aforesaid letter furnishes a clear indication that he was not definite even at that stage that death was the result of embolism or that even if it was so, it was due to the reasons which he later put forward.

17. In our view, there is no reason to think that the High Court was wrong

in its conclusion that death was due to shock resulting from reduction of the fracture attempted by the appellant without taking the elementary caution of giving anaesthetic to the patient. The trial court and the High Court were, therefore, right in holding that the appellant was guilty of negligence and wrongful acts towards the patient and was liable for damages.

18. The appeal is dismissed with costs.
 AKJ/D.V.C. Appeal dismissed.

AIR 1969 SUPREME COURT 135
 (V 56 C 28)

(From Allahabad: ILR (1964) 2 All 191)
J. C. SHAH, V. RAMASWAMI AND
G. K. MITTER, JJ.

Raj Kumar Mohan Singh, and others,
 Appellants v. Raj Kumar Pasupatinath
 Saran Singh and others, Respondents.

Civil Appeal No. 380 of 1965, D/-
 19-4-1968.

(A) Tenancy Laws — Oudh Estates Act (1869), S. 13 (1) — Son adopted by widow of taluqdar in pursuance of authority of husband would be a person who would have succeeded to estate or to interest therein within meaning of S. 13 (1). (1888) 15 Ind App. 127 (PC) and (1889) 16 Ind App. 53 (PC) and AIR 1934 PC 188, Foll. (Para 14)

(B) Tenancy Laws — Oudh Estates Act (1869), S. 22 (7) — Widow of taluqdar — Nature of estate — Adoption by widow — Doctrine of relation back does not apply. ILR (1964) 2 All 191, Reversed.

The position assigned to the widow of a taluqdar — be he a Hindu, Muhamadan, Christian or Sikh — in the scheme of succession is peculiar. In default of heirs mentioned in Cls. (1) to (6) of S. 22 the widow takes the estate, but for her lifetime only, whatever may be the personal law governing her husband dying intestate. In determining the nature of her estate and the powers she may exercise, analogies drawn from the personal law of the taluqdar would be misleading. There is no provision in the Act which forfeits the interest which the widow of a taluqdar takes on the death of her husband in default of heirs mentioned in Cls. (1) to (6) of S. 22. Her interest in the estate is not liable to be defeated once it is vested in her. She holds the estate for her natural lifetime; the son

adopted by her in pursuance of the authority of her husband, does not divest her of the estate. The adopted son inherits the estate on her death under Cl. (8) of S. 22 and not before. The adopted son is undoubtedly an 'heir' but he has during the lifetime of the widow no interest in the estate. He merely takes precedence over the junior widow who takes the estate by virtue of Cl. (9). The widow's interest in the property enures only for her lifetime, but she is the owner of the estate and the estate is fully vested in her, and the adopted son has during the lifetime of the widow no interest in the estate which he may transfer. Case Law Ref. (Para 18)

The adoption contemplated to be made by a taluqdar or by his widow with his consent under the Oudh Estates Act 1 of 1869 has not the incidents and consequences of adoption under the Hindu Law. The taluqdars belonged to the Hindu, Muhamadan, Christian and Sikh communities. The personal laws governing the Hindus and Sikhs recognise adoptions and the creation of rights in the adopted sons. Amongst the Muhamadans and Christians no adoptions are recognised by their personal laws. Under the Oudh Estates Act it was open to a taluqdar, whatever his persuasion, to authorise by writing his wife to adopt a son. To such an adoption the personal law had no application. In matters not expressly covered by the provisions of the Oudh Estates Act, the personal law of the taluqdar may be applicable, but the right of adoption not being uniformly exercisable by the taluqdars according to their personal laws, the peculiar incidents of Hindu adoptions have no application. Under the Hindu Law, adoption has primarily to be viewed in the context of spiritual rather than temporal considerations, and the devolution of property is only of secondary importance. The spiritual considerations are out of tune in considering the status of a son adopted by a Muslim or by a Christian. Under the Hindu Law the adoption made by a Hindu widow relates back to the date of the death of the adoptive father, but in the absence of any express provision in the Act, it would be impossible to attribute to the adoption made by a widow of a taluqdar pursuant to the authority given by her husband the incidents of an adoption under the Hindu Law. It is a necessary concomitant of the doctrine of relation back, that the adopted son takes the

estate of his father as if he were in existence at the date of his death. Any attempt to give to the adopted son an interest or right which is deemed to commence from the date of the adoptive father's death so as to divest the estate which is already vested in the widow is not only inconsistent with the personal law of a taluqdar who is not a Hindu or a Sikh, but comes in conflict with express provisions of the Act. The Act provides that a son adopted by a widow in pursuance of the instructions given by her husband takes the property on her death and not before. To deprive the widow of her right to the property vested in her on the death of her husband and to which she is declared by law to be entitled for her lifetime would be plainly contrary to the terms of S. 22 (7). It is thus clear that the doctrine of relation back is not applicable to an adoption made by the widow of a taluqdar governed by the Act. ILR (1964) 2 All 191, Reversed; Case law Ref.

(Paras 18 and 20)

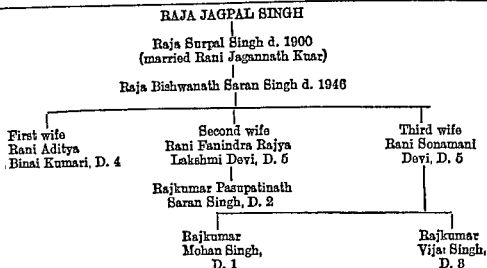
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war 15
1 O. D. 264, Babu Abdul Karim
Khan v. Babu Hari Singh 18

Mr. C. B. Agarwala, Senior Advocate,
(M/s. I. A. Abbasi, S. Rehman and C. P.
Lal, Advocates with him), for Appellants;
M/s. Jagdish Swaroop and A. K. Sen,
Senior Advocates (M/s. R. N. Trivedi
and Mr. S. S. Shukla and Yogeshwar
Prasad, Advocates, with him), for Respon-
dents Nos. 1 and 3.

The following judgment of the court
was delivered by

SHAH, J. —: The following is the
genealogical table explaining how the
parties are related:



2. Raja Jagpal Singh was granted the taluqdari of the Tiloi Estate by the Government, and his name was entered as taluqdar in Lists 1, 2 and 5 prepared under S. 8 of the Oudh Estates Act 1 of 1869. He died on September 15, 1875, and was succeeded by his son Raja Surpal Singh as taluqdar of the estate. Raja Surpal Singh had no legitimate children. On June 18, 1900, Raja Surpal

Singh executed a will disposing of his property and conferring upon his wife Rani Jagannath Kuar power to adopt a son. Raja Surpal Singh died on June 21, 1900. Rani Jagannath Kuar adopted on February 21, 1901, a son who was known as Raja Bishwanath Saran Singh hereinafter called 'Raja Bishwanath'. After the death of Raja Surpal Singh the Court of Wards took over the mana-

gement of the Tiloi Estate and continued to manage it till March 30, 1920 when it was released in favour of Raja Bishwanath. On August 29, 1932, Raja Bishwanath executed a deed of trust in respect of the Tiloi Estate and other properties primarily for the benefit of his creditors and the residue remaining after satisfying his debts for the benefit of his son Rajkumar Pasupatinath Saran Singh — hereinafter called "the Senior Rajkumar". Rani Jagannath Kuar died on August 7, 1933. On November 21, 1936, Raja Bishwanath revoked the deed of trust. On January 31, 1942, the Court of Wards again assumed management of the Tiloi Estate on behalf of Raja Bishwanath and continued to manage the estate till it was released on the abolition of the Estate under the U.P. Zamindari Abolition and Land Reforms Act 1 of 1951. On August 2, 1946, Raja Bishwanath executed a will bequeathing the Tiloi estate and its appurtenances to his son Rajkumar Mohan Singh — hereinafter called "the junior Rajkumar". Raja Bishwanath died on November 8, 1946, and disputes arose soon thereafter between the Senior Rajkumar and junior Rajkumar — the former claiming the estate relying upon the deed of trust and the latter relying upon the will of the late Raja.

3. The Court of Wards instituted in the Court of District Judge, Rai Bareilly, an inter-pleader suit on July 7, 1950, impleading the three widows of Raja Bishwanath, his three sons, and the deity Sri Jagannath Bahari Ji for whose benefit certain lands were settled under two deeds by Rani Jagannath Kuar. The District Judge held that the deed of trust executed by Raja Bishwanath was acted upon and was "not invalid and unenforceable" for any of the reasons set up by the junior Rajkumar, and that the Senior Rajkumar was not precluded from claiming the estate relying on the trust deed. He further held that the provisions of S. 22 of the Oudh Estates Act, 1869, applied to the taluqdari estate held by Raja Bishwanath but not to his non-taluqdari property. Since, however, a major portion of the property was the subject matter of the trust under the deed executed in 1932, and the rest had been bequeathed in favour of the Junior Rajkumar, the question of succession by lineal primogeniture did not arise in respect of any portion of the property which was the subject-matter of the suit.

The Court further held that Item 210 of Sch. A to the plaint was not in possession of the Court of Wards and consequently in that respect an interpleader suit did not lie, and in respect of Items 8 to 12 of Sch. B to the plaint, the three sons of Raja Bishwanath had only a right of management as shebais, that the deed of trust constituted a valid gift and the property included in the deed of trust was subject to the obligations created thereby, that Raja Bishwanath was fully competent to execute the deed of trust, and that the will dated August 2, 1946, executed by Raja Bishwanath in favour of Junior Rajkumar was operative in respect of the Items 102 and 112 of Sch. A of the plaint, and also in respect of Items 4, 5, 6 and 7 of Sch. B to the plaint and the other appurtenances of the Tiloi Estate which were not included in the deed of trust executed by Raja Bishwanath or in the deed of trust executed by Rani Jagannath Kuar. The Court gave certain directions in respect of the property settled under the deeds of trust created by Rani Jagannath Kuar, but since no claim is raised in respect of these properties, nothing need be said in that behalf. Substantially as a result of the findings recorded by the District Judge, the will set up by the Junior Rajkumar and the deed of trust set up by the Senior Rajkumar were both upheld, and a decree was made in favour of the Junior Rajkumar in respect of those properties which were not covered by the deed of trust.

4. Against that decree by Junior Rajkumar, his brother Rajkumar Vijai Singh and their mother Rani Sonamani Devi appealed. The Senior Rajkumar did not prefer an appeal against that part of the decree which upheld the will of Raja Bishwanath and the claim of the Junior Rajkumar. During the pendency of the appeal, the Senior Rajkumar was appointed receiver of the properties in dispute under an order of the Court dated March 24, 1959, and he continued to remain in possession thereafter. On the abolition of the Zamindari, the Court of Wards was struck off from the record.

5. Before the High Court of Allahabad two principal questions fell to be determined: (1) whether the deed of trust dated August 29, 1932, executed by Raja Bishwanath was valid and operative so as to create an interest in favour of the Senior Rajkumar; and (2) whether the deeds of trust executed by

Rani Jagannath Kuar on September 21, 1920 and May 15, 1933 were valid and operative. The High Court substantially agreed with the Trial Court on both the questions. Against that decree passed by the High Court, this appeal was filed with certificate granted by the High Court by the Junior Rajkumar his younger brother—Rajkumar Vijai Singh—and his mother—Rani Sonamani Devi.

6. Counsel for the appellants did not challenge the finding of the High Court about the validity and the operative character of the deeds of trust executed by Rani Jagannath Kaur. The only question canvassed by counsel for the appellants related to the property covered by the deed of trust executed by Raja Bishwanath. We have heard counsel for the appellants on two out of the several contentions raised by him—(1) that on a true interpretation of the will of Raja Surpal Singh, no interest in the estate was intended to be conferred upon Raja Bishwanath; and (2) granting that it was intended by the testator to bequeath the residuary estate in favour of Raja Bishwanath the will was inoperative by virtue of section 13 of the Oudh Estates Act, 1869 and that in any event Raja Bishwanath had under the will no vested interest in the taluqdari estate during the lifetime of Rani Jagannath Kuar.

7. Being of the view that the appellants must succeed on the second contention, we have not thought it necessary to determine whether the title of the Senior Rajkumar suffered from any other infirmity viz., that the deed of trust was not a permissible transaction under section 11 of the Oudh Estates Act, 1869, that possession of the property was not delivered to the trustees within six months of the date of execution of the deed of trust as required by S. 13(2) of the Oudh Estates Act, and the trust failed for non-compliance with the mandatory provisions of law in that regard, that the provisions of the deed of trust were vague and indefinite and on that account incapable of enforcement; that the trust was lawfully revoked by Raja Bishwanath and that the main purpose of the trust—satisfaction of the debts of Raja Bishwanath—has since the date of the deed of trust been achieved by the operation of the U. P. Encumbered Estates Act 25 of 1934, the U. P. Zamindari Abolition and Land Reforms Act (1 of 1951) and the U. P. Debt Reduction Act 15 of 1953.

8. Raja Surpal Singh executed his will on June 13, 1900. The preamble and the first four paragraphs of the will which are material in this appeal may first be read:

"Let it be known to all concerned that I Raja Surpal Singh Bahadur Taluqdar and proprietor of Tiloi Estate do hereby declare my last wishes and make the disposition of my property as below and it will operate after my demise unless and until I cancel these presents by duly executed will.

1. As I have got no heirs competent to manage the estate properly and independently, I solicit the Government to take the estate under the Court of Wards' superintendence unless and until there be some male successor fit to manage the estate.

2. As I have got no issue begotten of my wedded wife (Rani Jagannath Kuar) I authorize my said Rani to select a fit and promising boy with the approval of the Deputy Commissioner from the Rajkumar Thakurs of village Chilowli or other village and adopt him as my son.

3. The Deputy Commissioner of the District will very kindly press the said Rani to make the adoption according to law as soon as practicable after my demise and from the time of adoption the Court of Wards should hold the estate on behalf of the said adopted son.

4. My wife Rani Jagannath Kuar will receive a suitable maintenance of rupees one thousand a month whether the estate be under the charge of the Court of Wards or of my adopted son."

By paragraph 5 the testator directed that one Col. R. F. Angels should be continued as special manager of the estate on the same pay and privileges that he enjoyed at the date of the will. By paragraph 6 provision was made for two illegitimate children of the testator, and by paragraph 7 it was directed that the personal servants and others who it was stated had faithfully served the testator should be adequately rewarded.

9. In favour of the son to be adopted there is in the will no express bequest. But we are unable to hold that the testator by his will intended merely to devise specific legacies and to provide for the management of the estate and not to dispose of the residue. The preamble to the will declares the intention of the testator to dispose of his property as set out therein. By the first paragraph he requested the Government to take the estate under the

superintendence of the Court of Wards until there was some male successor fit to manage the estate, and by paragraph 2 he authorised his wife to adopt a son to him with the approval of the Deputy Commissioner from amongst certain classes. By paragraph 3 he recommended that the Deputy Commissioner should persuade the Rani to make the adoption according to law as soon as practicable after his demise, and after the adoption the Court of Wards was to hold the estate on behalf of the said adopted son. In our judgment, the intention of the testator was that after his death Rani Jagannath Kuar should adopt a son selected by her and that his estate should then remain under the management of the Court of Wards on behalf of the adopted son. This clearly indicates that the adopted son was on adoption intended to be the beneficiary of the estate. The will does not expressly devise the estate in favour of the adopted son, but the language clearly implies that intention. Till the adoption was made, the estate was to remain under the management of the Court of Wards and no beneficial owner was designated. What the effect in law of that direction is, we will presently consider. But there is no doubt that the testator intended that the son adopted by Rani Jagannath Kuar was to take the estate and the Court of Wards was to hold the estate on behalf of the adopted son. We therefore agree with the High Court that the testator intended to confer an estate of inheritance upon the son to be adopted by the Rani.

10. The finding that under the will of Raja Surpal Singh, the adopted son was on adoption intended to take an estate of inheritance is however not sufficient to justify the decision that Raja Bishwanath — the son adopted by Rani Jagannath Kuar — was invested lawfully with interest in the taluqdari estate which he could settle at the date of the deed of trust. There are special rules governing inheritance and succession to a taluqdari estate and testamentary dispositions made by a taluqdar within three months before his death are valid only if certain conditions are fulfilled and not otherwise. Again, under the will, between the date of the death of the testator and the date of adoption of a son by the Rani, the beneficial interest in the residue was not devised in favour of any person, and the

estate remained in abeyance till the Rani adopted a son. The legal effect of the will in the light of the Oudh Estates Act and in particular of section 22 remains also to be considered.

(11) To appreciate the provisions of the Oudh Estates Act 1 of 1869, which have a bearing on the questions in dispute, it is necessary in the first instance to refer to certain peculiar features of the estates held by the Oudh Taluqdars. Annexation of Oudh by the East India Company was effected on February 13, 1856. In anticipation of the change of Government, the Governor-General addressed a letter to the Resident on February 4, 1856, for guidance in the administration of the province, and directed that settlement of lands be made by the Government with the actual occupants of the soil, that is, with the petty zamindars or proprietors, and to exclude taluqdars who held the estates in the Province of Oudh. A summary settlement with the persons in occupation of the soil was commenced, but before the summary settlement was completed, insurrection by the Indian troops broke out at Lucknow on May 13, 1857, and the territory of Oudh was up in arms against the foreign regime. After the insurrection was quelled, the Government made a change in its policy, and the Commissioner of Oudh recommended to the Government of India that "talookas should only be given to men who have actively aided us, or who, having been inactive, now evince a true willingness to serve us, and are possessed of influence sufficient to make their support of real value". This policy recommended by the Commissioner was accepted by the Government of India, and on March 15, 1858, the Governor-General Lord Canning, issued his proclamation divesting the landed proprietors (except holders of five estates) in Oudh of all their proprietary rights in the soil and vesting them in the British Government. The effect of the proclamation was that all lands within the province of Oudh, with the exception of five estates, were at the disposal of the British Government, and all rights of the entire body of proprietors of lands covered by the said proclamation were extinguished, and any future rights to be claimed by any proprietors had to be claimed under regrant from the Government. Under the new scheme, sanads were granted to the taluqdars and tables setting out the names of taluq-

dars and the nature of their rights were prepared. After Lord Canning's proclamation a second summary settlement was started, by which a hierarchy of interests in the lands analogous to the feudal system in England was created.

12. The Oudh Estates Act 1 of 1869 was enacted in 1869 to deal with the special kind of property called "estate", brought into being in Oudh as a result of the Act. The long preamble of the Act recited that

"Whereas, after the re-occupation of Oudh by the British Government in the year 1858, the proprietary right in diverse estates in that province was, under certain conditions, conferred by the British Government upon certain Taluqdars and others; and whereas doubts may arise as to the nature of the rights of the said Taluqdars and others in such estates and as to the course of succession thereto, and whereas it is expedient to prevent such doubts, and to regulate such course, and to provide for such other matters connected therewith as are hereinafter mentioned;"

the Act was enacted. The Act made provisions about the nature of the rights of the taluqdars to the course of succession thereto and incidental matters. It had the merit of being an enactment declaring the rights of all the taluqdars, qua their estates, and prescribed a uniform course of succession irrespective of the personal law which governed individual taluqdars.

13. Since we are primarily concerned to determine the rights of the parties arising by virtue of a will executed in the year 1900, we propose not to refer to amendments made in the Act after the year 1900. The expression 'transfer' was defined in the Act as meaning "an alienation inter vivos"; and "will" was defined as meaning "the legal declaration of the intentions of the testator with respect to his property affected by this Act, which he desires to be carried into effect after his death"; 'taluqdar' was defined as meaning "any person whose name is entered in the first of the lists mentioned in section eight"; "estate" was defined as meaning "the taluqa or immovable property acquired or held by a Taluqdar or grantee in the manner mentioned in section three, section four or section five, or the immovable property conferred by a special grant of the British Government upon a grantee; and the 'heir'

was defined as meaning "a person who inherits property otherwise than a widow, under the special provisions of this Act"; and 'legatee' was defined as meaning "a person to whom property is bequeathed under the same provisions". By S. 3 the rights of taluqdars were declared: every taluqdar with whom a summary settlement of the Government revenue was made between the first day of April 1858, and the tenth day of October 1859, or to whom, before the passing of the Act and subsequently to the first day of April 1858, a taluqdari sanad had been granted, was deemed to have thereby acquired a permanent, inheritable and transferable right in the estate comprising the villages and lands named in the list attached to the agreement or kabuliya executed by such taluqdar when such settlement was made. By S. 8 the Governor-General of India was enjoined to prepare six lists — of which the following are material:

"First — A list of all persons who are to be considered Taluqdars within the meaning of this Act;

Second. — A list of the Taluqdars whose estates according to the custom of the family, on and before the thirteenth day of February 1856, ordinarily devolved upon a single heir;

Fifth — A list of the Grantees to whom sanads or grants may have been or may be given or made by the British Government, up to the date fixed for the closing of such list, declaring that the succession to the estates comprised therein shall thereafter be regulated by the rule of primogeniture."

By S. 11 power was conferred upon every taluqdar and grantee and every heir and legatee of a taluqdar and grantee to transfer the whole or any portion of the estate or of his right and interest therein during his lifetime, by sale, exchange, mortgage, lease or gift and to bequeath by his will to any person the whole or any portion of such estate, right and interest, but by S. 13 certain restrictions were imposed upon taluqdars as to the manner in which gifts and devises could be made. It was provided, insofar as it is material:

"No Taluqdar or Grantee and no heir or legatee of a Taluqdar or Grantee shall have power to give or bequeath his estate or any portion thereof or any interest therein to any person not being either—

(1) a person who, under the provisions of this Act or under the ordinary law to

which persons of the donor or testator's tribe and religion are subject, would have succeeded to such estate or to a portion thereof or to an interest therein, if such Taluqdar or Grantee, heir or legatee had died intestate, or

(2) * * *

except by an instrument of gift or a will executed and attested not less than three months before the death of the donor or testator, in manner herein provided in the case of a gift or will as the case may be and registered within one month from the date of its execution."

By S. 14, insofar as it is material, it was provided:

"If any Taluqdar or Grantee * * * or his heir or legatee, shall hereafter transfer or bequeath, the whole or any portion of his estate to another Taluqdar or Grantee, or to * * * a person who would have succeeded according to the provisions of this Act to the estate or to a portion thereof if the transferor or testator had died without having made the transfer and intestate, the transferee or legatee and his heirs and legatees shall have the same rights and powers in regard to the property to which he or they may have become entitled under or by virtue of such transfer or bequest, and shall hold the same subject to the same conditions and to the same rules of succession as the transferor or testator."

Chapter VII dealt with intestate succession, and Section 22 set out special rules of succession to the estates held by Taluqdars and Grantees dying intestate. It provided:

"If any Taluqdar or Grantee, whose name shall be inserted in the second, third or fifth of the lists mentioned in section eight, or his heir or legatee, shall die intestate as to his estate, such estate shall descend as follows, viz:—

"(1) To the eldest son of such Taluqdar or Grantee, heir or legatee, and his male lineal descendants, subject to the same conditions and in the same manner as the estate was held by the deceased;

(2) Or if such eldest son of such Taluqdar or Grantee, heir or legatee, shall have died in his lifetime, leaving male lineal descendants, then to the eldest and every other son of such eldest son successively according to their respective seniorities, and their respective male lineal descendants, subject as aforesaid;

(3) Or if such eldest son of such Taluqdar or Grantee, heir or legatee, shall

have died in his father's lifetime without leaving male lineal descendants, then to the second and every other son of the said Taluqdar or Grantee, heir or legatee successively, according to their respective seniorities, and their respective male lineal descendants, subject as aforesaid;

(4) Or in default of such son or descendants, then to such son (if any) of a daughter of such Taluqdar or Grantee, heir or legatee, as has been treated by him in all respects as his own son, and to the male lineal descendants of such son, subject as aforesaid;

(5) Or in default of such son or descendants, then to such person as the said Taluqdar or Grantee, heir or legatee, shall have adopted by a writing executed and attested in manner required in case of a will and registered, subject as aforesaid;

(6) Or in default of such adopted son, then to the eldest and every other brother of such Taluqdar or grantee, heir or legatee, successively, according to their respective seniorities, and their respective male lineal descendants, subject as aforesaid;

(7) Or in default of any such brother then to the widow of the deceased Taluqdar, Grantee, heir or legatee; or, if there be more widows than one, to the widow first married to such Taluqdar or Grantee, heir, or legatee, for her lifetime only;

(8) And upon the death of such widow, then to such son as the said widow shall with the consent in writing of her deceased husband, have adopted by a writing executed and attested in manner required in case of a will and registered subject as aforesaid;

(9) Or on the death of such first married widow and in default of a son adopted by her with such consent and in such manner as aforesaid, then to the other widow, if any, of such Taluqdar or Grantee, heir or legatee, next in order of marriage, for her life and on the death of such other widow, to a son adopted by her with such "consent and in such manner as aforesaid; or in default of such adopted son, then to the other surviving widows according to their respective seniorities as widows for their respective lives, and on their respective deaths to the sons so adopted by them respectively and to the male lineal descendants of such sons respectively, subject as aforesaid;

(10) Or in default of any such widow or of any son so adopted by her, or of

any such descendant, then to the male lineal descendants, not being najib-ul-tarfain of such Taluqdar or Grantee, heir or legatee, successively, accordingly to their respective seniorities and their respective male lineal descendants whether najib-ul-tarfain or not;

(11) Or in default of any such descendant then to such persons as would have been entitled to succeed to the estate under the ordinary law to which persons of the religion and tribe of such Taluqdar or Grantee, heir or legatee, are subject. Nothing contained in the former part of this section shall be construed to limit the power of alienation conferred by section eleven."

14. Raja Surpal Singh died within three months of the date of his will: the will was made on June 13, 1900, and presented for registration and was duly registered on June 15, 1900. Raja Surpal Singh died on June 21, 1900. If the will be regarded as made in favour of a person who would not, under the provisions of the Act or the ordinary law to which the testator was subject, have succeeded to the estate, the will was, by virtue of Section 13 (1) inoperative. We have already observed that under the will there was an intention to grant the residue of the estate to the adopted son, but till adoption the devise of the estate was in abeyance. The adopted son was still a person who would have, under the provisions of the Act, succeeded to the estate or to an interest therein. It may be observed that the legacies by Raja Surpal Singh in favour of illegitimate children and strangers to the family could not apparently come out of the taluqdari estate, but we are in the absence of necessary parties, not called upon to express any final opinion on that question. A son adopted by the widow with the consent in writing of the taluqdar would be entitled by Cl. (8) of S. 22 to take the estate upon the termination of the estate of the widow under Cl. (7). But the son adopted by the widow in pursuance of the authority from the taluqdar would, under the provisions of the Act, be deemed to be a person who would have succeeded to the estate or interest therein within the meaning of Section 13 (1). On that part of the case there is abundant authority.

15. In *Maharani Indar Kunwar v. Maharani Jaipal Kunwar*, (1888) 15 Ind App 127 (PC), it was held by the Judicial

Committee that a junior widow who under Section 22 (9), on the death of the senior widow and in default of a son adopted by her with such consent, is entitled to take the estate of a taluqdar, holds an interest in the estate of a Taluqdar within the meaning of Section 13 (1) even though her right to succeed is subject to a life estate in the taluqdari property expectant on the determination of the life estate of the senior widow therein, and is subject to be defeated by an adoption made by the senior widow. In *Bhaiya Rabidat Singh v. Maharani Indar Kunwar*, (1889) 16 Ind App 53 (PC), which is an offshoot of the case decided in *Maharani Indar Kunwar's case*, (1888) 15 Ind App 127 (PC), it was held by the Judicial Committee that the word 'intestate' in sub-section (1) of Section 13 means intestate as to estate. An adopted son is a person who would have succeeded to an intestate within the meaning of that section, although the authority to adopt him was conferred by the will of the taluqdar. Similarly in *Abdul Latif v. Abadi Begam*, 61 Ind App 322= (AIR 1934 PC 188) it was held by the Judicial Committee that the Junior widow of a taluqdar in List 2 was a person who would have succeeded to an interest in the estate upon intestacy, and accordingly Section 13 did not preclude the taluqdar from making a bequest to her by a will executed within three months of his death.

16. Therefore the fact that Raja Surpal Singh died within three months of the date his will was executed and attested, does not operate under Section 13 of the Act as a bar to the acquisition of an interest by Raja Bishwanath under the will of Raja Surpal Singh.

17. But under the will the devise of the residue in favour of Raja Bishwanath could become effective only on his adoption by Rani Jagannath Kuar. Between the date of his death and the adoption of a son there was intestacy in respect of the taluqdari estate which was not lawfully disposed of. As under the Hindu Law, so under the provisions of the Oudh Estates Act 1 of 1869, the estate does not remain in abeyance. On the death of the testator therefore the widow took the estate by virtue of S. 22 (7), and that estate must enure for the lifetime of the widow, for the Act does not contemplate that the statutory estate which the widow takes under Sec. 22 (7) on intestacy may be restricted. By ex-

press provision of the Act, the widow is not an heir, when she takes the estate of a taluqdar on intestacy, she does not inherit the estate as an heir, but she takes it by virtue of the statutory right conferred upon her. The source of her right is in Section 22 (7) and its extent and incidents are delimited thereby. She holds the estate as an owner, and she is entitled to enjoy it during her lifetime. She cannot alienate or encumber the estate or any part thereof beyond her lifetime. But so long as she is alive, no one has any vested interest in the estate. The person or heir who would take the estate will be determined on the termination of her natural span of life. If she adopts a son, pursuant to authority given in writing by her husband, and the son survives her, the estate will devolve upon the adopted son. If she is not authorised to adopt, or being authorised does not adopt, or even if she has lawfully adopted and the adopted son dies leaving no male lineal descendants, the estate will devolve upon the next junior widow, if any, for her lifetime, and on the death of such other widow to a son adopted by her with the consent in writing of her husband, and in default of an adopted son to the next surviving widow, according to their seniorities as widows for their respective lives, and "on their respective deaths to the sons so adopted by them respectively and to the male lineal descendants of such sons respectively."

18. The Oudh Estates Act, as observed by the Judicial Committee, is a Special Act, which is self-contained and complete in regard to the matters contained therein: Chandra Kishore Tewari v. Deputy Commr. of Lucknow in Charge Court of Wards Sissendi Estate, 76 Ind App 17 = (AIR 1949 PC 207). The rules relating to inheritance and succession contained therein follow no definite pattern consistent with any system of law—Hindu, Muhamadan or English. As remarked by the Judicial Commissioner of Oudh in Babu Abdul Karim Khan v. Babu Hari Singh, 1 O. D. 264, Sec. 22 of Act 1 of 1869 "follows neither the Hindu nor the Muhamadan nor the English Law, but borrowing something from each of them, lays down a peculiar line of succession applicable to the estate of those taluqdars and grantees dying intestate whose names are to be found in the second, third or fifth of the lists prepared under Section 8 of the Act". The

taluqdars of Oudh comprise among them Hindus, Mussalmans, Christians and Sikhs, and Section 22 was enacted to lay down a complete scheme of succession applicable to all taluqdars irrespective of the religious faith of the taluqdar. Under Section 22 (7) in default of heirs mentioned in Clauses (1) to (6) the property of a taluqdar devolves upon the widow first married to such taluqdar for her lifetime only. By the use of the expression "for her lifetime only" it is clearly intended that though the widow has full enjoyment during her lifetime, she must leave the estate unimpaired for the successor: Bisheshar Baksh Singh v. Jang Bahadur Singh, AIR 1930 Oudh 225 at p. 230. The position assigned to the widow of a taluqdar—be he a Hindu Muhamadan, Christian or Sikh—in the scheme of succession is peculiar. In default of heirs mentioned in Cls. (1) to (6) the widow takes the estate, but for her lifetime only, whatever may be the personal law governing her husband dying intestate. In determining the nature of her estate and the powers she may exercise, analogies drawn from the personal law of the taluqdar would be misleading. There is no provision in the Act which forfeits the interest which the widow of a taluqdar takes on the death of her husband in default of heirs mentioned in Clauses (1) to (6) of Section 22. Her interest in the estate is not liable to be defeated once it is vested in her. She holds the estate for her natural lifetime; the son adopted by her in pursuance of the authority of her husband, does not divest her of the estate. The adopted son inherits the estate on her death under Clause (8) of Section 22 and not before. The adopted son is undoubtedly an 'heir' but he has during the lifetime of the widow no interest in the estate. He merely takes precedence over the junior widow who takes the estate by virtue of Clause (9). The widow's interest in the property ensures only for her lifetime, but she is the owner of the estate and the estate is fully vested in her, and the adopted son has during the lifetime of the widow no interest in the estate which he may transfer.

19. The learned Judges of the High Court were of the view that adoption of a son by a widow of a taluqdar relates back to the date of the adoptive father's death, and in arriving at that conclusion the learned Judges made a somewhat intensive research into the different sys-

terms of law which permit affiliation of a son. "Adoption" in its dictionary meaning is the act by which relation of pater-nity and affiliation are recognised as legal-ly existing between persons not so re-lated by nature. The effect of adoption was to cast the succession on the adopt-ed, in case the adoptive father died in-estate, and created a relation of pater-nity and affiliation not before recognized as legally existing, and the change of name was more an incident than the ob-ject of adoption. Adoption was not known to the English Law until the Adoption of Children Act, 1926. Under that Act the High Court and certain other courts were given power to make adoption orders in respect of infants upon the application of a single person or married couple, subject to certain restrictions as to age and sex of the ap-plicant, and to the consent of the in-fant's parent or guardian. The French Law admitted of adoption, and the adopted child succeeded to the inheri-tance of the adopter: Code Napoléon, Article 350. Adoption was also known to the Spanish Law and the person adopt-ed succeeded as heir to the person who adopted him: Title 16, 4th Partidas. It was recognised in Greece, but in the in-terests of the next of kin whose rights were affected: adoption could be made at a fixed time — the festival of Thargelia. In Rome the system was in vogue long before the time of Justinian. But the ceremonies to accomplish the result were attended with much formality: Justinian reduced the statement to a code which simplified the proceeding. But none of these systems of law gave retrospective operation to an adoption made by a widow to the date of her husband's death. Adoptions under the diverse systems brought into being affiliation and a fic-tional paternity from the date of adop-tion, but they did not envisage the re-finements which the Hindu Law of adop-tion had reached. Under the Shastric Hindu Law adoption had the effect of transferring the adopted boy from his natural family into the adoptive family: It severed all his ties with the family in which he was born, and invested him with the same rights and privileges in the family of the adopter as the legiti-mate son, subject to certain specific ex-ceptions. Adoption of a son by a widow related back to the date on which the adoptive father died and the adopted son by a fiction of law was to be deem-

ed to have been in existence, as the son of the adoptive father at the time of the latter's death.

20. But the adoption contemplated to be made by a taluqdar or by his widow with his consent under the Oudh Estates Act 1 of 1869 has not the incidents and consequences of adoption under the Hindu Law. The taluqdars belonged to the Hindu, Muhamadan, Christian and Sikh communities. The personal laws governing the Hindus and Sikhs recog-nise adoptions and the creation of rights in the adopted sons. Amongst the Muha-madans and Christians no adoptions are recognised by their personal laws. Under the Oudh Estates Act it was open to a taluqdar, whatever his persuasion, to authorise by writing his wife to adopt a son. To such an adoption the personal law had no application. In matters not expressly covered by the provisions of the Oudh Estates Act, the personal law of the taluqdar may be applicable, but the right of adoption not being uniform-ly exercisable by the taluqdars accord-ing to their personal laws, the peculiar incidents of Hindu adoptions have no application. Under the Hindu Law, ad-op-tion has primarily to be viewed in the context of spiritual rather than temporal considerations, and the devolution of prop-erty is only of secondary importance. The spiritual considerations are out of tune in considering the status of a son adopted by a Muslim or by a Christian. Under the Hindu Law it is not disputed that the adoption made by a Hindu widow relates back to the date of the death of the adoptive father, but in the absence of any express provision in the Act, it would be impossible to attribute to the adoption made by a widow of a talu-qdar pursuant to the authority given by her husband the incidents of an adop-tion under the Hindu Law. It is a necessary concomitant of the doctrine of relation back, that the adopted son takes the estate of his father as if he were in existence at the date of his death. Any attempt to give to the adopted son an interest or right which is deemed to commence from the date of the adoptive father's death so as to divest the estate which is already vested in the widow is not only inconsistent with the personal law of a taluqdar who is not a Hindu or a Sikh, but comes in conflict with express provisions of the Act. The Act provides that a son adopt-

ed by a widow in pursuance of the instructions given by her husband takes the property on her death and not before. If the rule suggested were applicable, it would operate to deprive the widow of her right to the property vested in her on the death of her husband and to which she is declared by law to be entitled for her lifetime. That would be plainly contrary to the terms of Section 22 (7). We are unable therefore to agree with the High Court that the doctrine of relation back is applicable to an adoption made by the widow of a taluqdar governed by the Oudh Estates Act, 1869.

21. Therefore, in our view, during the lifetime of Rani Jagannath Kuar Raja Bishwanath had no interest and his interest in the taluqdari estate arose on the death of Rani Jagannath Kuar and not before. We may in this connection refer to the judgment of the Judicial Committee in Harnath Kuar v. Inder Bahadur Singh, 50 Ind App 69 = (AIR 1922 PC 403). In that case a Hindu while he was next in the order of succession after the death of the widow of a taluqdar of an Oudh Estate in List II of Act 1 of 1869 obtained a decree declaring that a will, which the widows of the last holder alleged authorised them to adopt, was invalid, and that he was entitled to the estate upon the death of the last surviving widow. The claimant succeeded to the estate on the death of the last widow of the taluqdar. In order to finance litigation which he had undertaken, the claimant had, in consideration of a loan for Rs. 25,000, purported to sell half the estate to a stranger, and he had agreed to put the vendee in possession of the property. After the death of the last surviving widow of the taluqdar the representative of the vendee sued the vendor for possession of the estate sold to the vendee. It was held that there was no effective transfer of the villages, since the vendor had only an expectancy, and the decree did not create any greater interest in him. It was, it is true, not a case of an adopted son, but of a reversioner. But the case does not establish that so long as the widow was alive, the estate was fully vested in her, and the heir who would ultimately take the estate under the rule of succession on intestacy had during the lifetime of the widow no interest in the estate, and he could not during the lifetime of the widow transfer the estate or any part thereof to another person.

22. Raja Bishwanath was, though, not precluded by virtue of Section 13 from setting up the will, was still not entitled to a present vested interest during the lifetime of Rani Jagannath Kuar. He was accordingly, during the lifetime of Rani Jagannath Kuar, not competent to settle the estate for the benefit of his creditors.

23. Counsel for the Senior Rajkumar contended that in any event the claim of Rani Jagannath Kuar was extinguished before the deed of trust was executed, and Raja Bishwanath had acquired title thereto by adverse possession. Counsel contended that the estate was, at all material times since 1901, held by the Court of Wards for and on behalf of the adopted son, and not on behalf of Rani Jagannath Kuar. Reliance in support of the plea of adverse possession was placed upon the sanction given by the Board of Revenue by letter dated February 22, 1901 to the adoption by Rani Jagannath Kuar, sanction by the Government of India by letter dated April 3, 1901 to the assumption of superintendence of the Tiloi Estate on behalf of the adopted son and clarifying that the Rani had no interest left in the estate thereof except that of maintenance holder; letter of the Board of Revenue to the Commissioner directing that the necessary notification be published in the Government Gazette and that steps be taken to have the names of Raja Bishwanath mutated in the revenue record; letter dated June 15, 1901 by the Deputy Commissioner to the Commissioner that the intention of the will was to make the adopted son, and not the Rani the successor of Raja Surpal Singh; the letter of the Board of Revenue that the Rani should be required to execute a deed acknowledging that she had adopted the child in pursuance of the will of her late husband; correspondence between Rani Jagannath Kuar and the Deputy Commissioner regarding the adequacy of maintenance awarded to her and the offer by the Board of Revenue to the Rani to assign sixteen villages formerly held by Rani Harbans Kuar and acceptance thereof; letter written by the Deputy Commissioner dated January 10, 1920 in anticipation of the approaching date of majority of Raja Bishwanath recommending that the Board be moved to release the estate with effect from March 29, 1920; letter dated April 3, 1920, informing the Commissioner that the Tiloi Estate had been released by the Court of Wards

with effect from March 30, 1920; and upon the fact that thereafter Raja Bishwanath remained in possession of the estate and exercised all rights of proprietorship in respect of it until August 29, 1932, when he executed the deed of trust. It is true that between the years 1901 when Raja Bishwanath was adopted and August 29, 1932, the date of the deed of trust, the estate was held either by him or on his behalf. But no contention was raised in the Trial Court that the interest which Rani Jagannath Kuar held in the estate was extinguished by adverse possession and during the lifetime of Rani Jagannath Kuar, Raja Bishwanath had acquired title to the estate. The High Court declined to allow the plea that the title of the Rani was extinguished by adverse possession to be raised before them on the ground that it was not raised in the pleadings, and was not urged at any stage of the trial, and since the question of adverse possession was a mixed question of law and fact they declined to allow it to be agitated for the first time before them. In our view, the High Court was right in declining to allow that question to be raised. An issue of adverse possession raises mixed questions of law and fact; it may be decided effectively after the relevant facts are proved. Again even though Rani Jagannath Kuar was given a mere maintenance, the minor Raja was living with her and it does not appear that she was excluded from the estate or any part thereof. Mere erroneous admission of title of another person without effective deprivation of possession would not result in extinction of title by adverse possession.

24. In the alternative, counsel for the Senior Rajkumar contended that those claiming under the will of Raja Bishwanath were estopped by the equitable doctrine embodied in Section 43 of the Transfer of Property Act. It was urged that even if Raja Bishwanath had no title at the date when he purported to transfer the property to the trustees for purposes mentioned therein when he acquired title on the death of Rani Jagannath Kuar, the Raja and those claiming under him were estopped from claiming that at the date of the transfer, he had no title. Section 43 of the Transfer of Property Act which incorporates the doctrine of feeding the grant by estoppel reads:

"Where a person fraudulently or erroneously represents that he is authorised to transfer certain immoveable property and professes to transfer such property for consideration, such transfer shall, at the option of the transferee, operate on any interest which the transferor may acquire in such property at any time during which the contract of transfer subsists.

* * * * *

Granting that Raja Bishwanath erroneously represented that he was authorised to transfer the estate sought to be settled by the deed of trust, the doctrine incorporated in Section 43 of the Transfer of Property Act may apply if the transfer is for consideration and not otherwise. In the present case, for effecting a settlement there was no consideration on the part of the trustees under the deed of settlement. Counsel for the Senior Rajkumar contended that by the deed of trust the trustees had undertaken to carry out various duties, and by so undertaking, consideration for the transfer moved from them. We are unable to hold that by agreeing to carry out the obligations imposed upon them, the transfer may be deemed to be one for consideration. Under the deed of trust, diverse powers are conferred upon the trustees to make rules and amend them from time to time for continuing and running the trust administration, to appoint sub-committees for some special purpose or management, to appoint from amongst them a Chairman, Secretary, Cashier and Legal Adviser, to pay off the debts due by the settlor and to exercise all the proprietary rights relating to the mortgage, sale, gift and perpetual lease etc. in respect of the said property. By undertaking these duties the trustees rendered no consideration and the transfer cannot be said to be one for consideration. It was also said by counsel for the Senior Rajkumar that in any event, two of the trustees were creditors of the settlor, and since they had undertaken to administer the trust, the transfer must be regarded as one for consideration. But by the deed of settlement the debts due to the creditors were not satisfied. Two of the trustees were, it is true, creditors of the settlor: those two trustees held a dual capacity—they were to administer the trust and also to receive payment in execution of the deed of trust. But on that account it cannot be said that the amounts due to them from the settlor were satisfied. We

agree with the High Court that the deed of trust was not executed for consideration and, therefore, the principle of Section 43 of the Transfer of Property Act had no application.

25. The appeal must therefore be allowed and the decree passed by the High Court modified. It will be declared that the deed of trust executed by Raja Bishwanath on August 29, 1932, did not operate to settle any property being part of the taluqdari estate and governed by the Oudh Estates Act 1 of 1869, for the purposes specified therein. The direction in the decree of the High Court that —“In respect of the properties mentioned in the trust deed—“Ext. E-7 dated August 29, 1932, made by Raja Bishwanath Saran Singh, the receiver should hand over possession of the said properties to Rani Fanindra Rajya Lakshmi Devi, who is the life trustee under the said deed of trust and entitled to manage the same herself or along with any other trustees that might be appointed in respect of the said trust”, shall be deleted and be substituted by the direction that the receiver shall hand over the properties mentioned in Ext. E-7 to Rajkumar Mohan Singh.

26. In the circumstances of the case, we are of the view that there shall be no order as to costs of this appeal in this Court and in the High Court, except as to the costs of the deity Shree Jagannath Bahari Ji. The order of the High Court as to costs of the deity shall be maintained and the costs of the deity in this Court will be paid out of the Estate.

JHS/D.V.C.

Appeal allowed.

AIR 1969 SUPREME COURT 147

(V 56 C 29)

(From: Madras)*

J. C. SHAH, R. S. BACHAWAT,
G. K. MITTER, C. A. VAIDIALINGAM
AND K. S. HEGDE, JJ.

The State of Madras, Appellant v. N. K. Nataraja Mudaliar, Respondent.

M/s. Sitalakshmi Mills Ltd. and others
Interveners.

Civil Appeal No. 763 of 1967, D/-
18-4-1968.

Constitution of India, Arts. 301, 302
and 303 (1) — Scope — Freedom of

*(Writ Petn. No. 836 of 1966, D/- 7-4-
1967 — Mad.).

IL/KL/C278/68

trade, commerce and intercourse — Taxing law — Hampering flow of trade — Sales-tax — When has the effect of — Central Sales-tax Act (1956), S. 8 (2), (2-A) and (5) — Not ultra vires Arts. 301 and 303 (1). Writ Petn. No. 836 of 1966, D/- 7-4-1967 (Mad), Reversed.

Majority view: Per J. C. Shah, G. K. Mitter, C. A. Vaidialingam, JJ.; R. S. Bachawat and K. S. Hegde, JJ. concurring:— Ss. 8 (2), 8 (2-A) and 8 (5) of Central Sales-tax Act, 1956, are intra vires Arts. 301 and 303 (1) of the Constitution. Writ Petn. No. 836 of 1966, D/- 7-4-1967 (Mad), Reversed.

(Paras 23, 31, 32)

Per J. C. Shah, G. K. Mitter and C. A. Vaidialingam, JJ.:— Art. 301 is couched in terms of the widest amplitude: trade, commerce and intercourse are thereby declared free and unhampered throughout the territory of India. The freedom of trade so declared is against the imposition of barriers or obstructions within the State as well as inter-State: all restrictions which directly and immediately affect the movement of trade are declared by Art. 301 to be ineffective. It must be taken as settled law that the restrictions or impediments which directly and immediately impede or hamper the free flow of trade, commerce and intercourse fall within the prohibition imposed by Art. 301 and subject to the other provisions of the Constitution they may be regarded as void. AIR 1961 SC 232 and AIR 1962 SC 1406 and AIR 1963 SC 928, Foll.

(Para 8)

It is also a settled law that a tax may in certain cases directly and immediately restrict or hamper the flow of trade, but every imposition of tax does not do so. AIR 1961 SC 232 and AIR 1968 SC 599, Foll.

(Para 9)

An Act which is merely enacted for the purpose of imposing tax which is to be collected and to be retained by the State does not amount to law giving, or authorising the giving of, any preference to one State over another, or making, or authorising the making of, any discrimination between one State and another, merely because of varying rates of tax prevailing in different States.

(Para 13)

The flow of trade does not necessarily depend upon the rates of sales-tax: it depends upon a variety of factors, such as the source of supply, place of consumption, existence of trade channels, the

rates of freight, trading facilities, availabilities of efficient transport and other facilities for carrying on trade. Existence of long-standing business relations, availability of communications, credit facilities and a host of other factors — natural and business — enter into the maintenance of trade relations and the free flow of trade cannot necessarily be deemed to have been obstructed merely because in a particular State the rate of tax on sales is higher than the rates prevailing in other States. (Para 14)

The rate which a State Legislature imposes in respect of inter-State transactions in a particular commodity must depend upon a variety of factors. A State may be led to impose a high rate of tax on a commodity either when it is not consumed at all within the State, or if it feels that the burden which is falling on consumers within the State will be more than offset by the gain in revenue ultimately derived from outside consumers. The imposition of rates of sales-tax is normally influenced by factors political and economic. If the rate is so high as to drive away prospective traders from purchasing a commodity and to resort to other sources of supply, in its own interest the State will adjust the rate to attract purchasers. Again, in a democratic constitution political forces would operate against the levy of an unduly high rate of tax. The rate of tax on sales of a commodity may not ordinarily be based on arbitrary considerations, but in the light of the facility of trade in a particular commodity, the market conditions internal and external — and the likelihood of consumers not being scared away by the price which includes a high rate of tax. Attention must also be directed to sub-s. (5) of S. 8 which authorises the State Government, notwithstanding anything contained in S. 8, in the public interest to waive tax or impose tax on sales at a lower rate on inter-State trade or commerce. It is clear that the legislature has contemplated that elasticity of rates consistent with economic forces is clearly intended to be maintained. (Para 16)

The Central Sales-tax though levied for and collected in the name of the Central Government is a part of the sales-tax levy imposed for the benefit of the States. By leaving it to the States to levy sales-tax in respect of a commodity on intra-State transactions no discrimination is practised: and by authorising the State

from which the movement of goods commences to levy on transactions of sale Central sales-tax, at rates prevailing in the State, subject to the limitation already set out, no discrimination can be deemed to be practised. AIR 1964 SC 1729 and AIR 1963 SC 928, Disting. (Para 17)

Per R. S. Bachawat, J. (Concurring):—

On principle there is no distinction between a tax on intra-State and a tax on inter-State sales. An intra-State sale may occasion the movement of goods from one part of the State to another part of the same State. Indeed, normally, an intra-State sale would occasion such movement, because the purchaser has to move the goods from the seller's place to some other place. An intra-State sale may also be affected by a transfer of documents of title to the goods during their movement from one part of the State to another part of the same State. But, there can be no doubt that a tax on such sales would not normally offend Art. 301. That Article makes no distinction between movement from one part of the State to another part of the same State and movement from one State to another. Now, if a tax on intra-State sale does not offend Art. 301, logically, a tax on inter-State sale cannot also do so. Neither tax operate directly or immediately on the free flow of trade or the free movement of the transport of goods from one part of the country to the other. The tax is on the sale. The movement is incidental to and a consequence of the sale. (Para 27)

Normally a law imposing a tax on intra-State sales does not offend Art. 301. The Central Sales-tax Act, 1956 is no exception to this rule. None of its provisions directly impede the movement of goods or the free flow of trade. Even assuming that the Act is within the mischief of Art. 301, it is certainly a law made by Parliament in the public interest and is saved by Art. 302. There is nothing in the Act which offends Art. 303 (1). (Paras 29, 30)

Per K. S. Hegde, J. (Concurring):— A mere difference in rates is neither showing preference nor making discrimination. But other things being equal, the difference in rates would result in showing preference to some States and making discrimination against others. Hence, difference in rates is a prima facie proof of the preference or discrimination complained of. It is for the State to justify

those differences. The real question for decision is whether the impugned provisions have given or authorised the giving of any preference to one State over another or made or authorised the making of any discrimination between one State and another. The word "State" in Article 301 is used in the sense of people residing in that State. It is impossible for any ordinary person to establish positively the preference or the discrimination complained of, apart from showing the difference in the rates. Once he shows the difference in the rates, it is for the State to show that the same has not resulted in showing preference to one or more States over others or making discrimination against one or more States over others in the matter of inter-State trade. (Para 33)

The Act is not a haphazard legislation; it is the product of deep thinking and clear analysis of the various aspects of the matter. The Supreme Court will be slow to hold such a measure as being either not in public interest or is violative of Art. 303 (1). The question of giving preference or making discrimination depends on various facts and circumstances, the tax rate being only one of them. The views of an expert committee on a subject so complicated as tax on inter-State sales is entitled to great weight. In the very nature of things, it is difficult for courts to ascertain the various factors that impede the free flow of trade or to assess their importance. This is not the same thing as saying that the Supreme Court should abdicate its functions in favour of an expert committee or should unduly exaggerate the importance of the collective knowledge and wisdom of the members of Parliament. But the fact remains that in assessing the strength of economic forces in a given matter the views of persons who may be expected to be familiar with the subject is entitled to weight and in the absence of clear proof to the contrary or unless it is shown that their conclusions are obviously wrong, it will be proper for the Supreme Court to proceed on the basis that the conclusions reached by them on facts — not on questions of law — are correct. (Para 34)

The Parliament was anxious that inter-State trade should be canalised through registered dealers over whom the appropriate government has a great deal of control. It is not very easy for them to evade tax. A measure which is intended

to check the evasion of tax is undoubtedly a valid measure. Further, inter-State trade carried on through dealers coming within S. 8 (2), must be in the very nature of things very little. It is in public interest to see that in the guise of freedom of trade, they do not evade the payment of tax. If the sales-tax they have to pay is as high or even higher than intra-State sales-tax then they will be constrained to register themselves and pay the tax legitimately due. The impact of this provision on inter-State trade is bound to be negligible, but at the same time it is an effective safeguard against evasion of tax. (Para 38)

Sub-section (5) of S. 8 provides for giving individual exemptions in public interest. Such a power is there in all taxation measures. It is to provide for unforeseen contingencies. The power in question cannot be said to be bad. If there is any misuse of that power, the same can be challenged. (Para 40)

Cases Referred: Chronological Paras

- (1968) AIR 1968 SC 599 (V 55) =
21 STC 212, Andhra Sugars Ltd.
v. State of Andhra Pradesh 9, 26
- (1965) AIR 1965 SC 1510 (V 52) =
16 STC 231, State of Mysore v.
Lakshminarasimhiah Setty and
Sons 21
- (1964) AIR 1964 SC 1729 (V 51) =
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Shakoor and Co. v. State of
Madras 19
- (1963) AIR 1963 SC 928 (V 50) =
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A. T. B. Mehtab Majid and Co.
v. State of Madras 8, 18, 26
- (1962) AIR 1962 SC 1406 (V 49) =
1963-1 SCR 491, Automobile
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State of Rajasthan 8, 9, 26, 33
- (1961) AIR 1961 SC 232 (V 48) =
1961-1 SCR 809, Atiabari Tea
Co. Ltd. v. State of Assam
8, 9, 26, 33
- (1958) AIR 1958 SC 468 (V 45) =
1958 SCR 1422, Sundararamier
and Co. v. State of Andhra
Pradesh 12
- (1955) AIR 1955 SC 661 (V 42) =
1952-2 SCR 603, Bengal Immunity
Co. Ltd. v. State of Bihar 3, 28
- (1953) AIR 1953 SC 252 (V 40) =
1953 SCR 1069, State of Bombay
v. United Motors (India) Ltd. 3
- (1940) 63 CLR 338, W. R. Moran
Proprietar Ltd. v. Deputy Federal
Commr., of Taxation (NSW) 15

(1908) 6 CLR 41 (Aus.), The King
v. Barger 15

Mr. Bishan Narain, Senior Advocate (Mr. A. V. Rangam, Advocate with him), for Appellant; M/s. M. R. M. Abdul Karim, K. Kajendra Choudhury and K. R. Choudhury, Advocates, for Respondent.

Mr. R. Thiagarajan, Advocate, for Intervener No. 1; Mr. R. Gopalakrishnan, Advocate, for Intervener No. 2; M/s. A. N. Singh and D. N. Gupta, Advocates, for Intervener No. 3; Mr. B. R. L. Iyengar, Senior Advocate, (M/s. R. N. Sachthey and S. P. Nayyar, Advocates, with him), for Intervener No. 4; Mr. B. Sen, Senior Advocate, (M/s. G. S. Chatterjee Advocate for Mr. P. K. Bose, Advocate, with him), for Intervener No. 5; Mr. C. B. Agarwala, Senior Advocate, (Mr. O. P. Rana, Advocate, with him), for Intervener No. 6; Mr. Lal Narain Sinha, Advocate General for the State of Bihar, (M/s. R. K. Garg and S. C. Agarwala, Advocates of M/s. Ramamurthi and Co., and M/s. Anil Kumar and S. P. Singh, Advocates, with him), for Intervener No. 7; Mr. Naunit Lal, Advocate, for Intervener No. 8; Mr. K. Baldev Mehta, Advocate, for Intervener No. 9; Mr. M. R. K. Pillai, Advocate, for Intervener No. 10.

The following judgments of the Court were delivered by

SHAH, J.: (on behalf of himself and Mitter and Vaidialingam, JJ.) In a proceeding for assessment of tax for 1963-64 under the Central Sales-tax Act, 1956, the Deputy Commercial Tax Officer rejected the contention of the assessee that a part of the turnover of his business in matches arose out of intra-State sale transactions at the assessee's depot at Ongole (in the State of Andhra Pradesh) to which depot the goods were despatched by him from his place of business in the State of Madras. The Deputy Commercial Tax Officer held that the goods were moved from "the godown stock" of the assessee in execution of contracts of sale with merchants outside the State of Madras, and on that account the turnover from sales was liable to tax under the Central Sales-tax Act. The assessee moved the High Court of Madras under Art. 226 of the Constitution seeking a writ of certiorari quashing the order of assessment, on the grounds, that the provisions of the Central Sales-tax Act which permitted levy of tax at varying rates in different States

were invalid, and that the transactions brought to tax were not in truth inter-State transactions. The High Court did not determine the nature of the transactions, but held that sub-ss. (2), (2-A) and (5) of S. 8 of the Central Sales-tax Act, 1956, in operation at the relevant time imposed or authorised the imposition of varying rates of tax in different States on similar inter-State transactions, and the resultant inequality in the burden of tax affected and impeded inter-State trade, commerce and intercourse, and thereby offended Arts. 301 and 303 (1) of the Constitution. The High Court rejected the plea of the assessee that S. 9 (3) of the Act was ultra vires. The State has appealed to this Court with certificate granted by the High Court against the order declaring sub-ss. (2), (2-A) and (5) of S. 8 of the Central Sales-tax Act, 1956, invalid.

2. A brief review of the developments in the law relating to imposition of tax on transactions of sale and its inter-relation with the constitutional provisions leading to the enactment of the Central Sales-tax Act, 1956, will facilitate appreciation of the competing views put forward before us at the Bar. The Government of India Act, 1935, by List II entry 48 of the Seventh Schedule conferred power exclusively upon the Provinces to legislate on the subject of "taxes on the sale of goods and on advertisement". In exercise of that power the Provincial Legislatures enacted sales-tax laws for their respective Provinces acting on the principle of "territorial nexus", and picked out one or more ingredients constituting a sale and made it or them the basis of imposing liability for tax. This exercise of taxing power by the Provinces led to multiple taxation of the same transaction by many provinces, the burden of tax falling ultimately on the consuming public.

3. In order to remove this burden imposed upon the consumers, Art. 286 was incorporated in the Constitution inter alia for the regulation of inter-State sales transactions. This Court in State of Bombay v. United Motors (India) Ltd., 1953 SCR 1069 = (AIR 1953 SC 252) held that under the Bombay Sales-tax Act 24 of 1952 sales effected in Bombay in respect of goods exported from the State were not taxable by the State of Bombay, but the importing State was competent to levy tax on transactions of sale in the course of inter-State trade or commerce

on persons who were resident outside its territory, provided that the goods were delivered in the importing State for the purpose of consumption therein. This decision made the dealer carrying on business in the exporting State amenable to the sales tax law of the importing State. The question was reconsidered by this Court in *Bengal Immunity Co. Ltd. v. State of Bihar*, 1952-2 SCR 603 = (AIR 1955 SC 661). The Court held that the sales or purchases made by an assessee which actually took place in the course of inter-State trade or commerce could not be taxed by any State until by law it was otherwise provided by Parliament. The Judgment in *Bengal Immunity Co's case*, 1952-2 SCR 603 = (AIR 1955 SC 661) removed, by making inter-State sales immune from taxation, the difficulties till then experienced by the trading community, but the importing States which had imposed tax on inter-State sales by non-resident dealers, relying on the principal of the judgment in *United Motors case*, 1953 SCR 1069 = (AIR 1953 SC 252) were faced with innumerable claims for restitution of the tax realized. The President then promulgated Ordinance No. III of 1956 which was later replaced by the "Sales Tax Laws Validation Act VII of 1956" with the object of restoring for the period specified in the Act the decision in *United Motors case* 1953 SCR 1069 = (AIR 1953 SC 252).

4. The problem of tax on inter-State sales was, in the meanwhile, examined by the Taxation Enquiry Commission. The report of the Commission led to the enactment of the Constitution (Sixth Amendment) Act, 1956. By that amendment entry 92A was added in Union List in the Seventh Schedule to the Constitution conferring power upon the Union to legislate in respect of "taxes on the sale or purchase of goods other than newspapers, where such sale or purchase takes place in the course of inter-State trade or commerce"; and for entry 54 in the State List, the following entry was substituted:

"Taxes on the sale or purchase of goods other than newspapers, subject to the provisions of entry 92-A of List I." Explanation to Cl. (1) of Art. 286 was omitted, and Cls. (2) and (3) were substituted by fresh clauses: by the newly enacted Cl. (2) the Parliament was authorised by law to formulate principles for determining when a sale or purchase of

goods takes place in any of the ways mentioned in Cl. (1), and by Cl. (3) it was enacted that any law of a State shall, in so far as it imposes or authorises the imposition of, a tax on the sale or purchase of goods declared by Parliament by law to be of special importance in inter-State trade or commerce, be subject to such restrictions and conditions in regard to the system of levy, rates and other incidents of the tax as Parliament may by law specify. In Art. 269 (1) clause (g) was added authorising the Government of India to collect tax on the sale or purchase of goods other than newspapers, where such sale or purchase takes place in the course of inter-State trade or commerce and making it obligatory upon the Government of India to assign the tax to the States in the manner provided in Cl. (2). By Cl. (3) it was enacted that:

"Parliament may by law formulate principles for determining when a sale or purchase of goods takes place in the course of inter-State trade or commerce." In exercise of authority conferred by the Constitution (Sixth Amendment) Act, 1956, the Parliament enacted on December 21, 1956, the Central Sales-tax Act, 1956, with a view to formulate principles (a) for determining when a sale or purchase of goods takes place in the course of inter-State trade or commerce or outside a State or in the course of import into or export from India; (b) providing for the levy, collection and distribution of taxes on sales of goods in the course of inter-State trade or commerce; (c) declaring certain goods to be of special importance in inter-State trade or commerce and specifying the restrictions and conditions to which State laws imposing taxes on the sale or purchase of such goods of special importance shall be subject. By S. 3 of the Act a definition of sale or purchase of goods said to take place in the course of inter-State trade or commerce was devised. By S. 4 conditions in which a sale or purchase of goods was to be deemed to have taken place outside a State were specified. By S. 5 the conditions in which a sale or purchase of goods taking place in the course of import or export were specified. By Ch. III (Ss. 6 to 13) provisions were enacted for declaring a charge of tax on inter-State sales and for setting up machinery for levy of tax and incidental matters. Section 6 imposed a charge on all sales effected by a dealer in the course of inter-State trade or commerce during any

year. By S. 7 provision was made for registration of dealers. Section 8, insofar as it is material, and as amended by Act 31 of 1958, read as follows:

"(1) Every dealer, who in the course of inter-State trade or commerce—

(a) sells to the Government any goods;

or
(b) sells to a registered dealer other than the Government goods of the description referred to in sub-section (3);

shall be liable to pay tax under this Act, which shall be two per cent. of his turnover.

(2) The tax payable by any dealer on his turnover insofar as the turnover or any part thereof relates to the sale of goods in the course of inter-State trade or commerce not falling within sub-section (1)—

(a) in the case of declared goods, shall be calculated at the rate applicable to the sale or purchase of such goods inside the appropriate State; and

(b) in the case of goods other than declared goods, shall be calculated at the rate of seven per cent., or at the rate applicable to the sale or purchase of such goods inside the appropriate State, whichever is higher;

and for the purpose of making any such calculation any such dealer shall be deemed to be a dealer liable to pay tax under the sales-tax law of the appropriate State, notwithstanding that he, in fact, may not be so liable under that law.

(2-A) Notwithstanding anything contained in sub-section (1) or sub-section (2), if under the sales-tax law of the appropriate State the sale or purchase, as the case may be, of any goods by a dealer is exempt from tax generally or is subject to tax generally at a rate which is lower than two per cent. (whether called a tax or fee or by any other name), the tax payable under this Act on his turnover insofar as the turnover or any part thereof relates to the sale of such goods shall be nil, or, as the case may be, shall be calculated at the lower rate.

Explanation.— For the purpose of this sub-section a sale or purchase of goods shall not be deemed to be exempt from tax generally under the sales-tax law of the appropriate State if under that law it is exempt only in specified circumstances or under specified conditions or in relation to which the tax is levied at

specified stages or otherwise than with reference to the turnover of the goods.

(3)
(4)

(5) Notwithstanding anything contained in this section, the State Government may, if it is satisfied that it is necessary so to do in the public interest, by notification in the Official Gazette, direct that in respect of such goods or classes of goods as may be mentioned in the notification and subject to such conditions as it may think fit to impose, no tax under this Act shall be payable by any dealer having his place of business in the State in respect of the sale by him from any such place of business of any such goods in the course of inter-State trade or commerce or that the tax on such sales shall be calculated at such lower rates than those specified in sub-section (1) or sub-section (2) as may be mentioned in the notification."

By S. 9 machinery was set up for levy and collection of tax and penalties. Insofar as it is material, it provided:

"(1) The tax payable by any dealer under this Act on sales of goods effected by him in the course of inter-State trade or commerce whether such sales fall within clause (a) or clause (b) of Section 3 shall be levied and collected by the Government of India in the manner provided in sub-section (3) in the State from which the movement of the goods commenced:

Provided

(2)

(3) The authorities for the time being empowered to assess, collect and enforce payment of any tax under the general sales-tax law of the appropriate State shall, on behalf of the Government of India and subject to any rules made under this Act, assess, collect and enforce payment of any tax, including any penalty, payable by a dealer under this Act in the same manner as the tax on the sale or purchase of goods under the general sales-tax law of the State is assessed, paid and collected; and for this purpose they may exercise all or any of the powers they have under the general sales-tax law of the State, and the provisions of such law, including provisions relating to returns, appeals, reviews, revisions, references, penalties and compounding of offences, shall apply accordingly:

Provided

(4) The proceeds in any financial year of any tax, including any penalty, levied and collected under this Act in any State (other than a Union territory) on behalf of the Government of India shall be assigned to that State and shall be retained by it; and the proceeds attributable to Union territories shall form part of the Consolidated Fund of India."

By Ch. IV (Ss. 14 and 15) provision was made for levy of tax at specially low rates on goods of special importance in inter-State trade or commerce. By S. 14 certain goods were declared to be of special importance in inter-State trade or commerce, and by S. 15, as amended by Act 31 of 1958, it was provided:

"Every sales-tax law of a State shall, insofar as it imposes or authorises the imposition of a tax on the sale or purchase of declared goods, be subject to the following restrictions and conditions, namely:—

(a) the tax payable under that law in respect of any sale or purchase of such goods inside the State shall not exceed two per cent of the sale or purchase price thereof, and such tax shall not be levied at more than one stage;

(b) where a tax has been levied under that law in respect of the sale or purchase inside state of any declared goods and such goods are sold in the course of inter-State trade or commerce, the tax so levied shall not exceed two per cent of the sale or purchase subject to such conditions as may be provided in any law in force in that State."

5. The Scheme of the Act was first to devise definitions of 'inter-State sales' and 'sales outside the State', and then to declare inter-State sales subject to tax, and to set up machinery for levying and collecting tax on those sales. Transactions in goods which were made subject to tax in the course of inter-State trade or commerce were classified into three broad categories—(1) transactions falling within Section 8 (1) i.e. all sales to Government, and sales to a registered dealer other than the Government of goods referred to in sub-section (3) of Section 8; (2) transactions falling within Section 8 (2) (a) i.e. sales in respect of declared goods; and (3) transactions falling within Section 8 (2) (b) i.e. sales [not falling within (1)] in respect of goods other than declared goods. Sales of goods in category (1) were declared liable at the relevant time to pay a tax of two per cent, on the turnover. On sales

of declared goods tax was to be calculated at the rate applicable to the sale or purchase of such goods inside the appropriate State. But by Section 15 the tax payable under a State law in respect of any sale or purchase of declared goods inside the State was not to exceed two per cent of the sale or purchase price thereof, and was not leviable at more than one stage. On turnover from sale of goods not falling within categories (1) and (2) the rate was seven per cent or the rate applicable to the sale or purchase of such goods inside the appropriate State, whichever was higher. But by sub-section (2A) of Section 8 it was provided that notwithstanding anything contained in sub-section (1) or sub-s. (2), if under the Sales tax law of the appropriate State the sale or purchase, as the case may be, of any goods by a dealer is exempt from tax generally or is subject to tax generally at a rate which is lower than two per cent the tax payable under the Act on the turnover insofar as the turnover or any part thereof relates to the sale of such goods shall be nil, or as the case may be, shall be calculated at the lower rate. There is a slight inconsistency between Section 8 (2) and Section 8 (2A). If the rate of tax under the State law is less than two per cent by virtue of Section 8 (2A), even in respect of turnover falling within S. 8 (2) (b) the rate of tax will not exceed the State rate; if the State rate exceeds two per cent, tax at the rate of seven per cent or of the State, whichever is higher, shall prevail. But that has no bearing on the question under discussion.

6. Tax under the Act is payable by the seller. The State from which the movement of goods commences in the course of inter-State sale collects the tax as agent of the Central Government, and in the manner provided in sub-s. (3) of Section 9. By sub-section (4) of Sec. 9 the proceeds in any financial year of any tax, including any penalty, levied and collected under the Act in any State (other than a Union territory) on behalf of the Government of India are to be assigned to that State and are to be retained by it, and the proceeds attributable to Union territories are to form part of the Consolidated Fund of India.

7. The Act and the constitutional provisions were intended to restrict the imposition of multiple taxation on a single inter-State transaction by different States, each State relying upon some

territorial nexus between the State and the sale. The tax though collected by the State under the Central Sales Tax Act was as an agent of the Central Government, it was, by sub-section (4) of Section 9, enacted in implementation of the principle of assignment of tax set out in Clause (2) of Article 269, assigned to the State which collected it.

8. This somewhat tortuous scheme of levying tax on inter-State transactions and making it available to the State which levied it, in effect countenances levy of different rates of tax on inter-State transactions in similar goods. It is upon the prevalence of different rates of tax which, subject to adjustments, and incorporated in the Central Sales Tax Act that the argument of the assessee is largely founded. He contends—and his contention has found favour with the High Court—that the liability to pay tax on inter-State transactions, depending upon the rate of tax prevailing in the exporting State, hampers trade and commerce, by giving or authorising the giving of preference to one State over another or by making or authorising the making of discrimination between one State and another, and thereby violates the guarantee of freedom of trade, commerce and intercourse declared by Part XIII of the Constitution. The assessee primarily relies upon Articles 301 and 303 (1) of the Constitution in support of his contention. Article 301 provides:

"Subject to the other provisions of this Part, trade, commerce and intercourse throughout the territory of India shall be free."

This Article is couched in terms of the widest amplitude: trade, commerce and intercourse are thereby declared free and unhampered throughout the territory of India. The freedom of trade so declared is against the imposition of barriers or obstructions within the State as well as inter-State: all restrictions which directly and immediately affect the movement of trade are declared by Article 301 to be ineffective. The extent to which Article 301 operates to make trade and commerce free has been considered by this Court in several cases. In *Atiabari Tea Co. Ltd. v. State of Assam*, 1961-1 SCR 809 = (AIR 1961 SC 232) Gajendragadkar, J., speaking for himself and Wanchoo and Das Gupta, JJ., observed at p. 860 (of SCR) = (at p. 254 of AIR):

".....we think it would be reasonable and proper to hold that restrictions,

freedom from which is guaranteed by Article 301, would be such restrictions as directly and immediately restrict or impede the free flow or movement of trade."

In *Automobile Transport (Rajasthan) Ltd. v. State of Rajasthan*, 1963-1 SCR 491 = (AIR 1962 SC 1406) the view expressed by Gajendragadkar, J. in *Atiabari Tea Co.'s case*, 1961-1 SCR 809 = (AIR 1961 SC 232) was accepted by the majority. Subba Rao, J., who agreed with the majority observed that the freedom declared under Article 301 of the Constitution of India referred to the right of free movement of trade without any obstructions by way of barriers, inter-State or intra-State, or other impediments operating as such barriers. The same view was expressed in *Firm A. T. B. Mehtab Majid and Co. v. State of Madras*, 1963 (Supp) 2 SCR 435 = (AIR 1963 SC 928) by a unanimous Court. It must be taken as settled law that the restrictions or impediments which directly and immediately impede or hamper the free flow of trade, commerce and intercourse fall within the prohibition imposed by Article 301 and subject to the other provisions of the Constitution they may be regarded as void.

9. But it is said that by imposing tax on sales, no restriction hampering trade is imposed. In the *Atiabari Tea Co.'s case*, 1961-1 SCR 809 = (AIR 1961 SC 232) Gajendragadkar, J., observed:

"Taxes may and do amount to restrictions but it is only such taxes as directly and immediately restrict trade that would fall within the purview of Article 301. The argument that all taxes should be governed by Article 301 whether or not their impact on trade is immediate or mediate, direct or remote, adopts, in our opinion, an extreme approach which cannot be upheld."

In a recent judgment of this Court in *Andhra Sugars Ltd. v. State of Andhra Pradesh*, 21 STC 212 = (AIR 1963 SC 599) Bachawat, J., speaking for the Court after referring to the observations made by Gajendragadkar, J., in *Atiabari Tea Co.'s case*, 1961-1 SCR 809 = (AIR 1961 SC 232) observed:

"This interpretation of Article 301 was not dissented from in (1963) 1 SCR 491 = (AIR 1962 SC 1406). Normally a tax on sale of goods does not directly impede the free movement or transport of goods. Section 21 is no exception. It

does not impede the free movement or transport of goods and is not violative of Article 301."

Section 21 of the Andhra Pradesh Sugar Cane (Regulation of Supply and Purchase) Act which was referred to in the judgment authorised the State Government to levy a tax at such rate not exceeding five rupees per metric tonne as may be prescribed on the purchase of cane required for use, consumption or sale in a factory. It must, therefore, be regarded as settled law that a tax may in certain cases directly and immediately restrict or hamper the flow of trade, but every imposition of tax does not do so.

10. Tax under the Central Sales Tax Act on inter-State sales, it must be noticed, is in its essence a tax which encumbers movement of trade or commerce, since by the definition in Sec. 3 of the Act a sale or purchase of goods is deemed to take place in the course of inter-State trade or commerce, if it—(a) occasions the movement of goods from one State to another; (b) is effected by a transfer of documents of title to the goods during their movement from one State to another. The question which then falls to be determined is whether the tax imposed in the present case is saved by the operation of the other provisions of Part XIII. Article 302 of the Constitution provides that Parliament may by law impose such restrictions on the freedom of trade, commerce or intercourse between one State and another or within any part of the territory of India as may be required in the public interest. Thereby the Parliament is, notwithstanding the protection conferred by Art. 301, authorised to impose restrictions on the freedom of trade, commerce or intercourse in the public interest. The expression "between one State and another" does not imply that it is only intended to confer upon the Union Parliament the power to remove the fetter upon legislative authority only so as to keep trade, commerce or intercourse free between one State Government and another. It is intended to declare trade, commerce and intercourse free between residents in one State and residents in another State. That is clear because Article 302 expressly provides that on the freedom of trade restrictions may be imposed not only as between one State and another, but also within any part of the territory of India. As we have already observed, Article 301 does not merely protect inter-State trade

or operate against inter-State barriers: all trade is protected whether it is intra-State or inter-State by the prohibition imposed by Article 301, and there is nothing in the language or the context for restricting the power of the Parliament which it otherwise possesses in the public interest to impose restrictions on the freedom of trade, commerce or intercourse, operative only as between one State and another as two entities. There is also no doubt that exercise of the power to tax may normally be presumed to be in the public interest.

11. Article 303 provides, by the first clause:

"Notwithstanding anything in Art. 302, neither Parliament nor the Legislature of a State, shall have power to make any law giving, or authorising the giving of, any preference to one State over another or making, or authorising the making of, any discrimination between one State and another, by virtue of an entry relating to trade and commerce in any of the Lists in the Seventh Schedule."

Having conferred by Article 302 power upon the Parliament to impose restrictions upon freedom of trade, commerce or intercourse, the Constitution proceeds to impose certain restrictions upon the power so conferred. Reference to the power of the State Legislatures in Article 303 (1) creates a complication which we are not called upon in the present case to resolve. It is expressly declared that the Parliament shall not have the power to make any law giving preference to one State over another, authorising the giving of any preference to one State over another, making any discrimination between one State and another, and authorising the making of any discrimination between one State and another, in exercise of or by virtue of any entry relating to trade and commerce in any of the Lists in the Seventh Schedule.

12. It was contended on behalf of the State that the power under Art. 303 could only be exercised so as to restrict the authority of the Parliament which arises by virtue of an entry relating to trade and commerce in the legislative lists and that an entry with respect to the levy of tax on trade and commerce is not an entry relating to trade and commerce and therefore there is no prohibition against the Parliament exercising power or authorising the giving of any preference to one State over another or

making or authorising the making of any discrimination between one State and another by the exercise of taxing power. Reliance in support of that contention was placed upon the judgment in *Sundaramer and Co. v. State of Andhra Pradesh*, 1958 SCR 1422 = (AIR 1958 SC 468) in which Venkatarama Aiyar, J., pointed out that under the Scheme of entries in Lists I and II of the Seventh Schedule the power of taxation exercisable in respect of any matter is a power distinct from the power to legislate in respect of that matter. It was also urged that the expression "an entry relating to trade and commerce in any of the Lists in the Seventh Schedule" was restricted to the entries which expressly deal with the power to legislate in respect of trade and commerce i. e. entries 41 and 42 of List I, entries 26 and 27 of List II and entry 33 of List III in the Seventh Schedule, and extended to no others. On the other hand it was contended that all legislative entries which directly affect trade and commerce are also within the expression "entry relating to trade and commerce".

13. We need express no opinion on the two questions argued before us. The question whether entries relating to trade and commerce in the Lists in the Seventh Schedule are restricted to entries 41 and 42 of List I, entries 26 and 27 of List II and entry 33 of List III, or relate to all general entries which affect trade and commerce, is academic in the present case. Nor do we think it necessary to decide whether for the purpose of Article 303 entries relating to tax on sale or purchase of goods i. e. entry 92A of List I, and entry 54 of List II are entries relating to trade and commerce, for, in our opinion, an Act which is merely enacted for the purpose of imposing tax which is to be collected and to be retained by the State does not amount to law giving, or authorising the giving of, any preference to one State over another, or making, or authorising the making of, any discrimination between one State and another, merely because of varying rates of tax prevail in different States.

14. It was urged that the High Court was right in holding that rates of tax on the sale of the same or similar commodity by different States by itself was discriminatory, since it authorised placing of an unequal burden on inter-State trade and commerce, affecting its free flow between the States. The rates of

tax prevailing in different States or transactions of sale in the diverse commodities are undoubtedly not uniform. According to the High Court such a scheme was "obviously quite discriminatory and considerably affected the freedom of trade, commerce and intercourse", the differential rates or exemptions in various States imposing an unequal burden on the same or similar goods which affected their free movement or flow in inter-State trade and commerce, and that a higher rate of tax in a State worked as a barrier to the free movement of similar goods to another State where there was no tax or a lower rate of tax, and for trade in particular goods declared or undeclared to be free throughout the territory of India, the rate of tax or exemption as the case may be must be uniform. We are unable to accept the view propounded by the High Court. The flow of trade does not necessarily depend upon the rates of sales tax: it depends upon a variety of factors, such as the source of supply, place of consumption, existence of trade channels, the rates of freight, trading facilities, availability of efficient transport and other facilities for carrying on trade. Instances can easily be imagined of cases in which notwithstanding the lower rate of tax in a particular part of the country goods may be purchased from another part, where a higher rate of tax prevails. Supposing in a particular State in respect of a commodity, the rate of tax is 2 per cent, but if the benefit of that low rate is offset by the freight which a merchant in another State may have to pay for carrying that commodity over a long distance, the merchant would be willing to purchase the goods from a nearer State even though the rate of tax in that State may be higher. Existence of long-standing business relations, availability of communications, credit facilities and a host of other factors—natural and business—enter into the maintenance of trade relations and the free flow of trade cannot necessarily be deemed to have been obstructed merely because in a particular State the rate of tax on sales is higher than the rates prevailing in other States.

15. In *The King v. Barger*, (1908) 8 CLR 41 (Aus.) the Australian High Court was called upon to deal with the meaning of the expression "discrimination between States or parts of States" used in Section 51 of the Australian Constitution, Isaacs, J., observed at p. 108: :

".....the pervading idea is the preference of locality merely because it is locality, and because it is a particular part of a particular State. It does not include a differentiation based on other considerations, which are dependent on natural or business circumstances and may operate with more or less force in different localities; and there is nothing, in my opinion to prevent the Australian Parliament, charged with the welfare of the people as a whole, from doing what every State in the Commonwealth has power to do for its own citizens, that is to say, from basing its taxation measures on considerations of fairness and justice always observing the constitutional injunction not to prefer States or parts of States."

In *W. R. Moran Proprietar Ltd. v. The Deputy Federal Commr. of Taxation* (N. S. W.), (1940) 63 CLR 338 the Judicial Committee of the Privy Council recorded its approval to that exposition. It is true that the Judicial Committee was interpreting Section 51 (ii) of the Australian Constitution. It also appears from the provisions of the Australian Constitution that by virtue of Section 96 of the Constitution there is to be a uniform imposition of customs duties. But the observations made by Isaacs, J., in (1908) 6 CLR 41 and approved by the Judicial Committee are useful in the determination of the true principle applicable in the present case, that, it is where differentiation is based on considerations not dependent upon natural or business factors which operate with more or less force in different localities that the Parliament is prohibited from making a discrimination.

16. The rates of tax in force at the date when the Central Sales Tax Act was enacted have again not become crystallised. The rate which the State Legislature determines, subject to the maximum prescribed for goods referred to in Section 8 (1) and (2) are the operative rates for those transactions: in respect of transactions falling within Section 8 (2) (b) the rate is determined by the State rate except where the State rate is between the range of two and seven per cent. The rate which a State Legislature imposes in respect of inter-State transactions in a particular commodity must depend upon a variety of factors. A State may be led to impose a high rate of tax on a commodity either when it is not consumed at all within the

State or if it feels that the burden which is falling on consumers within the State will be more than offset by the gain in revenue ultimately derived from outside consumers. The imposition of rates of sales tax is normally influenced by factors political and economic. If the rate is so high as to drive away prospective traders from purchasing a commodity and to resort to other sources of supply, in its own interest the State will adjust the rate to attract purchasers. Again, in a democratic constitution political forces would operate against the levy of an unduly high rate of tax. The rate of tax on sales of a commodity may not ordinarily be based on arbitrary considerations, but in the light of the facility of trade in a particular commodity, the market conditions internal and external—and the likelihood of consumers not being scared away by the price which includes a high rate of tax. Attention must also be directed to sub-section (5) of Section 8 which authorises the State Government, notwithstanding anything contained in Section 8, in the public interest to waive tax or impose tax on sales at a lower rate on inter-State trade or commerce. It is clear that the legislature has contemplated that elasticity of rates consistent with economic forces is clearly intended to be maintained.

17. Prevalence of differential rates of tax on sales of the same commodity cannot be regarded in isolation as determinative of the object to discriminate between one State and another. Under the Constitution as originally framed, revenue from sales-tax was reserved to the States. But since the power of taxation could be exercised in a manner prejudicial to the larger public interests by the States, it was found necessary to restrict the power of taxation in respect of transactions which had an inter-State content. Amendment of Article 286 and the enactment of the Sales Tax Validation Act, 1956, and the Central Sales Tax Act 1956, were all intended to serve a dual purpose: to maintain the source of revenue from sales-tax to the States and at the same time to prevent the States from subjecting transactions in the course of inter-State trade so as to obstruct the free flow of trade by making commodities unduly expensive. The effect of the Constitutional provisions achieved in a somewhat devious manner is still clear, viz., to reserve sales-tax as a source of revenue for the States. The Central

Sales Tax Act is enacted under the authority of the Union Parliament, but the tax is collected through the agency of the State and is levied ultimately for the benefit of the States and is statutorily assigned to the States. That is clear from the amendments made by the Constitution (Sixth Amendment) Act, 1956, in Article 269, and the enactment of Cls. (1) and (4) of Section 9 of the Central Sales Tax Act. The Central Sales-tax though levied for and collected in the name of the Central Government is a part of the sales-tax levy imposed for the benefit of the States. By leaving it to the States to levy sales-tax in respect of a commodity on intra-State transactions no discrimination is practised: and by authorising the State from which the movement of goods commences to levy on transactions of sale Central sales-tax, at rates prevailing in the State, subject to the limitation already set out, in our judgment, no discrimination can be deemed to be practised.

18. The view taken by the High Court was largely influenced by two cases decided by this Court on the interpretation of Article 304 (a). In *Firm A. T. B. Mehtab Majid and Co's case*, 1963 Supp (2) SCR 435 = (AIR 1963 SC 928) this Court struck down the levy of tax on sales of tanned hides and skins imported from outside the State of Madras at a rate higher than the rate of tax on sales of hides and skins tanned and sold within the State of Madras as infringing Article 304 (a). By Rule 16 framed under Section 19 of the Madras General Sales Tax Act, it was provided that in the case of untanned hides and skins the tax under Section 3 (1) of the Madras General Sales Tax Act shall be levied from the dealer who is the last purchaser in the State not exempt from tax under Section 3 (3) on the amount for which they are bought by him. By Rule 16 (2) it was provided that—(i) in the case of hides or skins which had been tanned outside the State the tax under Section 3 (1) shall be levied from the dealer who in the State is the first dealer in such hides or skins not exempt from tax under Section 3 (3) on the amount for which they are sold by him; and (ii) in the case of tanned hides or skins which had been tanned within the State, the tax under Section 3 (1) shall be levied from a person who is the first dealer in such hides or skins not exempt from tax under Section 3 (3) on the

amount for which they are sold by him. The tax-payer contended in *Firm A. T. B. Mehtab Majid's Case*, 1963 Supp (2) SCR 435 = (AIR 1963 SC 928) that the tanned hides and skins imported from outside and sold inside the State were under Rule 16 of the Madras General Sales Tax Rules subjected to a higher rate of tax than the rate imposed on hides and skins tanned and sold within the State and this discriminatory system of taxation offended Article 304 (a) of the Constitution. This Court accepted the contention and held that Rule 16 (2) discriminated against imported hides or skins which had been purchased or tanned outside and therefore it contravened Article 304 (a) of the Constitution.

19. Similarly in *A. Hajee Abdul Shakoor and Co. v. State of Madras*, 1964-8 SCR 217 = (AIR 1964 SC 1729) the assessee who were dealers in skins in the State of Madras, purchased raw skins from places both within and outside the State of Madras. They were assessed to sales-tax in accordance with the provisions of the Madras General Sales Tax (Turnover and Assessment) Rules, on the turnover of hides and skins purchased in the untanned condition outside the State and tanned within the State with respect to the assessment years 1955-56, 1956-57 and 1957-58. The tax was assessed at 3 pies per rupee on the price of tanned hides and skins for the years 1955-56 and 1956-57 and at the rate of 2 per cent on the turnover for the year 1957-58. In petitions filed by the assessee in this Court under Article 32 of the Constitution it was held that Section 2 (1) of the Madras General Sales Tax (Special Provisions) Act, 1963, discriminated against imported hides and skins which were sold upto August 1, 1957, upto which date the tax on sale of raw hides and skins was at the rate of 3 pies per rupee and was therefore void.

20. In the two cases the differential treatment violated Article 304 (a) of the Constitution, which authorises the Legislature of a State notwithstanding anything in Articles 301 and 303 by law to "impose on goods imported from other State or the Union territories any tax to which similar goods manufactured or produced in that State are subject, so, however, "as not to discriminate between goods so imported and goods so manufactured or produced." Imposition of differential rates of tax by the same

State on goods manufactured or produced in the State and similar goods imported in the State is prohibited by that clause. But where the taxing State is not imposing rates of tax on imported goods different from rates of tax on goods manufactured or produced, Article 304 (a) has no application. Article 303 prohibits the making of law which gives, or authorises the giving of, any reference to one State over another, or makes, or authorises the making of, any discrimination between one State and another. Prevalence of different rates of sales-tax in the State which have been adopted by the Central Sales Tax Act for the purpose of levy of tax under that Act is, as already mentioned, not determinative of the giving of preference or making a discrimination. The view expressed by the High Court that Sections 8 (2), 8 (2-A) and 8 (5) infringe Article 301 and Article 303 (1) cannot be sustained.

21. It was contended before the High Court that whereas excise duty was not liable to be included in the turnover of goods under the Madras General Sales Tax Act, it was liable to be included in the turnover for the purpose of Central Sales Tax Act. The High Court in making a general discussion on this question observed, following the judgment of this Court in *State of Mysore v. Lakshminarasimhiah Setty and Sons*, 16 STC 231 = (AIR 1965 SC 1510) that by "levied" in Section 9 (1) of the Central Act, what was meant was "levied as under the State Act," that would include also the State Rules enabling deductions in the computation of the turnover. The Court rejected the contention that "to the extent the excise duty is not deductible from taxable turnover under the Central Act unlike under the Madras General Sales Tax Act, there is discrimination between one State and another".

They observed that:

"In the matter of non-deductibility of excise duty from the turnover of inter-State sales, the Central Act has equal application and makes no discrimination. The Central Act does not say that excise duty will be deductible in one State and not in another. It is not deductible from the turnover of the inter-State sales and this rule is uniformly applied to all inter-State sales. There is, therefore, no question of inequality or discrimination forbidden by Article 303 (1) and

there is no question of contravention of Article 301 either."

But in dealing with the case of the assessee in the last paragraph of the judgment the High Court observed that since no provision had been made for deduction of the excise duty from the turnover of inter-State sales or purchases under the Central Act with the result that unequal burden will fall on differences in the quantum of turnover because of allowance in the one case and disallowance in another, of deduction of excise duty. This in the view of the High Court would impede the freedom of inter-State trade or commerce and intercourse within the meaning of Article 301 of the Constitution and was not saved by Article 303. The observations so made, somewhat blur the earlier discussion. If under the Madras General Sales Tax Act in computing the turnover the excise duty is not liable to be included and by virtue of Section 9 (1) of the Central Sales Tax Act has to be levied in the same manner as the Madras General Sales Tax Act, the excise duty will not be liable to be included in the turnover, and the observations made in the last paragraph of the judgment under appeal that because no express provision was made for exclusion of the excise duty in the computation of turnover from inter-State sales or purchases there was discrimination cannot be accepted as correct. We are of the view that in the matter of determining the taxable turnover the same rules will apply by virtue of Section 9 (1) of the Central Sales Tax Act, whether the tax is to be levied under the Central Sales Tax Act or the General Sales Tax Act.

22. The High Court proceeded to determine the case before them only on the plea that the impugned provisions of the Act were ultra vires. They did not consider whether the transactions in dispute were inter-State transactions and liable to tax in the hands of the assessee in the Madras State. It is the case of the assessee that he has been taxed in the Andhra Pradesh State by the appropriate authority in respect of the transactions of sale of goods which are sought to be taxed, on the footing that the transactions were intra-State transactions. The question whether the transactions were intra-State and were liable to be taxed under the Madras General Sales Tax Act has not been determined. The case must therefore be remanded to the High Court. The High Court will pro-

ceed to decide the questions. Since the assessee moved the High Court by a writ petition against the order of the sales tax authorities without filing an appeal before the authority competent to deal with the questions of fact, it will be open to the High Court to require the assessee to have those questions determined by the competent departmental authority.

23. The appeal will be allowed and the order passed by the High Court declaring the provisions of Sections 8 (2), 8 (2A) and 8 (5) *ultra vires* must be set aside.

24. The petition out of which this appeal arises was one of a group of petitions filed before the High Court. Against orders passed in favour of the other assessee the State has not preferred appeals. The amount involved in the claim is small. The State apparently has approached this Court with a view to obtain a final determination of the important question which was raised in the petitions filed before the High Court. We therefore direct that there will be no order as to costs in this Court and in the High Court.

25. BACHAWAT, J.: I have read the draft judgment prepared by our learned brother Justice Shah. He has said that tax under the Central Sales Tax Act on inter-State sales is in its essence a tax hampering movement of trade or commerce, since by the definition in Sec. 3 of the Act a sale or purchase of goods is deemed to take place in the course of inter-State trade or commerce, if it (a) occasions the movement of goods from one State to another; or (b) is affected by a transfer of documents of title to the goods during their movement from one State to another. He is of the view that the tax falls within the prohibition imposed under Article 301 of the Constitution.

26. In 1961-1 SCR 809 at pp. 860-861 = (AIR 1961 SC 232 at p. 254) Gajendragadkar, J. speaking for the majority of the Court said:—

"We are, therefore, satisfied that in determining the limits of the width and amplitude of the freedom guaranteed by Article 301 a rational and workable test to apply would be: Does the impugned restriction operate directly or immediately on trade or its movement..... It is the free movement of the transport of goods from one part of the country to

the other that is intended to be saved and if any Act imposes any direct restrictions on the very movement of such goods it attracts the provisions of Article 301, and its validity can be sustained only if it satisfies the requirements of Article 302 or Article 304 of Part XIII."

This interpretation of Article 301 was not dissented from in 1963 (1) SCR 491 at p. 533 = (AIR 1962 SC 1406 at p. 1424). In 21 STC 212 = (AIR 1968 SC 599) this Court rejected the contention that Section 21 of the Andhra Pradesh Sugarcane (Regulation of Supply and Purchase) Act, 1961 (Andhra Pradesh Act No. 45 of 1961) did not offend Art. 301. The Court held :

"Normally, a tax on sale of goods does not directly impede the free movement or transport of goods. Section 21 is no exception. It does not impede the free movement or transport of goods and is not violative of Article 301."

This Court distinguished the case of 1963 Supp (2) SCR 435 = (AIR 1963 SC 928) which decided that a sales tax which discriminated against goods imported from other States might affect the free flow of trade and would then be invalid unless protected by Article 304 (a). It is implied in Article 304 (a) that a discriminatory tax might affect freedom of trade.

27. On principle I see no distinction between a tax on intra-State and a tax on inter-State sales. An intra-State sale may occasion the movement of goods from one part of the State to another part of the same State. Indeed, normally, an intra-State sale would occasion such movement, because the purchaser has to move the goods from the seller's place to some other place. An intra-State sale may also be affected by a transfer of documents of title to the goods during their movement from one part of the State to another part of the same State. But, there can be no doubt that a tax on such sales would not normally offend Article 301. That Article makes no distinction between movement from one part of the State to another part of the same State and movement from one State to another. Now, if a tax on intra-State sale does not offend Article 301, logically, I do not see how a tax on inter-State sale can do so. Neither tax operate directly or immediately on the free flow of trade or the free movement of the transport of goods from one part of the country to the other. The tax is on

the sale. The movement is incidental to and a consequence of the sale.

28. In (1952) 2 SCR 603 at p. 754 = (AIR 1955 SC 661 at p. 722) Jagannadhas, J. after referring to Article 301 said:

"Now it is not disputed that a tax on a purely internal sale which occurs as a result of the transportation of goods from a manufacturing centre within the State to a purchasing market within the same State is clearly permissible and not hit by anything in the Constitution. If a sale in that kind of trade can bear the tax and is not a burden on the freedom of trade, it is difficult to see why a single point tax on the same kind of sale where a State boundary intervenes between the manufacturing centre and the consuming centre need be treated as a burden, especially where that tax is ultimately to come out of the residents of the very State by which such sale is taxable. Freedom of trade and commerce applies as much within a State as outside it. It appears to me again, with great respect, that there is no warrant for treating such a tax as in any way contrary either to the letter or the spirit of the freedom of trade, commerce and intercourse provided under Article 301."

29. As at present advised, I am inclined to agree with these observations. I am, therefore, inclined to think that normally a law imposing a tax on intra-State sales does not offend Article 301. It seems to me that the Central Sales Tax Act, 1956 is no exception to this rule. None of its provisions directly impede the movement of goods or the free flow of trade.

30. I may add that even assuming that the Central Sales Tax Act, 1956 is within the mischief of Article 301, it is certainly a law made by Parliament in the public interest and is saved by Article 302. I find nothing in the Act which offends Article 303 (1).

31. The decision of the High Court that Sections 8 (2), 8(2A) and 8 (5) of the Central Sales Tax Act, 1956 are ultra vires the Constitution must therefore be set aside. I agree to the order proposed by Shah, J.

32. HEGDE, J.: Though I agree with the conclusions reached by my learned brother Shah, J., namely, sections 8 (2), 8 (2-A) and 8 (5) of the Central Sales Tax Act, 1956 (No. 74 of 1956)—hereinafter referred to as the Act—are intra vires the Constitution, my reasons for coming to

that conclusion are not the same as his. Hence this note.

33. The facts of the case as well as the history of the legislation are fully set out in the majority judgment. It is settled by the decisions of this Court in 1961-1 SCR 809 = (AIR 1961 SC 232) and 1963-1 SCR 491 = (AIR 1962 SC 1406) that a taxing statute is not outside the scope of Article 301 of the Constitution. But before a taxing statute is held to be violative of that Article, it must be shown that it has a direct or immediate impact on the freedom of trade, commerce and intercourse within the country. In other words, a mere remote or incidental impact is insufficient to hold that Article 301 has been contravened. Article 302 empowers Parliament by law to impose such restrictions on the freedom of trade, commerce and intercourse between one State and another or within any part of the territory of India, as may be required in the public interest. The power conferred on Parliament is extremely wide and the only limitation placed on that power by Article 302 is that the law in question must be required in the public interest. Primarily it is for Parliament to determine the requirements of public interest. The decision of Parliament in this regard is not easy to challenge. Parliament is presumed to know the needs of the people, the requirements of the time and the economic and political interests of the country as a whole. By its very composition it is unlikely that Parliament would have regional bias or would adopt a parochial approach. In addition, there is the presumption of the constitutionality of a statute. Therefore the State undoubtedly starts with an advantage. But once it is shown that a measure prima facie gives preference to the residents of one State over another State or it makes discrimination between the residents of a State and that of another because of the adoption of different rates of tax in different States, then the matter assumes a different complexion in view of Article 303 (1). It should be within the knowledge of the Union Government why Parliament adopted different rates in different States. I agree that mere difference in rates is neither showing preference nor making discrimination. But other things being equal the difference in rates would result in showing preference to some States and making discrimination against others. Hence,

in my opinion, difference in rates is a *prima facie* proof of the preference or discrimination complained of. It is for the State to justify those differences. The real question for decision is whether the impugned provisions have given or authorised the giving of any preference to one State over another or made or authorised the making of any discrimination between one State and another. The word "State" in Article 301 is used in the sense of people residing in that State. It is impossible for any ordinary person to establish positively the preference or the discrimination complained of, apart from showing the difference in the rates. Once he shows the difference in the rates it is for the State to show that the same has not resulted in showing preference to one or more States over others or making discrimination against one or more States over others in the matter of inter-State trade. I am not prepared to place an interpretation on Article 303 (1) which would render that provision purposeless. After all it is the State that had enacted the impugned provisions. It must have had good reasons for enacting those provisions. It must place before court those reasons and satisfy it that Article 303 (1) has not been contravened. But on the material placed before us, I am satisfied that the differences in the rates are in public interest and those differences do not materially affect the free flow of trade in the country.

34. From the history of the legislation, it is clear that the subject of taxing inter-State sales is a complicated process. It has various facets. Sales-tax is one of the most important sources of revenue for the States. It was so even under the Government of India Act, 1935. It was not the intention of Parliament either to dry up that source or to divert the same. It wanted to retain that source for the States; but at the same time guard against States levying sales tax on inter-State sales in a manner which is likely to be prejudicial to the free flow of trade and commerce in the country. Constitutional amendments referred to in the judgment of Shah, J., have an important purpose behind them. Same is the case as regards the provisions in the Act. Before Articles 269 and 286 were amended and the Act enacted, a Committee known as Taxation Enquiry Committee, had gone into the various aspects of inter-State trade and commerce and made recommendations to

the Union Government on that subject. It was largely on the basis of those recommendations that Articles 269 and 286 of the Constitution were amended and the Act enacted. Therefore it is clear that the Act is not a haphazard legislation; it is the product of deep thinking and clear analysis of the various aspects of the matter. This Court will be slow to hold such a measure as being either *not in public interest or is violative of Article 303 (1)*. The question of giving preference or making discrimination depends on various facts and circumstances, the tax rate being only one of them. The views of an expert committee on a subject so complicated as tax on inter-State sales is entitled to great weight. In the very nature of things, it is difficult for courts to ascertain the various factors that impede the free flow of trade or to assess their importance. This is not the same thing as saying that this Court should abdicate its functions in favour of an expert committee or should unduly exaggerate the importance of the collective knowledge and wisdom of the members of Parliament. But the fact remains that in assessing the strength of economic forces in a given matter the views of persons who may be expected to be familiar with the subject is entitled to weight and in the absence of clear proof to the contrary or unless it is shown that their conclusions are obviously wrong, it will be proper for this Court to proceed on the basis that the conclusions reached by them on facts—not on questions of law—are correct. The Taxation Enquiry Committee has given good reasons in support of its recommendations.

35. We shall now examine the purposes behind Section 8 of the Act, which fixes rates of tax on sales in the course of inter-State trade, commerce and intercourse. The Act divides inter-State sales into four categories, namely—(i) sales to Government, (ii) sales of goods which are declared to be of special importance in the inter-State trade and commerce, (iii) sales to registered dealers, and (iv) sales to others. Good many sales in the course of inter-State sales are made to Governments. In a welfare State like ours, public sector is in-charge of various industries, which require raw material from various parts of the country. The Governments also require consumer goods of various types for its governmental functions as well as for its econo-

mic activities. A uniform rate is fixed for those sales under S. 8 (1) (a). Hence in respect of an important segment of inter-State sales the rate is uniform, no doubt subject to S. 8 (2-A), the scope of which I shall discuss a little later.

36. Section 14 declares that goods enumerated therein are goods of special importance in the inter-State trade and commerce. Section 15 prescribes the restrictions and conditions under which sales-tax in respect of the turnover relating to those goods may be levied. One of the conditions prescribed at the relevant time was that tax should not be more than two percentum of the turnover. Further in respect of those goods only a single point taxation is permissible. The declared goods constitute a large portion of the goods sold in inter-State trade. The incidence of taxation on those goods is such that it could not have had any serious repercussion in inter-State trade.

37. Section 8 (1) (b) regulates the sales-tax leviable on sales to registered dealers in the course of inter-State sales. The maximum rate fixed at the relevant time was two percentum of the turnover. All that the registered dealer has to do is to get included in his certificate of registration goods of the class or classes which he proposes to purchase as being intended for re-sale by him or for use by him in the manufacture or processing goods for sale or in the mining or in the generation or distribution of electricity or any other form of power. Here again the incidence of taxation is so low as ordinarily not to affect the free flow of trade.

38. This takes us to the remaining sales in the course of inter-State trade or commerce. By and large these sales are made to unregistered dealers. Here again, so far as the declared goods are concerned, tax has to be levied at the rate applicable to local sales, as provided in S. 8 (2) (a). Then we come to Cl. (b) of S. 8 (2), which deals with goods other than declared goods. Here the law at the relevant time was that the tax shall be calculated at the rate of seven percentum of the turnover or as the rate applicable to sale or purchase of such goods inside the appropriate State, whichever is higher. As could be seen from the report of the Taxation Enquiry Committee, the main reason for this provision was to prevent as far as possible

the evasion of sales-tax. The Parliament was anxious that inter-State trade should be canalised through registered dealers over whom the appropriate government has a great deal of control. It is not very easy for them to evade tax. A measure which is intended to check the evasion of tax is undoubtedly a valid measure. Further, inter-State trade carried on through dealers coming within S. 8(2), must be in the very nature of things very little. It is in public interest to see that in the guise of freedom of trade, they do not evade the payment of tax. If the sales-tax they have to pay is as high or even higher than intra-State sales-tax then they will be constrained to register themselves and pay the tax legitimately due. The impact of this provision on inter-State trade is bound to be negligible, but at the same time it is an effective safeguard against evasion of tax.

39. Section 8 (2-A) is incorporated with a view to see that the consumers in the States to which goods are imported are not placed at a disadvantage as compared to the consumers in the State from which the goods are imported. In fact this provision is bound to facilitate inter-State trade. The purpose behind this section is to see that the State Governments do not place the local consumers in a better position than the consumers outside.

40. Sub-section (5) of S. 8 provides for giving individual exemptions in public interest. Such a power is there in all taxation measures. It is to provide for unforeseen contingencies. Take for example, when there was famine in Bihar, if a dealer in Punjab had undertaken to sell goods to a charitable society in that State at a reasonable price for distribution to those who were starving, it would have been in public interest if the Punjab Government had exempted that dealer from paying sales-tax. Such a power cannot immediately or directly affect the free flow of trade. The power in question cannot be said to be bad. If there is any misuse of that power, the same can be challenged.

41. It must be remembered that under the present conditions the power to tax is not merely used for the purpose of collecting revenue; it is a powerful social instrument, in particular an instrument which can be effectively used for correcting economic maladjustments. While the

legislature must provide in the law for all reasonably foreseeable contingencies still some discretionary power has to be given to the executive to meet unexpected situations.

42. If we bear in mind the fact that sales-tax on inter-State sales is levied for the benefit of the States and the further fact that each one of the State Governments in its own interest is bound to create the best possible condition for the growth of industry and commerce in that State, it is reasonable to assume that they will not be blind to economic forces. All that one has to guard against is to see that they do not, by having recourse to their taxation power, obstruct the flow of trade into their State. In the normal course they will be interested in seeing that goods produced in their States are sold outside. Reasonably sufficient safeguards against the free flow of trade into a State have been provided by the provisions of the Act, firstly, by providing for the levy of sales-tax in the State in which the goods are produced, and, secondly, by placing various restrictions on the power of the States in fixing the rates.

43. None of the impugned provisions, in my opinion, has direct or immediate impact on inter-State trade or commerce. RSK/D.V.C. Appeal allowed.

AIR 1969 SUPREME COURT 164 (V 56 C 30)

(From Patna: ILR 39 Pat 380)
R. S. BACHAWAT AND K. S. HEGDE,
JJs.

The State of Bihar and another, Appellants v. Maharaja Pratap Singh Bahadur, Respondent.

Civil Appeal No. 157 of 1967, D/- 11-4-1968.

Tenancy Laws — Bihar Land Reforms Act, 1950 (Bihar Act 30 of 1950), Ss. 3, 24-A, 4 (a) — Issue of notification under S. 3 in respect of Gidhaur Estate — Effect on permanent Malikanas payable to proprietors of estate — Held permanent malikanas not being an interest in the estate, nor an incumbrance on it, did not cease on vesting of estate in Government and proprietor could not claim compensation for malikanas under S. 24-A. AIR 1963 SC 799 (804, 805), Rel. on. (Paras 12, 14, 15)

IL/KL/B940/68

Cases Referred:	Chronological	Paras
(1963) AIR 1963 SC 799 (V 50) =		
1962-3 SCR 213, State of Uttar Pradesh v. Trivikram Narain Singh		15
(1950) AIR 1950 Pat 86 (V 37) =		
ILR 27 Pat 1018, Maharaja P. S. Bahadur v. State of Bihar		9
(1932) AIR 1932 Cal 49 (V 19) =		
35 Cal WN 1233, Mahendra Narayan Roy v. Abdul Gafur		10
(1929) AIR 1929 PC 166 (V 16) =		
ILR 51 All 439, Jaggo Bai v. Utsava Lal		8
(1924) AIR 1924 Cal 197 (V 11) =		
ILR 50 Cal 822, Soudamini Dassya v. Secy. of State		10
(1908) 8 Cal LJ 300, Syed Shah Najamuddin Hyder v. Syed Zahid Hussein		9
(1894) 21 Ind App 148 = ILR 17 All 1 (PC), Deo Kuar v. Man Kaur		9
(1880) ILR 5 Cal 921 = 6 Cal LR 133, Hurmazi Begum v. Hirday Narayan		8
(1873) 19 Suth WR 94, Gobinda Chunder Roy v. Ram Chunder		8
(1869) 12 Suth WR 498 = 4 Beng LR AC 29, Bhuli Singh v. Mst. Nimu Behoo		9
(1868) 9 Suth WR 102, Herranund Sahoo v. Mst. Ozeerun		8

Mr. C. K. Daphtary, Attorney-General for India (M/s. D. P. Singh, R. K. Garg, S. C. Agarwala, K. M. K. Nair and S. P. Singh, Advocates, with him), for Appellants; Mr. Sarjoo Prasad, Senior Advocate (Mr. D. Goburdhun, Advocate, with him), for Respondent.

The following Judgment of the Court was delivered by

BACHAWAT, J.: This appeal is directed against an order allowing a writ petition under Art. 226 of the Constitution. Maharaja Pratap Singh Bahadur was the proprietor of the estates collectively known as the Gidhaur estate, in Monghyr district. On the publication of a notification under S. 3 of the Bihar Land Reforms Act, 1950 (Bihar Act XXX of 1950) on July 24, 1953 the Gidhaur estate and the interests of the Maharaja therein vested in the State of Bihar. The Maharaja was receiving a permanent malikana allowance of Rs. 5743/14/6 annually in two equal six monthly instalments as shown in annexure "A" to the writ application. The registers and rolls of the recipients of the malikana maintained by the Collector of the district since a long

time past show that the successive proprietors of the Gidhaur estate were receiving the malikana for a long time past. The State of Bihar stopped payment of the malikana allowance from April 1, 1958 on the ground that the proprietary interests of the Maharaja in the Gidhaur estate vested in the State and consequently his right to the malikana was extinguished.

2. The Maharaja alleged in the writ petition that the permanent malikana was payable irrespective of his proprietary rights in his estates notified under Section 3 and was not income or rent from those estates nor a charge or incumbrance on them. He alleged that the stoppage of the payment of the malikana was illegal and asked for a writ directing the State to make payment of the malikana. The State did not file any return to the petition. The High Court held that the Maharaja's right to the malikana was not an intermediary interest in the Gidhaur estate and did not cease with the extinction of his proprietary right in the estate. Accordingly, the High Court issued a writ in the nature of mandamus commanding the State of Bihar to pay the malikana due to the Maharaja from April 1, 1958. The State of Bihar has filed this appeal on a certificate granted by the High Court.

3. Section 2 of the Bihar Land Reforms Act is the definition section. Section 2 (i) defines an estate to mean any land included under one entry in any of the general registers of revenue paying and revenue free lands and includes a share of or in any estate. Section 2(ji) defines an "intermediary" in relation to any estate or tenure to mean a proprietor, tenure-holder, under tenure-holder and trustee. Section 2 (jji) defines an "intermediary interest" as meaning the interest of an intermediary in an estate or tenure. Section 2 (o) defines "proprietor" to mean a person holding in trust or owning for his own benefit an estate or part of an estate. Section 2 (r) defines a "tenure-holder" to mean a person who has acquired from a proprietor or another tenure-holder the right to hold land for the purpose of collecting rent or bringing it under cultivation by establishing tenants on it and includes inter alia the holder of a tenure created for maintenance of any person. Section 2 (q) defines tenure to mean the interest of a tenure-holder or under tenure-holder. Under Section 2-A the expressions "proprietor

or tenure-holder" and "estate or tenure" mean and include "intermediary" and the "intermediary interest" respectively. Section 3 (1) states that the State Government may, from time to time, by notification declare that the estates or tenures of a proprietor or tenure-holder, specified in the notification, have passed to and become vested in the State. Sections 4 (a) and 24-A (1) are as follows:—

"4. Consequences of the vesting of an estate or tenure in the State.— Notwithstanding anything contained in any other law for the time being in force or in any contract, on the publication of the notification under sub-section (1) of Section 3, or sub-section (1) or (2) of Section 3-A the following consequences shall ensue, namely:—

(a) Such estate or tenure including the interests of the proprietor or tenure-holder in any building or part of a building comprised in such estate or tenure and used primarily as office or cutchery for the collection of rent of such estate or tenure, and his interests in trees, forests, fisheries, Jalkars, hats, bazars, mela and ferries and all other sairati interests as also his interest in all sub-soil including any rights in mines and minerals whether discovered or undiscovered, or whether being worked or not, inclusive of such rights of a lessee of mines and minerals, comprised in such estate or tenure (other than the interests of raiyats or under-raiyats) shall, with effect from the date of vesting, vest absolutely in the State free from all incumbrances and such proprietor or tenure-holder shall cease to have any interests in such estate or tenure other than the interests expressly saved by or under the provisions of this Act."

"Section 24-A (1). Determination of compensation of any intermediary of temporarily settled estate — In the case of such intermediary of a temporarily settled estate, the Compensation Officer shall determine the compensation payable in respect of the transference to the State of the interest of the intermediary in such temporarily settled estate, whether let in farm or held in khas, at a sum equal to twenty times of the malikana payable to him during the previous agricultural year and, where the intermediary has taken out the engagement of the lands comprised in such estate for a fixed period on the payment of a fixed jama, also a sum equal to the pro rata refund

of the fixed jama paid by him for the unexpired period of the engagement."

4. It may be noted that Sections 2(jj), 2(jjj), 2-A and 24-A were inserted in the parent Act by the Bihar Land Reforms (Amendment) Act, 1953 (Bihar Act XX of 1954). Section 4 was also amended by the same Act.

5. Learned Attorney-General contended (1) that the right to the malikana was an interest in the estates called the Gidhaur estate specified in the notification of July 24, 1953 and on the issue of the notification the right to malikana stood extinguished and (2) alternatively, the Maharaja was an intermediary of temporary settled estates in respect of which the malikana was payable and on the transference of his intermediary interests in those estates, his right to the malikana stood extinguished and he became entitled only to the compensation payable under Sec. 24-A.

6. Regulation VIII of 1793 (sec. 43) described malikana as an allowance to proprietors in consideration of their proprietary rights. Baden-Powell's Lands Systems of British India, Vol. II, P. 717 said that malikana in Bengal and places other than the Punjab usually means an allowance to an ex-proprietor by way of solatium for a lost right.

7. The custom of paying malikana allowance to displaced proprietors may be traced back to the Moghul period. "The claims of the ancient zamindars and village headmen, when thus displaced were usually recognised to the extent of giving them an allowance for subsistence, and sometimes they continued to receive this allowance in the shape of payments from the new occupants called *russoomi-zemindaree*." (See Phillips on Law Relating to the Land Tenures of Lower Bengal, p. 126). It was said that "Malikana is the unalienable right of proprietorship." (see the answer of Ghulam Hosein Khan, Appendix No. 16 to Mr. Shore's Minutes of 2nd April, 1788 quoted in C. D. Field's Regulations of the Bengal Code p. 717). The Regulations from 1788 onwards recognised this custom. Regulation VIII of 1793, secs. 43 to 47 provided that in the event of the proprietor refusing to accept a reasonable settlement his lands were to be let in farm or held khas. When the lands were let in farm, the farmer was to engage to pay 10 per cent of the jama as malikana to the excluded proprietors in addition

to the jama and the Government was to be considered as guarantees for the payment. The malikana was realisable from the farmer as arrears of revenue. When the lands were held in khas 10 per cent of the net collections was to be paid as malikana from the treasury. S. 5 of Regulation VII of 1822 repealed the existing regulations regarding malikana and substituted fresh provisions for such allowance. The new provisions were declared by Section 11 of Regulation IX of 1833 to be prospective only and to be applicable solely to the settlements made under them. (See Clarke, Regulations Vol. I p. 71). Regulation VII of 1822 was originally enacted for the ceded and conquered Provinces, Cuttack, Pataspur and its dependencies. It was extended to other Provinces by Section 2 of Reg. IX of 1825. Later it was repealed as regards the North Western Provinces by Act XIX of 1873 and fresh provisions for allowance to displaced proprietors were substituted. The malikana was for a term of years when the proprietors were dispossessed from management temporarily. It was a permanent grant when the proprietors' rights in their lands were completely extinguished.

8. The decisions under the Limitation Acts relating to the malikana turned on the particular language of those Acts. Clause (12) of Section 1 of the Limitation Act of 1859 seemed to make it imperative on the courts to deal with malikana as an interest in land and to treat a claim for it as barred if not made within a period of 12 years after the last receipt by the proprietor. (see *Herranund Sahoo v. Mst. Ozeerun*, (1868) 9 Suth WR 102, *Gobinda Chunder Roy v. Ram Chunder*, (1873) 19 Suth WR 94). But under the Limitation Act of 1877 the non-receipt of malikana for 12 years did not extinguish the right and malikana could be sued for within twelve years from the time when it became due. (see *Hurmuzi Begum v. Hirday Narayan*, (1880) ILR 5 Cal 921). In *Jaggo Bai v. Utsava Lal*, ILR 51 All 439 = (AIR 1929 PC 166) the courts below treated malikana as immovable property and since the point as to its not being immovable property was not taken earlier, the Privy Council did not allow the point to be taken before it for the first time. Nevertheless the Privy Council held that a suit to establish a right as to malikana was not a suit for possession within the meaning of Article 141 and was governed by Art. 120 of the Limitation Act of 1908.

Though malikana is not a charge on immovable property the explanation to Article 132 of that Act declared that for the purposes of that article, it was "deemed" to be money charged on immovable property.

9. Malikana is not rent. [see Bhuli Singh v. Mst. Nimu Behoo, (1869) 12 Suth WR 498 and Syed Shah Najamuddin Hyder v. Syed Zahid Hussein, (1908) 8 Cal LJ 300 at p. 302]. It is not rent or revenue derived from land and not assessable as agricultural income. (Maharaja P. S. Bahadur v. State of Bihar, ILR 27 Pat 1018 = (AIR 1950 Pat 86)). In Deo Kaur v. Man Kuar, (1894) 21 Ind App 148 at pp. 160, 161 (PC) malikana was described as a grant of a portion of a land revenue for purposes of the Pensions Act, 1871 because Section 3 of the Act interpreted the expression "grant of money or land revenue" to include anything payable on the part of the Government in respect of a right. The Privy Council held that malikana was something payable on the part of Government in respect of a right and therefore a suit relating to malikana was not cognizable by the Court without a certificate from the Collector. The plea of bar under the Pensions Act is not taken in the present appeal.

10. Malikana is not an incumbrance on the estate of the proprietor liable to pay it and is not extinguished on the sale of that estate for recovery of arrears of land revenue under Act XI of 1859, (see Mahendra Narayan Roy v. Abdul Gafur, 35 Cal WN 1233 = (AIR 1932 Cal 49)). The person in receipt of a permanent malikana is not a proprietor of the estate for which malikana is payable and has no title to the alluvial accretion to the estate. (see Soudamini Dassya v. Secretary of State, ILR 50 Cal 822 at pp. 838, 845 = (AIR 1924 Cal 197 at pp. 203, 266))

11. The proprietors of the Gidhaur estate in Bihar are in receipt of a permanent malikana for over a century. The origin of this malikana allowance is not known. From time immemorial it has been customary in Bihar to pay a permanent malikana allowance to ex-proprietors in lieu of their lost proprietary right. Phillips in his Law Relating to the Land Tenures of Lower Bengal, pp. 144, 147, 269, said that the proprietors of the soil in Bihar universally claimed and possessed a right of malikana and he endeavoured in vain to trace its origin in Bihar. The malikana right of the excluded proprietors

in Bihar was acknowledged in the Regulations passed on August 8, 1788. At the time of Permanent Settlement, the new grantees were forced to acknowledge this right. (see Baden-Powell, Land-System of British India, Vol. I pp. 516, 517). The Bihar Board of Revenue Misc. Rules 1939, art. 342 p. 166 divides malikana into two classes. Malikana of the first class is for a term of years only, that is, during the currency of a settlement. Malikana of the second class is permanent. It states that "the Bihar malikana falls under this class and is a compensation permanently granted to the proprietors.... It is of a pensionary nature and does not depend upon collections." The permanent malikana is payable at the treasury on April 1, and October 1, every year on presentation of pay orders issued by the Collector accompanied by a life certificate of the recipient.

12. There can be no doubt that the malikana payable to the proprietors of the Gidhaur estate is a permanent grant of money in lieu of their proprietary rights in lands originally held by them. The proprietors retained certain estates. On the publication of the notification under Section 3 of the Bihar Land Reforms Act, 1950 the interest of the Maharaja in those estates was extinguished. But the malikana payable to him is not an interest in those estates and did not cease on the issue of the notification.

13. Annexure A to the writ application shows that cess was deducted from the malikana. Under Sections 5 and 41 of the Cess Act, 1880 cess is charged on immovable property and is payable by the holder of an estate or tenure or chaukidari chakran lands and by a cultivating raiyat. It is not known under what circumstances cess used to be deducted from the malikana. From the fact that cess was so deducted it is not possible to hold that malikana is an interest in the estates held by the Maharaja.

14. In this Court the appellant raised the second contention for the first time. The learned Attorney-General contended that the malikana was payable in respect of certain other estates, that the Maharaja should be regarded as an intermediary of those estates and that on the vesting of those estates in the Government the right to malikana ceased and the Maharaja became entitled to compensation only under Section 24A of the Bihar Land Reforms Act, 1950. The State of Bihar has filed a petition asking for an order ad-

mitting certain documents as additional evidence. We have allowed this petition. The first document is a letter of the Collector, Monghyr, stating that the Gidhaur estate was getting malikana in respect of 17 tauzis noted in the margin. The second document is the khewat of those tauzis. They show that various persons other than the Maharaja were the proprietors of the estates comprised in the tauzis. The petition states that all these estates have been notified under Section 3 and have now vested in the State Government. The third document is the notification published on July 24, 1953 showing the estates of which the Maharaja was the proprietor and which have now vested in the State Government. On the publication of the notification under Section 3, all the estates in respect of which the malikana is payable including the interest of any intermediary therein vested in the Government free from all incumbrances. But the Maharaja is not a proprietor, tenure-holder or an intermediary of those estates. The malikana is not rent or income derived from the estates. Nor is his right to the malikana an incumbrance on them. The Maharaja's right to the malikana is not an intermediary interest in the estates and did not vest in the Government. Consequently, he has no right to claim compensation for the malikana under S. 24A. That section provides for determination of compensation payable to the intermediary of a temporarily settled estate in respect of the transference to the Government of the interest of the intermediary in such estate. The Maharaja had no intermediary interest in the estates for the transference of which he could claim any compensation under Section 24A.

15. In *State of Uttar Pradesh v. Trivikram Narain Singh*, 1962-3 SCR 213 at pp. 226, 228 = (AIR 1963 SC 799 at pp. 804-805) this Court held that an allowance of a fixed sum of money computed on the basis of $\frac{1}{4}$ th share of the net revenue of certain estates payable by the Government to the ex-jagirdars as compensation for abandonment of their right in those estates was not a right or privilege in respect of land in any estate or its land revenue within the meaning of Section 6 (b) of the Uttar Pradesh Zamindari Abolition and Land Reforms Act 1951, and on the issue of a notification vesting those estates in the Government the right to the allowance did not cease. The allowance in that case was described as a pension. It may be that the allowance was not strictly

a malikana. Nevertheless the case is instructive. It shows that an allowance paid to ex-jagirdars in consideration of the extinction of their rights in land is not an interest in the land. The permanent malikana stands on the same footing. It is an allowance paid to ex-proprietors for extinguishment of their right to the estate formerly held by them. It is not an interest in that estate, nor an incumbrance on it, and does not cease on the vesting of the estate in the Government.

16. In the result, the appeal is dismissed with costs.

RSK/D.V.C.

Appeal dismissed.

AIR 1969 SUPREME COURT 108 (V 50 C 31)

(From Gujarat: ILR (1966) Guj 1113)
HIDAYATULLAH, C. J., S. M. SIKRI,
R. S. BACHAWAT, G. K. MITTER,
C. A. VAIDIALINGAM AND K. S.
HEGDE, JJ.

Ramanlal Gulabchand Shah etc. etc.,
Appellants v. The State of Gujarat and
others, Respondents.

Civil Appeals Nos. 1751-1773, 1769-1916,
2451, 2452, 2187-2189, 2214-2220, 2358-
2373, 1891, 2577-2582 of 1966 and 48-73,
88-104, 106, 107, 620, 705-708, 715-719,
814-852, 894-908, 1004, 1065-1069 and
1557 of 1967, D/- 19-4-1968.

(A) Constitution of India, Article 31B,
Ninth Schedule — Bombay Tenancy and
Agricultural Lands Act (67 of 1948), Sec-
tion 65 (1) (as amended by Section 35 of
Bombay Act 13 of 1956), Section 44 and
Preamble — Inclusion of Bombay Act
(67 of 1948) under Ninth Schedule —
Protection under Article 31B is available
only to first part of amended Sec. 65 (1)
and not to latter part.

Article 31B no doubt gives protection
to all Statutes listed in the 9th Schedule
of the Constitution and Bombay Act 67 of
1948, is so listed. The condition laid
down in the first part of amended Sec-
tion 65 (1) to the effect that Government
may take over management of the land
which remains uncultivated for two con-
secutive years cannot be challenged — as
that condition was included in the original
form of unamended Section 65, being pro-
tected by Article 31B. But this protec-
tion cannot extend to the condition
laid down in the latter part of the amend-
ed Section 65 (1). The effect of addition

of the latter condition by amending Section 65 is to make the section applicable to non-landholders also and thus carries the Act into new fields. Hence protection under Article 31B, if extended to the latter part of amended Section 65 (1), would amount to amendment of the 9th Schedule which is beyond the competence of any State Legislature. Such amendment cannot claim protection under general scheme of the preamble and Sec. 44 of the Act, though both of which in turn are protected under Article 31B.

(Para 10)

(B) Constitution of India, Art. 31A (1) (a) — Bombay Tenancy and Agricultural Lands Act (67 of 1948), Section 65 (1) (as amended by Section 35 of Bombay Act 13 of 1956) and Section 61 — Taking over property by State under latter part of Section 65 (1) — Does not amount to acquisition or extinguishment or modification of rights under Article 31A (1) (a) — Latter part of Section 65 (1) cannot claim protection under Article 31A (1) (a). ILR (1966) Guj 1113, Reversed.

In case full and efficient use of the land as laid down in latter part of the amended Section 65 (1) is not made, that section empowers the Government to take over management of the land. Such taking over of management cannot be said to be (a) acquisition by the State or (b) extinguishment of the rights of the holder or (c) modification of such rights within the meaning of Article 31A (1) (a). Hence, Article 31A (1) (a) cannot be invoked for giving protection to latter part of amended Section 65 (1).

(Para 12)

Acquisition as contemplated under Article 31A (1) (a) is for the State and by the State and must transfer the ownership of the property to the State or to a corporation owned or controlled by the State. Since Section 65 or the other provisions of the Act do not spell out any such thing, there is no acquisition by the State. There is also no extinguishment of the rights of the holder. The rights are merely suspended and continue to the owner. There can of course be extinguishment of rights without acquisition by the State but there must be extinguishment, that is complete termination of the rights. The scheme of the Act in S. 61 contemplates return of the lands unless sold to others and in those cases in which a sale is not effected it cannot be said that there is an extinguishment of the rights. Therefore that part of Art. 31A

(1) (a) does not apply. There is also no modification of the rights of the holder. ILR (1966) Guj 1113, Reversed; AIR 1953 SC 373, Rel. on.

(Para 11)

(C) Constitution of India, Arts. 31A (1) (b) and 31 (5) (a) — Bombay Tenancy and Agricultural Lands Act (67 of 1948), Section 65 (1) (as amended by Bombay Act 13 of 1956), Sections 61, 82 — Rules under Sec. 82, Rule 35 — Taking over management of property under latter part of Section 65 (1) — Absence of definite time limit under Rule 35 for such taking over — Latter part of Section 65 (1) is ultra vires Article 31A (1) (b). ILR (1966) Guj 1113, Reversed.

The protection of Article 31A (1) (b) is available only when there is a definite limit in the law for the period of management. "Management" is specially provided under Clause (b) of Article 31A (1) and taking over of management must be for a limited period. Without a limit of time the management would be an excuse for deprivation of property without compensation and that is not the intention of Article 31 (5) (a). It is hardly to be thought that an antinomy between Articles 31 and 31A (1) (b) was deliberately introduced.

(Paras 12, 13)

It is true that Section 61 which is protected by 9th Schedule and cannot be called in question, says that the State Government may announce the termination of the management when it is satisfied that it is not necessary. But advantage of the words of Section 61 cannot be taken to create a permanent deprivation of the property and yet claim protection under Article 31A (1) (b). Although Section 61 may not by itself be challengeable, the rules may be, notwithstanding that they were made under powers given by Section 82. A limit of time was deliberately put in by the constitutional amendment to distinguish between cases which fall within management from those of extinguishment and modification. Section 61 read with Section 81 must therefore require that any rule made should accord with the protection given under Article 31A (1) (b) to State action in taking over management for a limited period. On perusal of Rule 35, which is the pertinent rule, it is clear that no time limit is set therein for period of management. Merely because there is possibility of return of the land to the original owner, the management cannot be construed as of a limited period. Hence, the amended part of Section 65 (1) cannot

claim protection under Article 31A (1) (b), Section 61 notwithstanding.

(Paras 13, 14, 16)

In the latter part of amended S. 65 (1) there is nothing to show what are the requirements of action that can be taken under it. The deprivation of property is made to depend upon the subjective determination of an officer. Before action is taken it must be quite clearly established that the kind of agriculture which is being carried on is being carried on efficiently or that there is some distinct advantage in the new management to carry on the new kind of agriculture. A person is entitled to hold and enjoy his property as he thinks best. If regard is to be had for the benefits of society a clear law and a clear determination are required. Both the elements are missing in amended Section 65 (1). Protection under Article 31A (1) (b) cannot be given to taking over of the management where it is done merely because the officer thinks that wheat is to be preferred to fruits and fruits to grass and so on and so forth. ILR (1966) Guj 1113, Reversed.

(Para 17)

Cases Referred: Chronological Paras
(1953) AIR 1953 SC 373 (V 40) =
1953 SCR 1049, Raghubir Singh
v. Court of Wards, Ajmer II

Mr. B. R. L. Iyengar, Senior Advocate, (M/s. Ravinder Narain and O. C. Mathur, Advocates of M/s. J. B. Dadachanji and Co. and Mr. B. Dutta and Miss Bhuvanesh Kumar, Advocates, with him, for Appellants (In all the Appeals); Mr. C. K. Daphtary, Attorney General for India and Mr. N. S. Bindra, Senior Advocate (M/s. R. H. Dhebar and S. P. Nayar, Advocates with them), for Respondents (In all the Appeals).

The following Judgment of the Court was delivered by

HIDAYATULLAH, C. J.: These appeals come before us on a reference by the Constitution Bench referring the question—whether the amendment of Section 65 of the Bombay Tenancy and Agricultural Lands Act, 1948 by Section 35 (1) of the Bombay Act XIII of 1956, which added the words:

“or the full and efficient use of the land has not been made for the purpose of agriculture, through the default of the holder or any other cause whatsoever not beyond his control,”

has the protection of Articles 31A and 31-B of the Constitution. At the hearing

of this reference before this Special Bench (which included Judges of the Original Constitution Bench) it was decided to enlarge the reference to include the whole appeals so that they might be decided in their entirety at the same sitting.

2. These are appeals against the judgment and order of the High Court of Gujarat, 4/5 May, 1966 from many petitions questioning the declaration made by the Deputy Collector, Bulsar under Section 65 of the Act. Below is given the text of the section with the amended portion material to these appeals underlined (bracketed herein, Ed.). As a result of the declaration the appellants stand to lose possession of their lands. The facts on which the several declarations have come to be made may now be stated.

3. The appellants own and possess lands in the district of Bulsar and claim to carry on agricultural operation by raising and cutting grass used as fodder. They were served with notices under Section 65 of the Act. A sample notice is Annexure 'B' to the petition of Ramanlal Gulabchand Shah in the High Court. It was issued from the office of the Deputy Collector on February 5, 1966 addressed to Ramanlal Gulabchand Shah. It read as follows:—

.....
.....
.....
This is to inform you that during the inquiry made by us it has been found that you are holding the following grass land together with the others:—

On making inquiry it has been found that on account of your fault (not) beyond your control you have allowed to grow the grass naturally in the aforesaid land of your possession continuously for two years namely 1963-64 and 1964-65, and in two years prior to that kept the said land uncultivated. That you have not made full and efficient use of the said land for the purpose of agriculture.

Therefore, I Shri M. B. Shaikh, Dist. Deputy Collector, Bulsar, in view of the authority vested in me under Section 65 of the Tenancy Act, have to inform you and call upon you to show cause as to why the management of the aforesaid land or a portion thereof should not be assumed by the Government under Section 65 of the Tenancy Act.

.....
.....
“65. Assumption of management of lands which remained uncultivated.

(1) If it appears to the State Government that for any two consecutive years, any land has remained uncultivated (or the full and efficient use of the land has not been made for the purpose of agriculture, through the default of the holder or any other cause whatsoever not beyond his control) the State Government may, after making such inquiry as it thinks fit, declare that the management of such land shall be assumed. The declaration so made shall be conclusive.

(2) On the assumption of the management, such land shall vest in the State Government during the continuance of the management and the provisions of Chapter IV shall *mutatis mutandis* apply to the said land:

Provided that the manager may in suitable cases give such land on lease at rent even equal to the amount of its assessment.

Provided further that, if the management of the land has been assumed under sub-section (1) on account of the default of the tenant, such tenant shall cease to have any right or privilege under Chapter II or III, as the case may be, in respect of such land, with effect from the date on and from which such management has been assumed."

4. In consequence of the notice the parties appeared and denied the allegation that for two consecutive years they had not cultivated these lands. Ramanlal Gulabchand in his reply stated that:

".....since 1946-47 or thereafter we have been getting the said land cultivated by plough and by sowing good seeds of grass therein, we have made the grass to grow therein and by ploughing the land it is brought in level and in this manner formerly after cultivating the land with plough the seeds have been sown therein and since last six years or thereafter by cultivating the said lands continuously with the Tractor and sowing seeds of grass therein, the grass is being grown in the said land. Therefore, that allegation that said land has been kept uncultivated continuously for two years namely 1963-64 and 1964-65 and for the years prior to that made in the notice is absolutely false and we specifically deny the same. Further, over and above the cultivation in the said land we are also making the said land clean and also we are erecting hedge round about it we are also removing the thorns and other things lying in the said land and also keeping continuous watch over the same as soon as the grass

grown therein and when the grass becomes fit to be cut, we cut the same and bring the same at our house for our cattle and our cattle eat the same for the whole year.....(sic)".

The case was then sent to the Additional Mamlatdar for report. The Mamlatdar's report is not before us. On February 28, 1965 the Dist. Deputy Collector, Bulsar made his declaration and we get the gist of the Mamlatdar's report from his declaration. It appears that the Mamlatdar reported that the lands were "cultivable" and "food crops and fruit trees can be grown" but the owners had merely "allowed grass naturally to grow therein" and by such operations only they had "not made full and efficient use of the land in the two consecutive years viz. 1963-64 and 1964-65." The Deputy Collector declared that he was satisfied that full and efficient use of the lands had not been made consecutively during the years 1963-64 and 1964-65 as contemplated under Section 65 of the Act and that the default was not due to circumstances beyond the control of the owners. He also declared that the lands could grow food crops or fruit trees. He accordingly appointed the Mamlatdars as managers of said lands directing that they "should take immediate steps to lease out the lands for cultivation of food crops and manage the land as provided for management of estates under the provisions contained in Chapter IV of the Bombay Tenancy and Agricultural Lands Act, 1948". This declaration was questioned by the writ petitions from which the present appeals arise.

5. Before the High Court six grounds were urged in support of the petition. Broadly speaking they were: the constitutionality of Section 65 of the Act under Articles 14, 19 (1) (f) and (g) and 31; breach of principles of natural justice on the ground that the Deputy Collector who made the declaration did not hear the parties; and lastly that the declaration was vitiated on account of omission to take into consideration factors relevant for the purpose of taking action. Another ground of attack was that the exercise of power was mala fide and actuated by political considerations. This last ground was not presented to us and therefore may not be mentioned again.

6. The constitutional validity of the addition to Section 65 by the Amending Act was also questioned before us. The argument was that the added words introduced a condition which, even if taken

with the Rules, was destructive of the right of a person to hold and enjoy his property and to deprive him of it for all times without compensation. It was also submitted that in the law thus made too much power and discretion was left to the officer concerned, without indicating any standards of an objective nature to control them. It was also contended that the appellants, in any event, were fulfilling the requirements of cultivation as laid down in the Act itself.

7. Before entering into a discussion of these points we may first see what the Act enacts to achieve by itself and by its Rules. The Act has a long preamble which indicates the object of the law. It says inter alia:—

"And whereas on account of the neglect of a landholder or disputes between a landholder and his tenants, the cultivation of his estate has seriously suffered, or for the purpose of improving the economic and social conditions of peasants to ensuring the full and efficient use of land for agriculture, it is expedient to assume management of estates held by landholders and to regulate and impose restrictions on the transfer of agricultural lands, dwelling houses, sites and lands appurtenant thereto belonging to or occupied by agriculturists, agricultural labourers and artisans in the Province of Bombay and to make provisions for certain other purposes hereinafter appearing; it is hereby enacted as follows:—

The following definitions are material to our purpose. Section 2 (1) provides:

"Agriculture" includes horticulture, the raising of crops, grass or garden produce, the use by an agriculturist of the land held by him or a part thereof for the grazing of his cattle, the use of any land whether or not an appendage to rice or paddy land, for the purpose of rab manure but does not include allied pursuits, or the cutting of wood only:

Provided that in the case of such tracts of land abounding in natural growth of grass as the State Government may, by notification, in the official Gazette, specify, 'agriculture' shall include the cutting of grass for any purpose."

"To cultivate" is defined by S. 2 (5). It reads:

"To cultivate" with its grammatical variations and cognate expressions means to till or husband the land for the purpose of raising or improving agricultural produce, whether by manual labour or by

means of cattle or machinery, or to carry on any agricultural operation thereon; and the expression "uncultivated" shall be construed correspondingly.

Explanation.—A person who takes up a contract to cut grass or to gather the fruits or other produce of trees on any land, shall not on that account only be deemed to cultivate such land."

"To hold land" is defined by S. 2 (8c) and means only that the person must be lawfully in actual possession of the land as an owner or tenant, as the case may be. "Land-holder" is defined in S. 2 (9) thus:

"Land-holder" means a zamindar, jagirdar, saranjamdar, inamdar, talukdar, malik or a khot or any person not hereinbefore specified who is a holder of land or who is interested in land and whom the State Government has declared on account of the extent and value of the land or his interest therein to be a landholder for the purposes of this Act."

It must be noticed that this definition does not take into account a tenant. That word is defined in Section 2 (18) and reads:

"Tenant means a person who holds land on lease and includes:—

(a) a person who is deemed to be tenant under Section 4;

(b) a person who is protected tenant; and

(c) a person who is permanent tenant: and the word "landlord" shall be construed accordingly."

8. Chapter II deals with tenancies, but with its provisions we are not concerned because they bear only upon matters connected with the setting up of tenancies, their continuance and termination, the quantum of rent payable and other such matters. Section 5 of this Chapter prescribes the ceiling area of tenancy lands with reference to jirayat, seasonal irrigated and perennially irrigated lands. Section 7 authorises Government to vary the ceiling area and economic holding taking into consideration the situation of the land, its productive capacity, its situation in backward areas and any other factor that may be prescribed. Chapter III then deals with special rights and privileges of tenants and makes provision for distribution of land for personal cultivation. We are not concerned with any matter involved in it. Chapter IV deals with management of estates held by landholders. In view of the definition of 'landholder' this Part cannot be applied directly to non-

landholders but the provisions of S. 65 (2) make the provisions of Chapter IV applicable to the lands of non-landholders. The intention of Chapter V is to arrange for the management of the land of landholders with a view to better management and the liquidation of their debts. The relevant sections in this chapter (which applies in this indirect manner to non-landholders' lands) are Sections 44 to 48, 58, 59 and 61. Section 44 reads:

"Notwithstanding any law for the time being in force, usage or custom or the terms of contract or grant when the State Government is satisfied that on account of the neglect of a landholder or disputes between him and his tenants, the cultivation of his estate has seriously suffered, or when it appears to the State Government that it is necessary for the said purpose or for the purpose of ensuring the full and efficient use of land for agriculture to assume management of any landholder's estate, a notification announcing such intention shall be published in the Official Gazette, and the Collector shall cause notice of the substance of such notification to be given at convenient place in the locality where the estate is situated. Such notification shall be conclusive."

Section 45 vests the estate in the State Government and the management is deemed to commence from the date on which the notification is published. Section 46 gives the effect of declaration of management. As a result of the publication of the notification under Section 44 all proceedings and processes in civil courts in respect of actions against the landholders get automatically stayed and while the management continues, no further proceedings can be commenced. The holder of the estate also becomes incapable of entering into any contract, mortgage, etc. or to grant valid receipts for rents and profits. The manager, however has competence to do all these things. Section 47 then enumerates the powers of the Manager in the management. He is entitled to receive and recover all rents and profits due in respect of the property under management and for this purpose possesses all the powers of the holder as well as the powers of the Collector under the law for the time being in force. Under Section 48 the Manager is entitled to deduct from the recoveries the cost of the management and repairs, Government revenue and all other debts to Government, the rent to a superior holder and such periodical allowances as the Collec-

tor from time to time fixes for the maintenance and other expenses of the holder and such members of his family as the Collector directs and the costs of such improvements of the estates as the manager thinks necessary or as approved by the Collector. The balance is then applied by the Manager for the liquidation of the debts and liabilities of the landholders and if anything remains thereafter, it is paid to the land-holder. Sections 49 to 57 deal with claims to be made against the estate and the power to remove the mortgage in possession. Sections 58 and 59 may be read here. They confer powers of sales and lease on the Manager and to pass receipts for any moneys, rents or profits raised or received by him and the discharge of the persons on the strength of such receipts.

"58. Subject to the rules made under this Act, the Manager after the liquidation scheme has been sanctioned as aforesaid, shall have power to sell or grant on lease all or any part of the estate under the management:

Provided that the estate or any part thereof shall not be sold or leased for a period exceeding ten years without the previous permission of the Collector:

Provided further that the Collector shall not give such permission unless he is satisfied that such sale or lease is necessary for the benefit of the estate (or unless such sale is in favour of a tenant under Section 32, 32-F, 32-I or 32-O). The decision of the Collector shall be final.

59. The Manager's receipt for any moneys, rents or profits raised or received by him under this Act shall discharge the person paying the same therefrom or from being concerned to see to the application thereof."

Section 61 next provides for the termination of the management. It must be read in full:

"61. The State Government, when it is of opinion that it is not necessary to continue the management of the estate, by order published in the Official Gazette direct that the said management shall be terminated. On the termination of the said management, the estate shall be delivered into the possession of the holder, or, if he is dead, of any person entitled to the said estate together with any balances which may be due to the credit of the said holder. All acts done or purporting to be done by the Manager during the continuance of the management of the estate shall be binding on the holder

or to any person to whom the possession of the estate has been delivered."

The provisions though applicable to landholders are applied by S. 65 (2) *mutatis mutandis* to the lands of non-landholders. In other words, the scheme of the management (apart from liquidation of debts) applies to non-landholders. The other provisions dealing with management for the liquidation of debts, which are in the nature of the provisions of the Court of Wards Act, may not be considered here because they are not relevant to our purpose.

9. We may next see some of the Rules which have been framed under S. 82 of the Act. Rule 30 provides for a notice before action under S. 44 is taken and provides that the landholder's statement shall be recorded as regards the intention of the Government to assume management of the estate. Rule 33 provides that when a Manager proposes to sell any estate or any part thereof under S. 58 he shall give notice to the landholder to show cause why the estate or a part thereof should not be sold and must afford him an hearing. The method of selling or leasing of the estate under management or any part thereof is indicated in Rule 34 and it is by public auction unless such a course is, in the opinion of the Manager, unnecessary or inexpedient. Rule 35 is important and may be set down in extenso:

"35. Period of continuance of management of estates.—

(1) The Manager of an estate of which management has been assumed shall, before the 31st day of March following the year in which the management has been assumed, send to the State Government a report regarding the management of the estate and shall state whether in his opinion it is necessary to continue the management for the purpose for which it was assumed.

(2) After taking into consideration the report of the Manager made under sub-rule (1), the State Government shall decide whether the management should be terminated under Section 61 or continued further and if so, for what period, such period not being in excess of five years at a time.

(3) If the State Government decides to continue the management the Manager shall, from time to time, forward his report through the Collector and shall in any case submit a report not later than

two months before the expiry of the current period of the management to enable Government to decide whether the management shall be terminated under Section 61 or shall further be continued:

Provided that if the management is to be continued beyond the expiry of ten years from the date on which it was assumed the Collector shall hold a formal inquiry in the manner prescribed by the Bombay Land Revenue Code, 1879, and after recording the statement of the landholder or any person acting on his behalf, shall submit the record and proceedings of the inquiry and his report to the State Government, which shall be taken into consideration by the State Government before it decides to continue the management any further."

The other Rules do not bear upon the present controversy and may be left out of consideration. We may now proceed to consider this case.

10. The first question to consider is the vires of the addition to S. 65 by the Amending Act, which addition has been shown in the section quoted already. This matter has to be considered with reference to Arts. 31-A and 31-B read with the Ninth Schedule. The protection is claimed on the basis of these two articles by the State. Article 31-B no doubt gives protection to all statutes listed in Schedule IX of the Constitution and this Act is so listed. But it was listed before the amendment of S. 65 and that amendment cannot be said to have been considered when the Amendment of the Constitution was made. That Amendment if accepted as unassailable will have the indirect effect of amending the original Schedule IX by including something in it which was not there before. This is undoubtedly beyond the competence of any State legislature. The argument of the learned Attorney General that the general scheme of the Preamble and the provisions of S. 44 made applicable by S. 65 (2) both of which have the protection of Art. 31-B must give protection is fallacious. Even if the preamble and S. 44 could be read (and we do not decide that they can be so read) to give validity it is clear that the preamble talked only of landholders and the addition of the words to S. 65 is intended to apply the principle to non-landholders. Similarly the provisions of S. 44 under the unamended Act, could not have been made applicable to such landholders. The amendment of S. 65 was

really carrying the Act into new fields and not being considered as an amendment of the Constitution, how can it claim the protection given to the unamended Act? Therefore Art. 31-B and the Ninth Schedule cannot be called in aid.

11. The matter may, however, be considered under Art. 31-A. If Art. 31-A gives protection there would be an end to the appellants' contention if not the matter must be considered on principles settled by this Court. Art. 31-A was relied upon strongly by the learned Attorney General. He attempted to bring the amendment of S. 65 under Clauses (a) and (b) of Art. 31-A (1). We may now consider the matter under these two clauses separately. Art. 31-A (1) (a) and (b) read:

"31-A (1) Notwithstanding anything contained in article 13, no law providing for—

(a) the acquisition by the State of any estate or of any rights therein or the extinguishment or modification of any such rights, or

(b) the taking over of the management of any property by the State for a limited period either in the public interest or in order to secure the proper management of the property, or

shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by article 14, article 19 or article 31.

The amendment of S. 65 gives additional power of taking over lands of non-land-holders for management on two grounds. The first is that the land must have remained uncultivated for two consecutive years and the second is that full and efficient use of the land had not been made of the land. In so far as the first is concerned S. 65 in its original form included that condition and it cannot be challenged because of the protection of Art. 31-B read with the Ninth Schedule. Therefore action could be taken against any land which had remained uncultivated for two years. The action in this case is not taken because of this part of S. 65. But in so far as the second part is concerned the question must arise whether taking over of management can be said to be (a) acquisition by the State or (b) extinguishment of the rights of the holder or (c) modification of any such rights. Of these it is impossible to say that this was an acquisition by the State. That phrase has received con-

struction on more than one occasion in this Court. Although the decisions cannot be said to be uniform, one thing is certain that the taking away must be for the State and by the State. Such acquisition must transfer the ownership of the property to the State or to a corporation owned or controlled by the State. Since S. 65 or the other provisions of the Act do not spell out any such thing, there is no acquisition by the State. There is also no extinguishment of the rights of the holder. The rights are merely suspended and he continues to be the owner. There can of course be extinguishment of rights without acquisition by the State but there must be extinguishment, that is complete termination of the rights. The scheme of the Act in S. 61 contemplates return of the lands unless sold to others and in those cases in which a sale is not affected it cannot be said that there is an extinguishment of the rights. Therefore that part of Art. 31-A (1) (a) does not apply. The third part namely modification of rights have been considered by us but this Court in *Raghubir Singh v. Court of Wards, Ajmer*, 1953 SCR 1049 = (AIR 1953 SC 373) gave a limited meaning to the expression and that case has been applied on many occasions. It was observed there:

"The learned Attorney-General laid emphasis on the word "modification" used in Article 31-A. That word in the context of the article only means 'a modification of the proprietary right of a citizen like an extinguishment of that right' and cannot include within its ambit a mere suspension of the right of management of estate for a time, definite or indefinite."

(emphasis (here in ' ') added)

Thus mere suspension of the right of management of one's property without modification of the proprietary right was not held sufficient to give protection of Art. 31-A (1) (a). We would have given more thought to this matter but for the re-enactment of Art. 31-A with retrospective effect after *Raghubir Singh's case*, 1953 SCR 1049 = (AIR 1953 SC 373). *Raghubir Singh's case*, 1953 SCR 1049 = (AIR 1953 SC 373) did not interpret the article as it is today. In view of the retrospective amendment of the article it may be said that this Court interpreted an article which never was enacted in that form. Therefore the less we speak of the matter from the angle of observations in *Raghubir Singh's case*, 1953 SCR 1049 = (AIR 1953 SC 373) the better. But even

so the matter is not advanced much further.

12. Looking at the matter in the light of Art. 31-A as it is today (and it must be deemed to have been so always) 'management' is specially provided in (b) and must be considered under that clause. The words of that clause are 'the taking over of the management of any property'. 'Any property' means property of any kind and would embrace land of landholders and non-landholders alike. The words 'by the State' indicate that the taking over must be by the State. The next requirement is that this taking over must be either in the public interest or in order to secure the proper management of the property. And lastly the taking over must be for a limited period. The case here is covered by this clause and clause (a) is therefore not attracted.

13. It is, however, objected that the taking over is not limited to any period. S. 61 which is protected by the Ninth Schedule and cannot be called in question says that the State Government may announce the termination of the management when it is satisfied that it is not necessary. This does not set any limit leaving the matter at large. The learned Attorney-General however desired us to read the rules to show that there is a limit of time. He says that the rules be read in conjunction with the provisions of S. 61 because the section does not give any indication of any limit of time. Although S. 61 may not by itself be challengeable, the rules may be, notwithstanding that they were made under powers given by S. 82. A limit of time was deliberately put in by the constitutional amendment to distinguish between cases which fall within management from those of extinguishment and modification. Without a limit of time the management would be an excuse for deprivation of property without compensation and that is not the intention of Art. 31. It is hardly to be thought that an antinomy between Art. 31 and 31-A (1) (b) was deliberately introduced.

14. We do not express an opinion whether the rules can be read to indicate the limited period of management or that the scheme of the Act and the rules must be viewed together in this connection. But we are clear that the rules do not improve matters. Although it may not be possible to attack S. 61 which enables the State to hold the property as long as necessary as the section is protected, the action of

the State in making such rules as give no indication of a limit of time may be a circumstance to consider if the claim of protection is made out. Under clause (b) of Art. 31-A (1) protection is to State action in taking over management for a limited period and to laws enabling this to be done, but not to management unlimited in time. Section 61 read with S. 82 must therefore require that any rule made should accord with the protection given on these terms by Art. 31-A otherwise the protection will fail. Advantage of the words of S. 61 cannot be taken to create a permanent deprivation of the property and yet claim protection of Art. 31-A (1) (b). It is in this context that we must examine the provisions.

15. We must first clear one misapprehension and it is that the provisions of Chapter IV can be said to apply in toto. It must be remembered that that chapter is primarily concerned with the liquidation of liability of landholders and schemes to effect that purpose. Section 58 does not give a clean power of sale but only after a liquidation scheme is sanctioned. That applies to landholders and may not be made applicable to non-landholders.

16. To see how the management is to work in respect of non-landholders we have to turn to the rules. Here the pertinent rule is R. 35. That rule requires a report from the Manager after about a year to enable the State Government to consider whether it is necessary to continue management. The State Government may then decide to release the land from management, or continue it. The management may continue for periods of 5 years at a time on the strength of periodic reports but if management is to continue beyond 10 years a formal inquiry is necessary and then Government may decide to continue the management further. No limit of time is then indicated. There is, therefore, no limit set at all. The protection of Art. 31-A (1) (b) is available only when there is a definite limit in the law for the period of management. Neither S. 61 alone, nor read with the rules indicates any such limit and the condition of protection from Articles 13, 14, 19 and 31 is thus not available. The argument of the learned Attorney General that so long as there is a possibility of a return of the land to the original owner, we must construe the management as of a limited period is not acceptable to us. It is hardly to be expected that a return of property which is on the Greek Kalends can be

vators or tenure-holders. The thekedari system alone was to go because it was an obstacle to the conferment on cultivators the benefits of the U. P. Zamindari Abolition and Land Reforms Act.

9. The Bill after receiving the assent of the President of India, became law on 20th January, 1959. On 30th June, 1959, the State Government issued notification No. 312/IC-277-C-1953 enforcing the Thekedari Abolition Act in the above-mentioned nine districts of the State. The same day another notification no. 312(4)/IC-277-C-1953 was issued under section 3 of the Thekedari Abolition Act ordering that with effect from July, 1959, all leases in respect of Government Estates in those nine districts shall be determined. The same day, the State Government issued a third notification under the powers conferred by clause (b) of sub-section (1) of Section 2 of the U. P. Zamindari Abolition and Land Reforms Act, 1950. This notification directed that the Zamindari Abolition and Land Reforms Act shall with effect from July 1, 1959, apply to Government estates situate in the districts in which the Thekedari Abolition Act has been enforced by virtue of the notification dated June, 30, 1959. This notification then stated:

"but in the case of estates or parts thereof in which no intermediary, as defined in clause (12) of section 3 of the said Act, has any right, title or interest, the Act shall apply subject to the modifications and amendments specified in the Schedule appended hereto."

The notification further stated that the Zamindari Abolition and Land Reforms Act shall come into force in the aforesaid estates with effect from 1st July, 1959. With a single swift and an efficient stroke, the Thekedari Abolition Act was extended and enforced in the nine districts. All leases were determined and the Zamindari Abolition and Land Reforms Act enforced, in respect of all the Government Estates, with effect from 1st July, 1959.

10. The speech of the Finance Minister did indicate that the Thekedari system had to be abolished before land reforms could be enforced in the Government Estates, but the Hon'ble Minister did not say that only thekedari leases were to be affected by the Act. The language of the definition clauses is wide and includes every lease and lessee by whatever name called. The intention that the Act was to govern all leases of the Government estates is further strengthened by the second notification mentioned above by which all the leases were determined. Further, the third notification enforcing the Zamindari Abolition and Land Reforms Act made it clear that in the case of estates in which no

intermediary, as defined in clause (12) of S. 3 of the Zamindari Abolition and Land Reforms Act, has any right, title or interest, the Zamindari Abolition and Land Reforms Act shall apply subject to the modifications and amendments specified in the schedule. Clause (12) of section 3 of the U. P. Zamindari Abolition and Land Reforms Act defined an 'intermediary' to include a thekedar. The determination of the leases and the enforcement of the Zamindari Abolition and Land Reforms Act was not confined to those estates alone which were under a lease with a thekedar. A perusal of the Schedule shows that sections 130 and 131 of the Zamindari Abolition and Land Reforms Act were to apply with the modification that a lessee to whom the provisions of the Government Grants Act, 1895 apply will become a bhumidhar, if he possessed the right to transfer the holding by sale; otherwise he will become a sirdar. So, in respect of the estates in which no intermediary including the thekedar had any right, the leases made by the State Government were determined, but the lessees became bhumidhars or sirdars. In Government Estates on lease to thekedars, the Zamindari Abolition Act applied as it was. The title of the thekedar determined under section 4 of that Act, but cultivators or tenants became bhumidhars or Sirdars. In every case, all Government leases were extinguished and fresh rights conferred, on the tillers of the soil.

11. If it were to be held that non-thekedari leases were not within the purview of the Act, the purpose mentioned in the preamble i.e. the introduction of land reforms in Government Estates would be frustrated rather than facilitated. For instance, the Zamindari Abolition Act will confer its benefits on subtenants on land covered by thekedari leases, but will not apply to subtenants of other kinds of Government leases. This will be odd and discriminatory, specially when in all Government Estates in 31 other districts where no thekedars existed, the Zamindari Abolition Act had already been enforced by notification no. 1780/IC-227-C 1953 dated March 31, 1955 (See p. 361 of Government Edition of U. P. Z. A. Act 1958 Ed.) For all these reasons, I am unable to accept the petitioner's submission that the Thekedari Abolition Act applied only to thekedari leases. But, I am prepared to hold that this historical survey plainly and unambiguously establishes that the legislature in enacting the Thekedari Abolition Act did not intend that the non-thekedari lessees of Government Estates would vanish or be uprooted from the soil. Cultivatory leases were intended to be respected. Cultivators were to have the benefit of the

laws relating to land reforms and were to become bhumidhar or sirdar.

12. In 1965 the State Government appears to have departed from the initial proclaimed purpose that the Thekedari Abolition Act was to apply to the nine districts mentioned by the Hon'ble Revenue Minister. By a notification No. 1683/IC-340C-65, the State Government extended the provisions of the Act to the areas comprising the district of Naini Tal, with effect from June, 26, 1965. The same day by another notification no. 1688 (ii) IC-340C-65, the State Government ordered that under section 3 of the Thekedari Abolition Act, all leases in respect of Government Estate in 53 Mustajiri villages of the Tarai and Bhabar Government Estate, district Naini Tal, shall with effect from 1-7-1965 be determined. Mustajiri means zamindari. In these villages the Government lessees had proprietary rights (vide District Gazetteer Vol. 34, p. 128). Then, all leases in the Government Estates of 35 other villages in the Tarai and Bhabar area were determined by the impugned notification dated 30th June, 1966. These are non-mustajiri or kham villages, that is, directly managed; the rent being in cash, at Bighawar rate. For the petitioners it was contended that though the leases were terminated under the Thekedari Abolition Act, but the Zamindari Abolition Act has not been extended to the Government Estates in these 35 villages. I asked the learned counsel appearing for the State to verify this and make a statement. The hearing was adjourned to enable him to obtain instructions. Learned counsel then confirmed the fact stated for the petitioners.

13. The result, therefore, is that the Thekedari Abolition Act is in force in the district of Naini Tal. All leases in respect of Government Estates in 35 villages were determined by the impugned notification of 30th June, 1966. There has been no enforcement of the U. P. Zamindari Abolition and Land Reforms Act to the Government Estates in these villages. The petitioners' rights, title and interest under the leases have vanished. They have not acquired any rights under the Zamindari Abolition and Land Reforms Act. For the petitioners it was urged that the impugned notification was a mala fide exercise of power.

14. To this the reply was that the Act conferred a discretionary power on the Executive to determine leases in any district. The impugned notification was squarely within the language of the section; which did not make the determination of the leases conditional upon the introduction of land reforms. The preamble could not control the charging sections. The non-enforcement of the Zamindari Abolition

Act was not relevant to the validity of the notification. The question is: Are Courts tied down merely to the literal view of words? Mr. Justice Holmes said: "We must think things and not words." Per Hidayatullah J. in I. G. Golak Nath v. State of Mysore, Writ Petns. Nos. 153 and 205 of 1966 decided by the Supreme Court on 27-2-1967 reported in AIR 1967 SC 1643. Venkata-rama Aiyar, J. in Chamarbaugvala v. Union of India, AIR 1957 SC 628 (Para 6) held that the literal meaning had only a prima facie preference in a court; but to arrive at the real meaning it is always necessary to get an exact conception of the aim, and the scope and object of the whole Act. Viscount Simonds in A. G. v. Prince Ernest Augustus, 1957 AC 436 at p. 460 said that words took their colour and contents from their context; context includes other enacting provisions, the preamble, the existing state of the law and the mischief which by legitimate means the Court can find that the Statute was designed to remove.

15. In Industrial Law bonus is understood to be a share of the workman in profits. The labour appellate tribunal awarded bonus even though the Mill had made a loss. The Supreme Court reversed the decision. In Muir, Mills Ltd. v. Suit Mills Mazdoor Union, AIR 1955 SC 170 (para 17) Bhagwati, J. held that the concept of social justice does not emanate from the fanciful notions of any adjudicator but must have a more solid foundation.

16. In Kochuni v. State of Madras, AIR 1960 SC 1080 the Supreme Court confined the applicability of Article 31-A of the Constitution to laws relating to agrarian reforms only, in view of its statement of objects and reasons.

17. So, a discretionary power can be validly exercised within the language of the law as circumscribed by its purpose and policy. If by taking advantage of the flexibility of the language, the executive creates a tiny loophole and attempts to drive through it a coach and four, to gain an end contrary to the true intent and content of the law, it fraudulently diverts the use of power. Such an exercise is colourable and void.

18. The legislature knew that in 1955 the benefits of the Zamindari Abolition and Land Reforms Act had been extended to Government Estates in 31 districts. It was told that the Thekedari Abolition Act was intended to extend land reforms in the remaining districts. I dare say that the legislature, and the President of India while giving his assent, would have recoiled at the very thought of it, had they been informed that this Act will be used to single out the District of Naini Tal for a harsh and oppressive treatment, by extinguishing

the leases of pioneers who risked their lives and fortune to develop the area for the first time in its history, without extending the benefits of the land reforms provisions. We have seen that the legislature was in a way assured to the contrary. The impugned notification is an act of bad faith with the legislature. It is fraud on powers and is for that reason ineffective. The impugned notification deserves to be quashed.

19. If the submission for the State is accepted and the notification is held to be a valid exercise of the power conferred by the Act, the Act itself would cease to have the protection of Article 31-A. While dealing with the next submission that the Act violates the second proviso to Article 31-A, I have held that Article 31-A protects legislation relating to agrarian reforms. On the submission of the learned counsel, the Thekedari Abolition Act would, in relation to Nainital district, not have that objective. It will not be covered by Article 31-A and would be open to attack on the ground that it violates Articles 14, 19 or 31. It may well have to be held that it violates Article 14.

20. The next submission advanced on behalf of the petitioners was that the Thekedari Abolition Act violates the second proviso to Article 31-A of the Constitution and as such it became void with effect from 20th June, 1964, when the aforesaid second proviso was added to the Constitution by the Constitution 17th Amendment Act.

21. Before dealing with the merits of this problem, it will be feasible to consider the scope of the second proviso and the place the Constitution reserves for it in the scheme of the Articles relating to right to property. This matter cannot be adequately understood without a knowledge of the legal background of Articles 31, 31-A and 31-B. The relevant and the material provisions of these Articles may first be read:

"31. Compulsory acquisition of property:

(1) No person shall be deprived of his property save by authority of law.

(2) No property shall be compulsorily acquired or requisitioned save for a public purpose and save by authority of a law which provides for compensation for the property so acquired or requisitioned and either fixes the amount of the compensation or specifies the principles on which and the manner in which, the compensation is to be determined and given; and no such law shall be called in question in any court on the ground that the compensation provided by that law is not adequate.

(2A) Where a law does not provide for the transfer of the ownership or

right to possession of any property to the State or to a corporation owned or controlled by the State, it shall not be deemed to provide for the compulsory acquisition or requisitioning of property, notwithstanding that it deprives any person of his property.

(3) No such law as is referred to in clause (2) made by the Legislature of a State shall have effect unless such law, having been reserved for the consideration of the President, has received his assent".

.....

31-A. Saving of laws providing for acquisition of estates, etc. —

(1) Notwithstanding anything contained in Article 12, no law providing for—

(a) the acquisition by the State of any estate or of any rights therein or the extinguishment or modification of any such rights, or

(b)

(c)

(d)

(e)

shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by Article 14, Article 19 or Article 31:

Provided that where such law is a law made by the Legislature of a State, the provisions of this article shall not apply therein unless such law, having been reserved for the consideration of the President, has received his assent.

Provided further that where any law makes any provision for the acquisition by the State of any estate and where any land comprised therein is held by a person under his personal cultivation, it shall not be lawful for the State to acquire any portion of such land as is within the ceiling limit applicable to him under any law for the time being in force or any building or structure standing thereon or appurtenant thereto, unless the law relating to the acquisition of such land, building or structure, provides for payment of compensation at a rate which shall not be less than the market value thereof."

Sub-section (2) of Article 31-A explains the expression "estate" and "rights" in relation to an estate. An "estate" means what the local law relating to the land tenure says. "Rights" include rights vesting in a proprietor, tenure-holder or other intermediary etc.

22. Article 31-B runs as follows:

"31-B. Validation of certain Acts and Regulations:— Without prejudice to the generality of the provisions contained in Article 31-A, none of the Acts and Regulations specified in the Ninth Schedule nor any of the provisions thereof shall be deemed

to be void, or ever to have become void, on the ground that such Act, Regulation or provision is inconsistent with, or takes away or abridges any of the rights conferred by, any provisions of this part, and notwithstanding any judgment, decree or order of any court or tribunal to the contrary, each of the said Acts and Regulations shall, subject to the power of any competent Legislature to repeal or amend it, continue in force."

The 9th Schedule at present has 64 entries. The Explanation to the 9th Schedule is:

"Explanation: — Any acquisition made under the Rajasthan Tenancy Act, 1955 (Rajasthan Act, III of 1955), in contravention of the second proviso to clause (1) of Article 31-A shall, to the extent of the contravention, be void." It may be noted that the Rajasthan Tenancy Act, 1955 is mentioned at Entry 55 of the 9th Schedule.

23. The Bihar Land Reforms Act, 1950, which sought to abolish zamindari was challenged in Kameshwar Singh v. State of Bihar, AIR 1951 Pat 91 (SB). The plea that it violated Article 31 (2) failed, but the attack under Article 14 succeeded. The Patna High Court delivered the judgment on March 12, 1951. At that time Land Reforms Acts of several States including Uttar Pradesh, Orissa and Madhya Pradesh were under challenge in courts on similar grounds. With a view to put an end to this litigation and make agrarian reforms effective, Parliament by the Constitution 1st Amendment Act, 1951, passed on 18th June, 1951, added Articles 31-A and 31-B with retrospective effect. Article 31-A protected laws providing for the acquisition of estates or rights therein. Article 31-B was put in as a further line of defence. The 9th Schedule contained the Land Reforms Acts passed in the various States. Thus the first stage of agrarian reforms was achieved.

24. In *State of West Bengal v. Bala Banerjee*, AIR 1954 SC 170 the Supreme Court held that compensation in Article 31 (2) meant "a just equivalent." Another controversy which was raised at that time related to the mutual applicability of clauses (1) and (2) of Article 31. In *Dwarkanadas Shrinivas v. Sholapur Spg. and Wvg. Co. Ltd.*, AIR 1954 SC 119 and AIR 1954 SC 92 the majority held that clauses (1) and (2) of Article 31 dealt with that same subject matter of Eminent Domain and a substantial deprivation of the right to or of possession of property though done under clause (1) would have to satisfy the conditions of clause (2). Das, J. in his minority judgment, however, held that clause (2) alone dealt with the concept of Eminent Domain, that is, acqui-

sition or requisition wherein title or possession passed to the State, whereas clause (1) related to police powers. Parliament was exercised over these decisions. Pandit Jawahar Lal Nehru indicated that there were two courses open, either to "reform" the Supreme Court, or to "disarm" it by amending the Constitution. The second course was adopted by enacting the Constitution 4th Amendment Act, 1955, to nullify those decisions. As observed by Subba Rao J. in *Kochuni's case*, AIR 1960 SC 1080 (Para 23) Parliament accepted the minority view of Das, J. Clause (2) of Article 31 was changed. The word "requisition" was introduced in it in place of the phrase "shall be taken possession of". Clause 2A was also added. To make the inadequacy of compensation non-justiciable, the following was added to clause (2)

"and no such law shall be called in question in any court on the ground that the compensation provided by that law is not adequate."

25. It was felt that the fourth amendment was not intended to abolish the fundamental right conferred by Article 31 (2). If the word "estate" in Article 31-A was widely construed, it would include practically the entire land of the country, and the same could be taken for a non-public purpose and for meagre compensation. That would have made Article 31 (2) a dead letter, *qua* land. In *Kochuni's case*, AIR 1960 SC 1080 the Supreme Court considered the statement of objects and reasons of the fourth Amendment and contained the scope of Article 31-A to it. It was held that "Article 31-A deprives citizens of their fundamental rights and such an article cannot be extended by interpretation to overreach the object implicit in the article." It was held that Article 31-A would apply only to laws relating to agrarian reforms in respect of estates held on tenure. Article 31-A would not be attracted to a law providing for instance, partition or devaluation of the property, or laws which were purely expropriatory without any relation with agrarian reforms. The Court took limited view of the concept of agrarian reforms, so as to exclude ancillary matters like development of waste or vacant land. The various States had undertaken the second stage of agrarian reforms by enacting laws relating to Consolidation of Holdings and imposing ceiling on land holdings. They were being challenged to Courts.

26. In this state of affairs, Parliament again intervened by enacting the Constitution 17th Amendment Act, 1964 on 20th June, 1964. The definition of "estate" was amended and enlarged so as to include waste or vacant land. The 9th Schedule was amended by adding inter

alia laws relating to imposition of ceiling on land holdings. Having protected the ceiling Acts, Parliament protected lands within the ceiling limits of tenure-holders. For that, the second proviso was added. The explanation was appended to the 9th Schedule to make the second proviso really effective even against obnoxious existing laws.

27. In AIR 1965 SC 632 the Supreme Court held that Article 31-A would apply to transfers or alterations of tenure where that was dealt with in a legislation, the general scheme of which was to promote agrarian reforms. The matter again came up before the Supreme Court in AIR 1965 SC 1017 where Subba Rao, J. spoke for the Court that the position was that agrarian reforms included ancillary matter like development of vacant and waste land, as indicated by the 17th Amendment, but that Article 31-A would apply to laws relating to agrarian reforms alone.

28. The position therefore, was that Article 31(2) referred generally to acquisition and requisition of property, for which the inadequacy of compensation was not justiciable. Sub-clause (a) of Clause (1) of Article 31-A dealt with laws relating inter alia, to acquisition and requisition of an "estate", that is to say, of land which was held on a tenure and is sought to be taken under a law relating to agrarian reforms. Article 31-A protected such laws against violations of Articles 14, 19 and 31. After the 17th Amendment, its role in the scheme of things visibly changed. It gave by the 2nd proviso, protection to persons also against acquisition of their ceiling areas.

29. It was for the State argued that the second proviso was merely a proviso to Article 31-A. Its violation would make Article 31-A inapplicable, and the law would become vulnerable to an attack under Articles 14, 19 and 31. But then if a law relating to acquisition of an estate satisfied Clause (2) of Article 31, it would be valid. In my opinion this submission is not sound.

30. Article 31-A after the 17th Amendment, carves out a field of legislation from Article 31(2), and is a complete code in respect of that field. The field is acquisition of an 'estate'. On this field Article 31-A acts to the different ways. Negatively, it protects laws relating to that field from an attack under Articles 14, 19 and 31. Positively, by the second proviso it protects persons personally cultivating land within their ceiling limits, from acquisition without payment of compensation at the market rate. This is a protection against Article 31(2); because under Article 31(2), such land could be acquired without paying compensation at the market rate. If Article 31(2) were

also to apply, the result would be that Parliament will be deemed to give with one hand and, at the same time, take it away with the other. That will be absurd.

31. The second proviso does not in so many words indicate the effect of its contravention. But, the Explanation simultaneously added to the 9th Schedule suggests that a law contravening the second proviso would be void. In my opinion, Parliament gave a substantive guarantee and conferred a fresh fundamental right by the second proviso. It is well known that the legislature can enact a positive independent provision in the form of a proviso, see *Ishverlal Thakorelal Almaula v. Motibhai Nagjibhai*, AIR 1966 SC 459 (Para 8) and *State of Orissa v. Debaki Debi*, AIR 1964 Supreme Court 1413 (Para 21). The submission for the State that the Thekedari Abolition Act, even though it may violate the second proviso, would nonetheless be valid, if it does not infringe Clause (2) of Article 31, is in my opinion, not sound. If the Thekedari Abolition Act violates the second proviso, it would be unconstitutional then and there.

32. The question then is whether the Thekedari Abolition Act infringes the second proviso to Article 31-A. Clause (a) of sub-section (1) of this Article deals with acquisition of the estate or of rights in an estate. It also mentions extinguishment or modification of rights in an estate. In *Ajit Singh v. State of Punjab*, AIR 1967 SC 856 the Supreme Court held that if the result in the case of extinguishment of rights is the transference of all the rights in an estate to the State, it would properly fall within expression "acquisition by the State of an estate". It ruled that in the case of "modification or extinguishment" of rights the beneficiary is not the State, whereas in "acquisition" either of an estate or of rights therein the beneficiary is the State itself. The Supreme Court dealt with a case of determination of a lease and observed (paragraph 8).

"For example, suppose the State is the landlord of an estate and there is a lease of that property, and law provides for the extinguishment of leases held in estate. In one sense it would be an extinguishment of the right of a lessee, but it would properly fall under the category of acquisition by the State because the beneficiary of the extinguishment would be the State."

The Thekedari Abolition Act extinguishes the leases granted by the State Government in respect of Government estates. The beneficiary of the determination of the leases is the State. Under section 6 of the Act the Collector takes over possession and charge of the land, building

etc. Under section 4, clause (g) of the Act every mortgage, sub-lease or other transfer of lease rights are also to be determined as if the land included in the lease had been "acquired" under an enactment providing for compulsory acquisition. The Act contemplates payment of compensation for the determination of the lessees' interest. It is thus plain that the determination of the lease in the instant case amounts to acquisition by the State within meaning of Article 31-A. In *Ajit Singh's case*, AIR 1967 SC 856 the Supreme Court further held that the phrase "acquisition by the State of an estate" in the second proviso has the same meaning it has in the main provision of Article 31-A. The *Thekedari Abolition Act* would be "a law making provision for acquisition by the State of an estate" within Article 31-A as well as the second proviso.

33. The land contemplated by the second proviso cannot be acquired except on payment of compensation at the market rate. Learned counsel for the petitioner contended that the *Thekedari Abolition Act* does not really pay any compensation, the provisions therefore being illusory. The learned counsel appearing for the State contested this, but however admitted that the Act does not seek to provide compensation at the market rate but, before the second proviso can apply, two conditions have to co-exist. The land must be within the ceiling limit applicable to the lessee and secondly that land must be under personal cultivation.

34. In this State U. P. Imposition of Ceiling on Land Holdings Act, 1960 came into force on January 3, 1961. It extended to the whole of Uttar Pradesh. It came into force at once in the whole of the State except in the areas mentioned in section 2, where it would come into force from such date as may be notified. The portion of Tarai and Bhabar sub-Division where no intermediary exists, is exempt from section 2. In such portions of the Tarai and Bhabar Sub-Division the Act came into force on 3rd January, 1961. In any event, proceedings under that Act have been taken in respect of the land given to the petitioners by the Government under the lease dated 12th February, 1951. The Prescribed Authority by its order dated 29-9-1962 held that the lease shows that the total area leased out in both the villages was 1188.82 acres. After exempting the orchards, groves etc. which are exempted under the Ceiling Act, 348.82 acres were left, to which the provisions of ceiling would apply. Under the Act the petitioners would be entitled to 368 acres as their ceiling areas. Thus the entire land covered by the lease was

within the ceiling limits and no land was held to be surplus with the petitioner.

35. For the respondents it was urged that the U. P. Imposition of Ceiling on Land Holdings Act will not apply to land covered by leases made by the Government under the Government Grants Act, 1895. Under Sections 2 and 3 of that Act, the Transfer of Property Act or the U. P. Tenancy Act were not applicable to lands which are the subject of a grant or transfer under that Act. The Government Grants (U. P. Amendment) Act, 1959 repealed and re-enacted Ss. 2 and 3 of the Government Grants Act, 1895. After the amendment nothing contained in the Transfer of Property Act, 1882, the Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950, the Uttar Pradesh Urban Areas Zamindari Abolition and Land Reforms Act 1956, the Jaunsar-Bawar Zamindari Abolition and Land Reforms Act, 1956, the U. P. Tenancy Act, 1939 or any other law for the time being in force, shall apply or be deemed to have ever applied to any grant or transfer of land or of any interest therein made by the government in favour of any person. Under section 3 the grant or transfer was to take effect according to its tenor notwithstanding these laws or any decree or any direction of the court of law.

36. After the passing of this amending Act, it was felt that section 2 as amended was likely to affect the operation of the law for imposition of ceiling on land holding that might be made in future. It was also apprehended that the language of Section 2 may undo the vesting of estates of Government grantees under Sec. 4 of the U. P. Zamindari Abolition Land Reforms Act, 1950. With a view to remove these misgivings the Government Grants Act, 1895 was amended again, by the Government Grants (U. P. Amendment) Act, 1960. Sections 2 and 3 of the Act were again substituted and were deemed always to have been substituted. So substituted section 2 provided that nothing contained in the U. P. Tenancy Act, 1939, or the Agra Tenancy Act, 1926, shall affect or be deemed to have ever affected any rights, created, conferred or granted by leases of land made by the Government in favour of any person. Section 3 of the 1960 Amendment Act repealed the Amending Act 9 of 1959 with effect from the date of its enforcement. The 1959 Act was deemed to have been so repealed as if it has no force or effect at any time whatsoever. The position was as if the 1959 Act had never been enacted.

Sub-section (3) of section 2 after its amendment in 1960 was as follows:

"(3) Certain leases made by or on behalf of the Government to take effect according to their tenor—All provisions

restrictions, conditions and limitations contained in any such creation, conferment or grant referred in section 2, shall be valid and take effect according to their tenor any decree or direction of a court of law or any rule of law, statute or enactment of the Legislature to the contrary notwithstanding:

Provided that nothing in this section shall prevent, or be deemed ever to have prevented, the effect of any enactment relating to the acquisition of property, land reforms or the imposition of ceiling on agricultural land."

So, a lease made by the Government under the Government Grants Act was made subservient to the effect of any enactment relating to land reforms or the imposition of ceiling on agricultural land. It is, therefore, not correct that the law relating to the imposition of ceiling was not to apply to the lands of the petitioners leased out to them under the Government Grants Act. Consequently, the effect of the second proviso of Article 31-A of the Constitution cannot be avoided on this ground.

37. Under clause (b) of section 4 of the Thekedari Abolition Act, a maximum of 30 acres of such portions of the leased land as have been brought by the lessee under his personal cultivation are left with him and the lessee becomes the hereditary tenant of such land. It is obvious that this provision is not correlated to the ceiling limit of the lessee. No amendment was introduced in it after the coming into force of the Ceiling Act in 1961. It still provides for a maximum of 30 acres only. Under the Imposition of Ceiling on Land Holdings Act, the minimum ceiling area of a tenure-holder is 40 acres of fair quality land (vide section 4 (2) (a) of the Act). Under clause (b) of section 4 (2) if the tenure-holder has a family having more than five members, the ceiling area shall be 40 acres together with 8 acres of fair quality of land for every additional member of the family, subject to the maximum of 24 such acres. Thus the ceiling area varies between 40 and 64 acres for every tenure-holder.

38. Moreover, the provision in S. 4 (b) of the Act for leasing up to 30 acres in the shape of a hereditary tenancy really does not go to feed the 2nd proviso. Under the Act, the lease as a whole is extinguished and the entire land including that under personal cultivation is acquired. The conferring of hereditary tenancy rights for a part of the acquired land has not been suggested to be providing for compensation at the market rate. The hereditary tenancy was not suggested to be of the same value as the rights under the original lease. It is thus clear that the Thekedari Abolition Act seeks also to acquire land under

personal cultivation and within the ceiling limit of the lessees, without providing for payment of compensation at the market rate.

39. Is the Act severable? Could its application or enforcement be restricted to valid part only; viz. the part of leased lands which are not within the ceiling limit? I think not. The principles of severability were summarised by Venkatarama Aiyer J. in the leading case of AIR 1957 SC 628 thus:

"1. In determining whether the valid parts of a statute are separable from the invalid parts thereof, it is the intention of the legislature that is the determining factor. The test to be supplied is whether the legislature would have enacted the valid part if it had known that the rest of the statute was invalid. Vide Corpus Juris Secundum, Vol. 82, p. 156; Sutherland on Statutory Construction, Vol. 2, pp. 176-177.

2. If the valid and invalid provisions are so inextricably mixed up that they cannot be separated from one another, then the invalidity of a portion must result in the invalidity of the Act in its entirety. On the other hand, if they are so distinct and separate that after striking out what is invalid, what remains is in itself a complete code independent of the rest, then it will be upheld notwithstanding that the rest has become unenforceable. Vide Cooley's Constitutional Limitations, Vol. 1, at pp. 360-361; Crawford on Statutory Construction, pages 217-218.

3. Even when the provisions which are valid are distinct and separate from those which are invalid, if they all form part of a single scheme which is intended to be operative as a whole then also the invalidity of a part will result in the failure of the whole. Vide Crawford on Statutory Construction, pp. 218-219.

4. Likewise, when the valid and invalid parts of a statute are independent and do not form part of a scheme but what is left after omitting the invalid portion is so thin and truncated as to be in substance different from what it was when it emerged out of the legislature, then also it will be rejected in its entirety.

5. The separability of the valid and invalid provisions of a statute does not depend on whether the law is enacted in the same section or different sections (vide Cooley's Constitutional Limitations, Vol. 1 pp. 361-362); it is not the form, but the substance of the matter that is material, and that has to be ascertained on an examination of the Act as a whole and of the setting of the relevant provisions therein.

6. If after the invalid portion is expunged from the statute what remains cannot be enforced without making

alterations and modifications therein, then the whole of it must be struck down as void, as otherwise it will amount to judicial legislation. Vide Sutherland on Statutory Construction, Vol. 2, p. 194.

7. In determining the legislative intent on the question of separability, it will be legitimate to take into account the history of the legislation, its object, the title and the preamble to it. Vide Sutherland on Statutory Construction, Vol. 2, pp. 177-178."

The Act makes a single scheme which is intended to be operative as a whole. Then, it cannot be predicated that the legislature would have passed this Act, if it had considered that lands under personal cultivation and within ceiling limit cannot be acquired under the existing provisions for compensation. If the Act is held inapplicable to such limit, the result will be that the lease would remain in force and the thekedar or the lessee would continue his old rights, in such lands. It cannot be said that the legislature would have agreed to a piecemeal determination of the lease, as that would not have fulfilled the purpose of introducing land reforms in respect of those parts of the land for which the lease remained in force. The Act, in my opinion, is not severable.

40. The Act violates the second proviso to Article 31-A. That proviso came into force on 20th June, 1964. With effect from that date, the Thekedari Abolition Act became void and inoperative. The State Government hence had no power to determine the petitioner's lease after 20th June, 1964, under that Act. The impugned notification dated 30th June, 1966, does not have the force of law and is void.

41. The last submission raised on behalf of the petitioners was that the Thekedari Abolition Act does not profess to pay what may be called compensation at all. The compensation for the determined lease was nothing but illusory. The Act consequently infringed Article 31 (2) of the Constitution. The short answer is that the Act being covered by Article 31-A, is completely protected by Article 31-A from being affected by Article 14, 19 or 31.

42. In the result, the petitions succeed and are allowed. The U. P. Government Estates Thekedari Abolition Act No. 1 of 1959 is declared to have become unconstitutional and void with effect from 20-6-1964. The impugned notification dated 30th June, 1966 issued by the State Government determining the petitioners' lease and also the notice issued by the Deputy Commissioner, Naini Tal are quashed. The petitioners will be entitled to their costs

which are assessed at Rs. 500/- in each case.

RGD

Petitions allowed.

AIR 1969 ALLAHABAD 56 (V 56 C 9)
LUCKNOW BENCH

JAGDISH SAHAI AND R. CHANDRA JJ.
Virendra Swarup, Petitioner v. President of India and others, Opposite Parties.

Writ Petn. No. 463 of 1968, D/- 24-5-1968.

(A) Constitution of India, Art. 183(a) — Scope — Representation of the People Act (1951), Ss. 74, 67A, 157 — Notification under S. 74 — Effect of — Object of S. 67A — Commencement of term — Deputy Chairman of legislative Council ceasing to be member by virtue of his election in 1962 and again becoming member by virtue of his election in 1968 — Notionally there was a break in the eye of law.

A was elected as member of U. P. Legislative Council for 6 years on 6-5-1962 from Graduates Constituency. On 6-2-1965 he was elected Deputy Chairman of Council. Fresh election was held to elect member of Council from same constituency on 21-4-1968. Counting of votes took place on 22-4-1968. A who was also a candidate was declared elected. Election of A was notified under S. 74 of Representation of the People Act on 6-5-1968. Governor of U. P. directed Secretary of Council to announce that B was to function as Deputy Chairman from 6-5-1968. This order of Governor was challenged by A in petition under Art. 226 of Constitution.

Held that it was for the purposes of notification under S. 74 of the Representation of the People Act that A would be treated to have been elected as a member on 22-4-1968. Before commencement of the new term the process of election should be completed and that was why S. 67A had to be enacted. S. 67A did not confer on a person elected any rights to the office of the member unless and until his election was notified and unless and until the term for which he was elected commenced. Under S. 157 of Representation of the People Act the persons elected to it became members only on the date of the commencement of their term and ceased to be members on the date on which their term expired. If they were re-elected, then their fresh term started from the date on which the notification was issued. Thus A ceased to be a member by virtue of his election in 1962 but again became a member by virtue of his election in 1968. It could not therefore

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be said that he did not cease to be a member on the completion of his 1962 term. Notionally there was a break in the eye of law. Article 183(a) dealt with the consequences that would ensue in the existing term of a member and had no relation with the succeeding term. (1914) 2 Ch. 376 and (1879) 4 QBD 230, Not appld. (Paras 10, 12, 13, 14, 17, 23)

(B) Civil P. C. (1908), Pre. — Interpretation of Statutes—Meaning of words — Same words used in two different provisions in same Act — Words must be given same meaning in both provisions. AIR 1952 SC 369, Rel. on. (Para 20)

(C) Civil P. C. (1908), Pre. — Interpretation of Statutes — Constitutional law — Marginal note in Constitution is part of Constitution and furnishes clue to meaning and purpose of Article — AIR 1955 SC 661, Rel. on. (Para 21)

(D) Civil P. C. (1908), Pre. — Interpretation of Statutes — Constitutional law — Rule of construction.

While interpreting a democratic Constitution any interpretation which may result in a person perpetually continuing in an elected office in spite of his term coming to an end must be repelled. Such an interpretation will be a negation of democracy and would result in elected officers of a Legislature becoming life tenure-holders. (Para 24)

Cases Referred: Chronological Paras

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| (1955) AIR 1955 SC 661 (V 42)= | |
| 1955-2 SCR 603, Bengal Immunity | |
| Co. Ltd. v. State of Bihar | 21 |
| (1952) AIR 1952 SC 369 (V 39)= | |
| 1953 SCR 1, Aswini Kumar Ghose | |
| v. Arabinda Bose | 20 |
| (1914) 2 Ch 376=83 LJCh 850, | |
| English v. Cliff | 15 |
| (1879) 4 QBD 230=48 LJMC 95, | |
| Tomlinson v. Bullock | 15 |

Sudhir Shanker, K. K. Narain, Devendra Swarup and Shailendra Swarup, for Petitioner.

JAGDISH SAHAI, J. :— Shri Virendra Swarup (hereinafter referred to as the petitioner) has approached this Court under Article 226 of the Constitution of India and has prayed for the issue "of an order, direction or writ in the nature of certiorari" to quash the order contained in letter dated 13-5-1968 (annexure 2) and for "an order, direction or writ in the nature of mandamus directing the respondents not to implement or give effect to the aforesaid order". There is also the prayer for a writ of mandamus directing the respondents nos. 1 and 2 not to withhold the amenities and emoluments of the petitioner as Deputy Chairman of the Legislative Council so long as he continues to be the member of the Council. In addition there is the usual prayer for the issue of any other writ or direction

as this Court may in the circumstances of the case deem it fit and proper to issue.

2. The respondent no. 1 is the President of India, the respondent no. 2, the Governor of U. P., the respondent no. 3, the State of U. P. and the respondent no. 4, Sri Darbari Lal Sharma.

3. The petitioner was elected as member of the U. P. Legislative Council (hereinafter referred to as the Council) for six years on 6th of May, 1962 from the Graduates' Constituency. On 16th of February, 1965, he was elected the Deputy Chairman of the Council. On the completion of six years, a fresh election was held to elect a member to the Council from the same constituency on 21st April, 1968. The counting of votes took place on 22-4-1968 and the petitioner who was a candidate was declared elected having secured the largest number of votes. The notification notifying the election of the petitioner issued under Section 74 of the Representation of the People Act was made on 6th of May, 1968.

4. According to the petitioner, the Governor of U. P. directed Sri Parmatma Saran Pachauri, Secretary of the Council to announce that Sri Darbari Lal Sharma was to function as the Deputy Chairman also from 6th of May 1968. Thereupon Sri Pachauri issued letters to the members of the Council on 13th of May, 1968. The letter reads:

"Mujhe apko yeh soochit karne ka adesh hua hai ki Sri Rajyapal ne Bharat Ka Sambidhan ke anuchchhed 184 ke khand (1) dwara prapta adhikaron ka prayog karte hue Sri Darbari Lal Sharma sadasya, Vidhan, Parishad ko dinank 6 May, 1968 se Vidhan Parishad ke 'Sabhapati' pad ke kartavyon ko palan karne ke lie niyukta kia hai." (Underlined ('here into ' ') by us).

It is said that the word Sabhapati has been wrongly written for Up-Sabhapati in this letter. Our original impression was that in a hurry this letter though relating to the appointment of Sri Darbari Lal Sharma as Chairman of the Council has wrongly been filed in this case. We thought that the petitioner must have received in his capacity as a member the letter appointing Sri Darbari Lal Sharma as Chairman and the one authorising him to perform the functions of the Deputy Chairman and inadvertently the wrong letter was filed. However, in view of what we have been told at the Bar we proceed on the assumption that in this letter the word Sabhapati has been wrongly written for Up-Sabhapati.

5. The petitioner's contention is that he never ceased to be a member of the Council and between the expiry of his term commencing in 1962 and the start of his fresh term in 1968 there was no interval with the result that he never

ceased to be a member of the Council. Placing reliance upon Article 183 of the Constitution of India, it was strenuously contended by Mr. Jagdish Swarup, learned counsel for the petitioner, that the petitioner continues to be the Deputy Chairman of the Council inasmuch as he never ceased to be a member. It is submitted that the office being full the Governor had no jurisdiction to direct the Secretary of the Council to announce that Sri Darbari Lal Sharma was to function as Deputy Chairman in his capacity as a member of the Council.

6. Article 183 so far as relevant for our purposes reads:

"A member holding office as Chairman or Deputy Chairman of a Legislative Council —

(a) shall vacate his office if he ceased to be a member of the Council;

....."

Mr. Jagdish Swarup contends that between the expiry of the petitioner's 1962 term and the beginning of his 1968 term there has been no lapse of time and the continuity in his membership was never broken. Learned counsel emphasises the use of the words "if he ceases" and contradistinguishing them from "when he ceases" contends that the intention of the Constituent Assembly was to allow the Chairman or the Deputy Chairman to continue if he is re-elected for the next succeeding term.

7. There is a similar provision with regard to the Speaker and the Deputy Speaker of an Assembly, the same being Article 179 the relevant part of which reads:

"A member holding office as Speaker or Deputy Speaker of an Assembly —

(a) shall vacate his office if he ceases to be a member of the assembly;

....."

Both the provisions use the same words i. e. "If he ceases to be a member" and the expressions must have the same meaning in the two provisions as the provisions fall in the same act and deal with similar matters.

8. The learned counsel next places reliance upon section 67A of the Representation of the People Act which reads:

"Date of election of candidate. — For the purposes of this Act, the date on which a candidate is declared by the returning officer under the provisions of section 53 or section 66, to be elected to a House of Parliament or of the Legislature of a State shall be the date of election of that candidate."

The argument is that by virtue of the provisions of section 67A of the Representation of the People Act, the petitioner became a member of the Legislative Council on the date when the result of his election was announced which in the

present case according to the petitioner's averment is 22nd of April, 1968, and for that reason he never ceased to be a member.

9. It is the petitioner's own case that the term of his office by virtue of his election in 1962 was to expire on "the midnight of 5th of May, 1968." (Vide his writ petition).

10. If the petitioner's argument that he became a member again on 22nd of April, 1968, be taken as correct, it would lead to the unacceptable conclusion that the petitioner again became a member of the Council for the fresh term on the 22nd of April, 1968, i. e. 13 days before the term of his office as a member by virtue of his election in 1962 came to an end. If some one else were elected instead of him, according to this argument there would be two members for thirteen days from the same constituency — a conclusion which is impossible of acceptance.

Very clearly, the submission is not correct. The provisions of Section 67A occur in the Representation of the People Act which has been enacted "to provide for the conduct of elections . . . the qualifications and disqualifications for membership . . . the corrupt practices and other offences at or in connection with such election . . .". As is well known, the process of election is a long one. It starts on the day when nominations are made. After nominations, there is scrutiny of the nomination papers. Thereafter the election is held. After that the votes are counted and the result of the election declared. Thereafter the result of the election is notified in the Government Gazette. It is for the purposes of notification under Section 74 of the Representation of the People Act that the petitioner would be treated to have been elected as a member on 22nd of April, 1968. Obviously, before the new term starts, the process of election should be completed and that is why section 67A had to be enacted. In our judgment, section 67A does not confer on a person elected any rights to the office of the member unless and until his election is notified and unless and until the term for which he is elected commences.

11. Section 157 of the Representation of the People Act is headed as "Commencement of the term of office of members of the Legislative Councils". It reads:

"(1) The term of office of a member of the Legislative Council of a State whose name is required to be notified in the Official Gazette under section 74 shall begin on the date of such notification.

(2) The term of office of a member of the Legislative Council of a State whose name is not required to be notified under section 74 shall begin on the date of pub-

lication in the Official Gazette of the declaration containing the name of such person as elected under section 67 or of the notification issued under sub-clause (e) of clause (3) of article 171, announcing the nomination of such person to the Council, as the case may be."

It is clear from this provision that a member of a council is elected for a term and that the term begins on the date on which the notification is issued.

12. The Council may be a continuing body in the sense that it is never dissolved but the persons elected to it become members only on the date of the commencement of their term and cease to be members on the date on which their term expires. If they are re-elected, then their fresh term starts from the date on which the notification is issued.

13. The notification in respect of the petitioner's election in 1968 was issued on 6th of May, 1968 as the following recital in it would show:

"In pursuance of the provision of clause (3) of Article 348 of the Constitution, the

Governor is pleased to order the publication of the following. English translation of notification no. E-7521/XVII-A-91-68, dated May 6, 1968."

The notification reads:

"Whereas elections have been held in pursuance of the notification issued under section 16 of the Representation of the People Act, 1951 (43 of 1951) for the purpose of filling the seats of the members of the Uttar Pradesh Legislative Council retiring on the 5th May, 1968, on the expiration of their term:

Now, therefore, in pursuance of section 74 of the said Act, the names of the members elected by the various council constituencies and by the members of the U. P. Legislative Assembly at the said elections, and of the members nominated to the said Council by the Governor under sub-clause (e) of Clause (3) of Article 171 of the Constitution, are hereby notified for general information.

1. Members elected by the Council Constituencies.

Name of constituency

Name of member

3. Kanpur-Cum-Jhansi Graduates' Constituency

Sri Virendra Swarup.

From the aforesaid notification it is clearly established that the petitioner's term starting in 1962 expired on the 5th May, 1968 and the term consequent to his election in 1968 started on 6th of May, 1968. Consequently, the petitioner ceased to be a member by virtue of his election in 1962 and again became a member by virtue of his election in 1968.

14. For practical purposes there might not have been a break in the continuity of his membership but notionally and legally there was such a break though it might have been for a flash of a second.

15. Mr. Jagdish Swarup contends that between the end of 5th of May, 1968 at midnight and the beginning of 6th of May 1968 at midnight there was no interval of time with the result that the petitioner never ceased to be a member of the Council. He has placed reliance upon the following two cases in support of his contention. —

1. English v. Cliff, (1914) 2 Ch. 376 at p. 381.

2. Tomlinson v. Bullock, (1878) 4 QBD 230 at p. 232.

In our opinion, these cases cannot be of help for interpreting the language of Article 183 of the Constitution of India. Those decisions are in respect of different statutes. Those cases do not deal with elections.

16. The first case was one of trust and the question that was raised in that case

related to the construction of a settlement Warrington J. observed as follows:

"... The trust in the present case is to arise at the expiration of the term of twentyone years, and if looked at from one point of view that trust, arises coincidentally with the last moment of the term, although, if looked at from another point of view, it may be said to arise at some infinitesimally small fraction of time after the last moment of the term. In my opinion, however, the only sensible view to be taken of such a limitation is that the term determines and the trust arises at the very same moment of time, and if looked at in that way, it is impossible to say that the trust arises at a later period than that allowed by law"

The observations extracted above clearly show that in such cases there is no uniform rule and two views are possible: (obviously depending upon the terms of the Statutes) one that the next term starts coincidentally with the last moment of the last term and the other being that it starts after some infinitesimally small fraction of time after the last moment of the last term.

17. The second case deals with the question as to on what date an Act will be deemed to have come into force. Lush J. observed:

The only point of time which this Act makes material is the day on which the royal assent was given. It thus recog-

nizes the well known maxim that the law takes no notice of the fractions of a day, and except where there are conflicting rights between subject and subject, for the determination of which it is necessary to ascertain the actual priority, such is the universal rule — an Act which comes into operation on a given day becomes law as soon as the day commences."

It would be noticed that the rule enunciated in the above extract does not extend to a case of conflicting rights between subject and subject. Inasmuch as in the present case another person could be elected in place of the petitioner, the conflict between his rights and that of the petitioner can be clearly visualised. This case, therefore, does not support Mr. Jagdish Swaroop. In any case it is clearly distinguishable, as is the first case.

18. Admittedly, the petitioner was elected in 1962 for a period of six years and according to his own case as set up in his petition the period of his first term came to an end on the midnight of 5th of May, 1968. It is also clear that his present term started on 6th of May, 1968, i. e. the date on which the notification was issued. At present, he is a member of the Council not by virtue of his election in 1962 but by virtue of his election in 1968 and on account of the notification issued on 6th of May, 1968. The consequences of his election in 1962 came to an end. He is a member now as a consequence of a fresh election in 1968. Consequently, we are of the opinion that he ceased to be a member by virtue of his election in 1962 but again became a member by virtue of his election in 1968. It cannot therefore be said that he did not cease to be a member on the completion of his 1962 term. As said earlier, the gap of time between the close of the 1962 term and the start of 1968 term may be only a flash of a second, but in the eye of law and notionally there was a break, and clearly, for a flash of a second, the petitioner ceased to be a member.

19. We have already pointed out that the language of Article 179(a) of the Constitution is the same as the language of Article 183(a). Both the provisions use the words "if he ceases to be a member."

20. There cannot be any manner of doubt that in the case of the Speaker or the Deputy Speaker of an Assembly no sooner his term is over he would cease to be a member even though he might have been elected for the next term even during the continuance of the existing term. If the Speaker or the Deputy Speaker cease to be members in spite of their re-election in the next succeeding term, we see no reason why the Chairman or the Deputy Chairman do not so cease to be members. The Constituent

Assembly in its wisdom has used the same expression in the two Articles, even though it knew that a Legislative Assembly would dissolve and a Council would not. It is a settled rule of interpretation of statutes that when the same words are used in two different provisions of the same Act and the two provisions deal with similar matters then the words must be given the same meaning in both the provisions; *Aswini Kumar Ghose v. Arabinda Bose*, AIR 1952 SC 369.

21. In our opinion, the expression "when he ceases to be a member" mean "when he ceases to be a member either by virtue of the closure of his term, or because of his resignation or removal from office in the same term". We find some support for this view from the marginal note to Article 183 which is "Vacation and resignation of, and removal from, the offices of Chairman and Deputy Chairman". It is settled law that a marginal note in the Constitution is a part of the Constitution and furnishes some clue to the meaning and purpose of the Article; *Bengal Immunity Co. Ltd. v. State of Bihar*, AIR 1955 SC 661.

22. Articles 178 to 187 are headed as "Officers of the State Legislature" and find place in Part VI of the Constitution. An analysis of this part of the Constitution shows that parallel provisions have been made for the Speaker and the Deputy Speaker of an Assembly and the Chairman and the Deputy Chairman of a Council. Article 178 provides for election by an Assembly of its Speaker and Deputy Speaker. For the Council, its counterpart is Article 182 which provides for the election by a Council of the Chairman and the Deputy Chairman.

23. Article 179 deals with the vacation and resignation of, and removal from, the offices of the Speaker and Deputy Speaker. For a Council, its counterpart is Article 183 which deals with the vacation and resignation of, and removal from, the offices of Chairman and Deputy Chairman. Article 180 deals with the power of the Deputy Speaker or other person to perform the duties of the office of, or to act as, Speaker. Its counterpart for purposes of a Council is Article 184 which deals with the power of the Deputy Chairman or other person to perform the duties of the office of, or to act as, Chairman. Art. 181 provides that the Speaker or the Deputy Speaker shall not preside while a resolution for his removal from office is under consideration. Its counterpart for the Council is Article 185 which provides that the Chairman or the Deputy Chairman shall not preside while a resolution for his removal from office is under consideration. Article 186 provides for salaries and allowances of the Speaker and Deputy Speaker of an Assembly and

the Chairman and Deputy Chairman of a Council, and Article 187 deals with the secretariat of State Legislature. The various provisions enumerated above clearly show that for all purposes the Chairman and the Deputy Chairman of a Council have been equated with the Speaker and the Deputy Speaker of an Assembly. Clearly the scheme of the Constitution is to have similar provisions in respect of the two sets i. e. the Speaker and Deputy Speaker one set and the Chairman and the Deputy Chairman the other set. That being the position, and inasmuch as a Speaker or a Deputy Speaker admittedly ceases to be a Speaker or a Deputy Speaker on the closure of his term even though re-elected for the next succeeding election, it must be held that a Chairman and a Deputy Chairman also so cease to hold his office. In our opinion, Article 183(a) deals with the consequences that will ensue in the existing term of a member and has no relation with the succeeding term.

24. Properly analysed, the argument of Mr. Jagdish Swarup is that inasmuch as the petitioner has got re-elected, he continues to be the Deputy Chairman to-day and would continue to be so for the next six years, i. e., until the end of his present term and in case he is re-elected, again he would continue so long as he succeeds in getting re-elected, without there being a fresh election for that office. In our judgment that never could be the intention of the Constituent Assembly. While interpreting a democratic Constitution any interpretation which may result in a person perpetually continuing in an elected office in spite of his term coming to an end must be repelled. Such an interpretation will be a negation of democracy and would result in elected officers of a Legislature becoming life tenure-holders.

25. Inasmuch as we are satisfied that there is no substance in the merits of the case, we have not examined the question whether in the instant writ petition the order of the Governor can be challenged or whether the President or the Governor can be made a party to these proceedings.

26. The petition is dismissed.
SSG/D.V.C. Petition dismissed.

AIR 1969 ALLAHABAD 61 (V 56 C 10)
LUCKNOW BENCH

R. CHANDRA AND K. C. PURI, JJ.

Shyama Charan Sri Ram Saran, Applicant v. The State, Opposite Party.

Criminal Appeal No. 72 of 1968; Capital Sentence No. 4 of 1968, D/- 8-4-1968, against judgment of S. J., Hardoi, D/- 12-1-1968.

IL/IL/E24/68

(A) Penal Code (1860), S. 300, Exception 1 — Murder — Grave and sudden provocation — What amounts to — Burden of proof — Evidence Act (1872), S. 105.

Where a person causes the death of another person it is for him to show that his act was removed from the category of murder by one of the exceptions to the section. The provocation must be such as will upset not merely a hasty, hot-tempered and hyper-sensitive person but would upset also a person of ordinary sense and calmness. The law does not take into account abnormal creatures reacting abnormally in given situations. The law contemplates the acting of normal beings in given situations and the protection that is offered by the Exception is the protection for normal beings reacting normally in a given set of circumstances. A Court has to consider whether a reasonable person placed in the same position as the accused was, would have reacted under that provocation in the manner in which the accused did. Where the provocation is sought by the accused it cannot furnish any defence against the charge of murder. (Para 11)

On the facts of the case it was held that the provocation was provided from the side of the accused himself and hence he could not claim any benefit under Exception 1 to S. 300. (Para 11)

(B) Penal Code (1860), S. 302 — Murder — Sentence — Accused himself found responsible for giving provocation — He chased the woman, threw her on ground showered knife blows on vital parts of body and virtually butchered to death on spot — Crime being committed in a most inhuman and brutal manner, death penalty awarded to accused, held was fully deserved — Accused could not claim any lenient consideration. (Para 12)

(C) Criminal P. C. (1898), S. 342 — Murder — Bad character of accused not a fact in issue in case—Sessions Judge held not justified in questioning accused to find out antecedents of his past life — He could examine him only about the evidence proposed to be used against him — In criminal proceedings, fact that accused has a bad character is irrelevant unless evidence is given that he has a good character — Evidence Act (1872), S. 54. (Para 13)

J. N. Misra, for Applicant; K. N. Kapoor, for the State.

R. CHANDRA, J. :— This is a Jail appeal by Shyama Charan (40), resident of village Malhpur Kaurha, Police Station Kant, district Shahjahanpur, against his conviction under section 302, I. P. C. by the Sessions Judge, Hardoi. He has been awarded death penalty. The Sessions Judge has also made the usual reference for confirmation of the death sentence.

Since this was a capital sentence case, and the appellant could not afford to engage a counsel, Shri J. N. Misra was appointed amicus curiae to represent him. We have heard Shri Misra for the appellant and the Assistant Government Advocate for the State.

2. Shyama Charan appellant is a Sadhu. He probably belongs to the sect of 'Dandi Sadhus' who carry a stick with them which is regarded sacred. The case of the prosecution in short was, that on 29th May, 1967 at about 3 P. M. he visited village Mahmudpur, police station Pali, district Hardoi. When he was going on the village pathway he passed through a chabutra which was situated close to the chaupal, which belonged to one Mathura Singh. Srimati Bitta a widow (sister of Mathura Singh), was sitting in that chaupal and talking to her son Mahesh Pal, aged about fourteen years. She had come to the village only a few months ago, from her late husband's place Ramapur. Mahesh Pal had come that very morning to take her back home. She, however, deferred the departure for a couple of days. When they were busy chatting in the chaupal they saw Shyama Charan appellant. He went there and sat at the door of the chaupal. Srimati Bitta and her son on seeing the Sadhu respectfully wished him with the usual words 'Siya Ram'. To their utter surprise, they found that the appellant did not like that form of greeting and completely lost temper. He remarked, 'why do you wish with the words "Siya Ram". Do you not know their misdeeds (referring to 'Sita' and 'Ram'). Ladies like you were a disgrace to the country. Would you die, if instead you used the words "Namō Narayan".'

Srimati Bitta could not tolerate those disrespectful remarks for Sita and Ram who among the Hindus are normally regarded as the incarnations of God. She immediately retorted "What type of Sadhu you are, when you are talking in these terms, are you a Sadhu or an imposter. I shall call my men who will take you to task". With these words, she got up and came out of the chaupal. While going she also kicked the stick which the appellant was carrying. When she was going through the pathway towards the house of her brother Mathura Singh which was situated about 10 paces from there, Shyama Charan also got up and took out a knife from his jhola which he was carrying and chased Srimati Bitta. He threw her on the ground, and by sitting on her chest showered knife blows on vital parts of her body. The boy Mahesh Pal saw the entire incident from the chabutra like a helpless spectator. He raised an alarm and a number of persons from inside the house of Mathura Singh and others arrived there. There-

upon the assailant took to his heels. He was chased, overpowered and arrested. He was also dispossessed of the knife and was taken to the chabutra. The victim succumbed to her injuries on the spot.

3. Mahesh Pal and his cousin Om Pal went to the police station where the former lodged the report Ext. Ka-1 at 6.30 P. M. (The distance of the police station from the scene of occurrence was about eight miles). Head Constable Mobin Ahmad P. W. 4 recorded the report. A case was registered under section 302 I. P. C. vide extract from the general diary report Ext. Ka-3. At the time of making of the report no Sub-Inspector was present at the Thana. Constable Dhani Ram was deputed to convey the information to Sub-Inspector Chandrapal Singh, who was at Chowki Panch Deura. Head Constable Mobin Ahmad himself went with some constables to village Mahmudpur. They reached there at about 10 P. M. The dead body of Srimati Bitta was found lying in the galiyara and a number of villagers were watching it. Shyama Charan appellant had also been detained there by the villagers. The Head Constable prepared the inquest report Ext. Ka-4. After the necessary formalities he despatched the dead body of Srimati Bitta through Constable Zileadar Singh P. W. 3 for post mortem examination to Fatehgarh. (It was sent to Fatehgarh and not to Hardoi, because it was nearer from village Mahmudpur). Sub-Inspector Chandrapal Singh P. W. 5 also returned early next morning. He recovered the sacred stick Ext. 1, knife Ext. 2 and jhola (not exhibited) under the memos Exts. Ka-8, Ka-9 and Ka-10. These articles were duly sealed at the spot. The sub-Inspector also collected plain and blood-stained earth from the scene of occurrence under the memo Ext. Ka-11. After inspecting the locality he prepared the site plan Ext. Ka-12. He also interrogated the witnesses.

4. Dr. M. R. Khetrapal, Medical Officer, Sadar Hospital, Fatehgarh, conducted the post mortem examination on the dead body of Srimati Bitta on 30th May, 1967 at 4 P. M. He estimated the age of the deceased as 45 years, and time since death about one day. He found the following ante mortem injuries on her person:—

1. Punctured wound $\frac{1}{2}$ " x $\frac{1}{4}$ " x $2\frac{3}{4}$ " on the right side on the neck, $\frac{1}{4}$ " above the inner side of the right collar bone clean cut margins with sharp angle at the lower end and raggedness on the upper end of the wound. Directed obliquely and downwards and backwards.

2. Incised wound $\frac{1}{2}$ " x $\frac{1}{4}$ " bone on the chin in the front, clean cut margins obliquely downwards with tailing at the lower end.

3. Punctured wound $\frac{1}{2}$ " x $\frac{1}{4}$ " x 1" on the right side on the lower part of the

chest in the midclavicular bone 11" below the right collar bone, clean cut margins with sharp angle at one end and raggedness on the other end of the wound, directed obliquely and forwards.

4. Incised wound $\frac{1}{2}$ " x $\frac{1}{4}$ " muscle in front of the right thigh, 7" above the knee, clean cut margins with tailing upwards and directed obliquely upwards.

5. Incised wound 1" x $\frac{1}{4}$ " muscle on the outer side of right thigh 5" above the right knee. Clean cut margins with tailing upwards, directed from behind upwards.

6. Incised wound $\frac{3}{4}$ " x $\frac{1}{8}$ " x $\frac{1}{4}$ " on the left palm. Clean cut margins, obliquely downwards with tailing at the lower side.

7. Incised wound $\frac{1}{2}$ " x $\frac{1}{4}$ " x $\frac{1}{4}$ " on the left side back 8 $\frac{1}{2}$ " below the left shoulder blade, clean cut margins with tailing at the lower part, directed obliquely downwards and forwards.

Several vessels below injuries nos. 1 and 2 were found ripped open.

5. In the opinion of the doctor death was due to shock and haemorrhage as a result of the injuries on the neck, vide post mortem report Ext. Ka-2, and the statement of Dr. Khetrpal Ext. Ka-14. After completing the investigation the chargesheet was submitted on 7-7-1967.

6. The appellant pleaded not guilty and denied the charge. It was, however, admitted that he was arrested in village Mahmudpur on the afternoon of 29th May, 1967. His contention was that he was going to village Mahmudpur but did not enter it, because he found a big crowd gathered there. He stayed in a grove just outside the village. (From the site plan it appears that the distance of the grove from the chaupal of Mathura Singh was about 60 paces). That was actually the place where according to the prosecution, he was chased, overpowered and arrested. The defence was that he was sitting in the grove and taking rest, because he wanted to avoid the crowd in the village. It was further pleaded that some persons from the village approached him and asked him to take some intoxicants. He refused. Whereupon, the village people got annoyed, and gave him a beating. He became unconscious. He regained consciousness sometime in the night and found himself in police custody. It was only then that he learnt that he had been charged for committing the murder in the village.

7. The prosecution in support of its case examined five witnesses. The accused did not produce defence.

8. The medical evidence on the record conclusively proves that Srimati Bitta did not die a natural death, but it was the result of violence used against her. Mahesh Pal P. W. 1, the fourteen year old son of the deceased narrated at the trial the circumstances in detail under

which Shyama Charan committed the murder of his mother. It appears that on behalf of the appellant an attempt was made to get from the witnesses that the deceased had abused him (the appellant) and due to that he lost his temper. But in that attempt he completely failed. He was a most natural witness of the occurrence. On all material details of the incident he was fully corroborated by the evidence of Chhotey Singh P. W. 2, who was a neighbour of Mathura Singh. There were no material contradictions in the evidence of these witnesses nor any direct enmity with the appellant could be established. They had no apparent motive to implicate him falsely. The trial Judge has rightly relied upon their evidence. We entirely agree that the charge of murder has been fully brought home to Shyama Charan.

9. On behalf of the appellant it was strenuously urged, that this was a case of grave and sudden provocation, and was fully covered under section 300, Exception 1 of the Indian Penal Code. The relevant portion from that section may be reproduced below:—

"... Except in the cases hereinafter excepted, culpable homicide is murder, if the act by which the death is caused is done with the intention of causing death, or —

2ndly — If it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused, or —

3rdly — If it is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death, or —

4thly. — If the person committing the act knows that it is so imminently dangerous that it must, in all probability cause death, or such bodily injuries as is likely to cause death and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid

Exception 1. Culpable homicide is not murder if the offender, whilst deprived of the power of self-control by grave and sudden provocation, causes the death of the person who gave the provocation or causes the death of any other person by mistake or accident."

10. The above Exception is subject to the following provisos:—

"First — That the provocation is not sought or voluntarily provoked by the offender as an excuse for killing or doing harm to any person.

Secondly — That the provocation is not given by anything done in obedience to the law, or by a public servant in the lawful exercise of the powers of such public servant.

Thirdly — That the provocation is not given by anything done in the lawful exercise of the right of private defence.

Explanation — Whether the provocation was grave and sudden enough to prevent the offence from amounting to murder is a question of fact. . . .

11. Unless the act done constitutes, at least prima facie, murder by reason of the intention with which it is found to be done, the Court need not consider the exceptions. Where a person causes the death of another person it is for him to show that his act was removed from the category of murder by one of the exceptions to the section. The provocation must be such as will upset not merely a hasty, hot-tempered and hyper-sensitive person but would upset also a person of ordinary sense and calmness. The law does not take into account abnormal creatures reacting abnormally in given situations. The law contemplates the acting of normal beings in given situations and, the protection that is offered by the Exception is the protection for normal beings reacting normally in a given set of circumstances. A court has to consider whether a reasonable person placed in the same position as the accused was, would have reacted under that provocation in the manner in which the accused did. Where the provocation is sought by the accused it cannot furnish any defence against the charge of murder.

The facts proved in the case clearly show that Srimati Bitta showed due respects to the Sadhu which he deserved, by greeting him with the words 'Siya Ram'. Normally, it could not be expected that he would feel annoyed with that form of greeting. He uttered words which were disrespectful both to 'Sita' and 'Ram' and he further condemned the woman as a disgrace to the society. He also suggested to her that instead of 'Siya Ram' she should have greeted him with the words 'Namō Narayan'. Naturally Srimati Bitta could not tolerate those unwarranted remarks, from a person who appeared before her in the garb of a Sadhu. In a fit of anger, she told him that she genuinely suspected if he was a real Sadhu or an imposter. She also told him that she would call her men who would take him to task. While going towards the house of her brother, she also kicked the stick which the Sadhu was carrying. So, it was abundantly clear that the provocation was provided from the side of the appellant himself. In the circumstances he could not claim any benefit under Exception 1 to Section 300 of the I. P. C. So, this submission of the learned counsel for the appellant has no substance.

12. It was next urged that the entire incident was the outcome of a sudden

quarrel, and it was not premeditated and the appellant deserved a lenient consideration. It was submitted that he may be awarded the lesser penalty provided under law. But we find it difficult to accept that request. The manner in which the murderous assault was made on the helpless woman, the appellant could not claim any lenient consideration. As already pointed out, he himself was responsible for giving the provocation. Then, he chased the woman, threw her on the ground, showered knife blows on vital parts of the body and virtually butchered her to death on the spot. It could not be doubted that the crime was committed in a most inhuman and brutal manner. The death penalty awarded to the appellant by the Sessions Judge is fully deserved. We see no good reason to interfere with the discretion which he has judicially exercised.

13. Before we part with the case, we may point out that the Sessions Judge was not justified in questioning the appellant to find out the antecedents of his past life. The following passage appears towards the end of the judgment :—

"I questioned him further about his life so that the quantum of punishment may be determined accurately. The accused narrated that when he was not a 'Sadhu' he used to be troubled by the police. He had been detained for one year under section 109 of the Criminal Procedure Code. To save himself from police, he became a 'Sadhu'. He thought that those who did not become 'Sadhu' hated 'Sadhus'. It appears that the accused did not have a very clean past and was even dissatisfied with his new way of life."

In criminal proceedings, the fact that the accused person has a bad character is irrelevant, unless evidence has been given that he has a good character, in which case it becomes relevant (See Section 54 of the Evidence Act). The bad character of the appellant was not itself a fact in issue in the case. Under law, the Sessions Judge could examine the appellant only about the evidence, which was proposed to be used against him. So, this kind of evidence was clearly inadmissible, and we have ignored it completely, while judging the guilt of the appellant.

14. The appeal is, accordingly, dismissed, and the conviction and sentence of Shyama Charan appellant on the charge under Section 302, Indian Penal Code are maintained. The reference made by the Sessions Judge for confirmation of the death sentence passed on Shyama Charan, is also accepted. The sentence shall be carried out according to law.

LGC/D.V.C.

Appeal dismissed.

AIR 1969 ALLAHABAD 65 (V 56 C 11)

S. N. KATJU AND A. K. KIRTY, JJ.
Ram Murti, Appellant v. Sri Subedar
 and another, Respondents.

Election First Appeal No. 166 of 1967,
 D/- 13-12-1967, against judgment and
 order of Election Tribunal (Dist. J.)
 Bareilly, D/- 30-5-1967.

(A) Panchayats — U. P. Kshettra
 Samitis and Zila Parishads Adhiniyam
 (U. P. Act 33 of 1961), Ss. 13, 26 — Elec-
 tion of Adhyaksha of Zila Parishad —
 Act mentioning qualifications and dis-
 qualifications of being Adhyaksha — Per-
 son elected not qualified — Aggrieved
 person can present petition raising the
 question even though there are no provi-
 sions in the Act for the grounds to be set
 out in petition seeking to set aside elec-
 tion of Adhyaksha. (Para 7)

(B) Panchayats—U. P. Kshettra Samitis
 and Zila Parishads Adhiniyam (U. P. Act
 33 of 1961), S. 13(c) — Person perform-
 ing duties of Honorary Magistrate — Sar-
 Panch of Nyaya Panchayat is not such a
 person and is not disqualified from being
 elected as Adhyaksha of Zila Parishad.
 Criminal P. C. (1898), Ss. 12 and 14 —
 U. P. General Clauses Act (1 of 1904),
 S. 3(32).

Person performing duties of Honorary
 Magistrate is disqualified under S. 13(c)
 for being elected as Adhyaksha of Zila
 Parishad. Office of Sarpanch of a Nyaya
 Panchayat does not come within the
 meaning of the expression "Honorary
 Magistrate" as used in S. 13(c). The
 Nyaya Panchayat acts as a body and no
 individual member of the Nyaya Pan-
 chayat is appointed as Magistrate. A
 Magistrate is appointed under Secs. 12
 and 14 of the Code of Criminal Procedure.
 The persons who are empowered to sit as
 a Bench under S. 15 of the Code are Magis-
 trates who themselves are appoint-
 ed under Section 12 or 14 of the
 Code. But no individual member
 of a Nyaya Panchayat can be said to
 have been appointed as a Magistrate in
 the manner provided by Ss. 12 and 14 of
 the Code of Criminal Procedure and a
 member, individually, has no magiste-
 rial powers nor can he exercise any such
 power. It is only when he sits on the
 Nyaya Panchayat as a member that the
 Nyaya Panchayat discharges certain
 Magisterial duties. It is the Nyaya Pan-
 chayat collectively which does so. The
 Sarpanch in his individual capacity does
 not discharge any magisterial function.
 The legislature thus clearly distinguished
 a member or a Sarpanch of a Nyaya
 Panchayat and a person who holds or has
 held any office under such body. If a
 Sarpanch who was a member of a Nyaya
 Panchayat was intended to be excluded
 on the ground of his holding the office of

a member of Nyaya Panchayat or its
 Sarpanch, then he should have been spe-
 cifically mentioned in S. 13(c) of the Act.
 (Paras 8, 9, 10)

To come under S. 3(32) U. P. General
 Clauses Act, it has to be seen whether a
 Sarpanch under the U. P. Panchayat Raj
 Act is a person "exercising all or any
 of the powers of a Magistrate under the
 Code of Criminal Procedure." A Sarpanch
 cannot be said to be a person exercising
 any of the powers of a Magistrate under
 the Code of Criminal Procedure. A Magis-
 trate must be a person who is appointed
 under the Code of Criminal Procedure by
 the Government and he exercises the
 powers conferred on him under the Code
 of Criminal Procedure. A Nyaya Pan-
 chayat is constituted under the special
 provisions of the U. P. Panchayat Raj
 Act. (Para 11)

(C) Panchayats—U. P. Kshettra Samitis
 and Zila Parishads Adhiniyam (U. P. 33
 of 1961), S. 13(c) — Nomination paper of
 one of the candidates to the election of
 Adhyaksha of Zila Parishad improperly
 rejected — This is sufficient to invalidate
 the election of the only remaining candi-
 date — The result of the election is
 materially affected — Fact that elected
 candidate belonged to majority party is
 of no avail — Panchayats — U. P. Zila
 Parishads (Election of Adhyaksha and
 Up-Adhyaksh and Settlement of Election
 Disputes) Rules (1961), R. 13—Representa-
 tion of the People Act (1951), S. 100.
 (Para 12)

S. C. Khare, for Appellant.

KATJU, J.— The appellant Ram Murti
 has preferred this appeal against the
 order of the District Judge, Pilibhit, sit-
 ting as an Election Tribunal, declaring
 that the election of the appellant as the
 Adhyaksh of Zila Parishad, Pilibhit was
 void and that the office of the said Adh-
 yaksh was still vacant.

2. The election for the office of Adh-
 yaksh, Zila Parishad Pilibhit took place
 in November 1963. 25-11-1963 was the
 last date for filing nominations when the
 nomination papers of the appellant Ram
 Murti, the first respondent Subedar and
 the second respondent Ganga Prakash
 were filed. At the scrutiny of the nomi-
 nation papers the Returning Officer re-
 jected the nomination papers of Subedar
 under Section 13(c) of the U. P. Kshettra
 Samitis and Zila Parishads Adhiniyam
 (U. P. Act 33 of 1961), hereinafter refer-
 red to as the Act, on the ground that he
 being a Sarpanch was disqualified for
 being elected as the Adhyaksh of the
 Zila Parishad. The nomination paper of
 the second respondent was also rejected
 under Sec. 19(2) of the Act because he
 had not attained the age of 30 years. Thus
 the appellant Ram Murti was the only
 candidate left in the field and he was

declared elected as the Adhyaksh under Rule 13 of the U. P. Zila Parishads (Election of Adhyaksha and Up-Adhyaksha and settlement of Election Disputes) Rules, 1961, hereinafter referred to as the rules, on 26-11-1963. Thereafter the election of Ram Murti was challenged in an election petition by Subedar and Ganga Prakash.

3. It was contended on their behalf that the nomination papers had been wrongly rejected and they prayed that the election of Ram Murti should be set aside. It was contended on behalf of the appellant Ram Murti that the nomination papers of Subedar and Ganga Prakash had been properly rejected as they were persons who were disqualified from being elected as Adhyaksh of the Zila Parishad and, secondly, that even if the nomination papers of the respondents had been improperly rejected the result of the election was not materially affected and, therefore, the respondents were not entitled to the relief sought by them.

4. The Election Tribunal held, *inter alia*:

(i) That the State Government has no direct control over the office of Sarpanch, particularly in the appointment and removal of a Sarpanch, and has only an indirect control, over it. Even assuming that the government has a direct control over the office of the Sarpanch that by itself is not sufficient to hold that the disqualification mentioned in sec. 13(c) is established. Even if an office carries with it certain allowances or honorarium or other advantages, other than a regular salary, then that office cannot be said to be an office of profit. A Sarpanch does not get any regular salary or allowance or even an honorarium but holds an elected office and, consequently, the office of Sarpanch of a Nyaya Panchayat could not be said to be an office of profit. Therefore, the rejection of the nomination paper of respondent Subedar was not justified in law.

(ii) That the nomination paper of respondent no. 2 had been properly rejected. The Tribunal further held that since the nomination paper of Subedar had been illegally rejected and he could not contest the election for which he was fully qualified and his exclusion resulted in the uncontested election of the appellant to the office of the Adhyaksh of the Zila Parishad, the election of the appellant was void and had to be set aside.

5. Aggrieved from the decision of the Tribunal the appellant has come in appeal to this Court.

6. Learned counsel for the appellant contended, firstly, that there is no provision in the Act laying down the ground on which an election could be set aside and, therefore, the respondent was not entitled to any relief. He further argued

that the nomination paper of respondent Subedar had been properly rejected because he was discharging the duties of an Honorary Magistrate and, therefore, it was hit by the disqualification laid down under Sec. 13(c) of the Act.

7. Section 19(1) of the Act provides for rules for "resolution of doubts and disputes relating to the election of Adhyaksh and Upadhyaksha". The rules lay down the procedure for the decision of election disputes. Sections 18 and 19 further provide for the qualification of a person who could hold the office of Adhyaksh of a Zila Parishad. Section 13 read with section 26 of the Act lays down disqualification which would disentitle a person from holding the office of an Adhyaksh of a Zila Parishad. It may be that the Act does not specifically provides for the grounds to be set out in a petition for setting aside the election of an Adhyaksh of a Zila Parishad but there is provision with regard to the qualifications and the disqualifications of a person seeking the office of Adhyaksh and it would follow that where a person is not qualified or is disqualified to hold the office of an Adhyaksh of a Zila Parishad then in that the question could be raised in a petition by an aggrieved person. There is therefore no force in the contention of the learned counsel that because there is no specific provision for the grounds to be set out in a petition seeking to set aside the election of an Adhyaksh, the present petition was not maintainable.

8. The question raised before the Election Tribunal was the propriety of the rejection of the nomination papers of the respondents. It had to be seen whether their nomination papers were properly or improperly rejected by the Returning Officer. The nomination paper of the first respondent was rejected on the ground that it was hit by Sec. 13(c) of the Act and he was a disqualified person because he held the office of Sarpanch of a Nyaya Panchayat. It has therefore to be seen by the Tribunal whether the first respondent was a disqualified person within the meaning of Section 13(c) of the Act. The Tribunal expressed the view that the holding of the office of Sarpanch of a Nyaya Panchayat did not attract the disqualifications as laid down in Sec. 13(c) of the Act. It held that the office of Sarpanch was not an office of profit within the meaning of Sec. 13(c) and, therefore, the first respondent was not a person who was disqualified to hold the office of an Adhyaksh of a Zila Parishad. The aforesaid finding of the Tribunal was not seriously challenged by the learned counsel before us. He however contended that the office of Sarpanch of Nyaya Panchayat came within the meaning of the expression "honorary Magistrate" as used

in Section 13(c) of the Act and, therefore, the first respondent could not hold the office of Adhyaksh of a Zila Parishad. He contended that a Sarpanch has to discharge magisterial duties and since he does not receive any remuneration he is in substance an honorary magistrate and, therefore, he was not qualified to seek election to the office of the Adhyaksh of a Zila Parishad. It could be said that certain offences under the Indian Penal Code and certain other acts are cognizable by a Nyaya Panchayat under the U. P. Panchayat Raj Act. But the Nyaya Panchayat acts as a body and no individual member of the Nyaya Panchayat is appointed as Magistrate. A Magistrate is appointed under Secs. 12 and 14 of the Code of Criminal Procedure. The Code provides by Sec. 15 for the investment of a Bench of Magistrate with any of the powers conferred or conferable by or under the Code and it further directs any two or more Magistrates to sit together as a Bench. The persons who are empowered to sit as a Bench under Sec. 15 of the Code are magistrates who themselves are appointed under Secs. 12 or 14 of the Code.

9. In the present case no individual member of a Nyaya Panchayat can be said to have been appointed as a magistrate in the manner provided by Secs. 12 and 14 of the Code of Criminal Procedure and a member, individually, has no magisterial powers nor can he exercise any such power. It is only when he sits in the Nyaya Panchayat as a member that the Nyaya Panchayat discharges certain magisterial duties. It cannot be said that a member of a Nyaya Panchayat is either appointed as a magistrate or in his individual capacity discharges any magisterial functions. It is the Nyaya Panchayat collectively which does so.

10. Section 13(c) of the Act pointedly refers to the office of an honorary magistrate. If the intention of the legislature was to disqualify a member of the Panchayat or a Sarpanch of the Nyaya Panchayat they would have been included in the category of persons mentioned in Sec. 13(c) along with the honorary Magistrates, honorary Assistant Collector or honorary Munsif. The intention of the Legislature is made clear by the provision of Sec. 13(d). It disqualifies persons from holding the office of an Adhyaksh who have "held any office under Government or any Zila Parishad, Kshettra Samiti, Gaon Sabha, Nyaya Panchayat or a person who has been dismissed for corruption or disloyalty to the State unless a period of five years has elapsed since his dismissal." The aforesaid clause pointedly refers to a person having held the office under the Nyaya Panchayat. The Legislature thus clearly distinguishes a member or a Sarpanch of a Nyaya Panchayat and a per-

son who holds or has held any office under such body. If a Sarpanch who was a member of a Nyaya Panchayat was intended to be excluded on the ground of his holding the office of a member of a Nyaya Panchayat or its Sarpanch, then he should have been specifically mentioned in Sec. 13(c) of the Act. The only function which a Sarpanch is empowered to discharge when acting alone is under Section 23 of the Act. A Sarpanch when he apprehends that any person is likely to commit a breach of the peace or disturb public tranquillity may issue notice to such person to show cause why he should not be made to execute a bond for keeping the peace, but after issuing such notice the matter has to be referred to a Bench and it is for the Bench to confirm the order or discharge the notice initially issued by the Sarpanch. It could be said that the Sarpanch by issuing a notice under S. 53 only discharges an executive function and the matter has to be decided by the Nyaya Panchayat as a body and the Sarpanch in his individual capacity does not discharge any magisterial function.

11. Learned counsel for the appellant referred to Sec. 3(32) of the U. P. General Clauses Act. A Magistrate under the said clause is defined as "Magistrate shall include every person exercising all or any of the powers of a Magistrate under the Code of Criminal Procedure for the time being in force". Learned counsel contended that because a Sarpanch exercises powers similar to a Magistrate under the Code of Criminal Procedure he should be deemed to be an honorary Magistrate within the meaning of S. 13(c). It has to be seen whether a Sarpanch under the U. P. Panchayat Raj Act is a person "exercising all or any of the powers of a Magistrate under the Code of Criminal Procedure." As mentioned above, no power of a Magistrate is conferred on a Nyaya Panchayat or a Sarpanch under the Code of Criminal Procedure. A Sarpanch participates in the deliberations of the Nyaya Panchayat and exercises powers conferred on the Nyaya Panchayat under the U. P. Panchayat Raj Act. A Sarpanch, therefore, could not be said to be a person exercising any of the powers of a Magistrate under the Code of Criminal Procedure. A Magistrate must be a person who is appointed under the Code of Criminal Procedure by the Government and he exercises the powers conferred on him under the Code of Criminal Procedure. A Nyaya Panchayat is constituted under the special provisions of the U. P. Panchayat Raj Act. Panches are persons who are elected by the people and members of a Nyaya Panchayat are nominated from the panel of elected members by the prescribed authority and then the Panches them-

selves elect the Sarpanch. It is apparent that a Sarpanch is not appointed by the Government in the manner prescribed by the Code of Criminal Procedure and he only functions as a member of the Nyaya Panchayat as provided for by the U. P. Panchayat Raj Act. The expression 'honorary Magistrate' as used in Sec. 13(c) obviously refers to the well-known class of persons exercising Magisterial powers and appointed as such by the government to discharge their duties without getting any remuneration for the same. It would be stretching the meaning of the expression to include within its ambit a Sarpanch under the Panchayat Raj Act. There is thus no force in the contention that since the first respondent was a Sarpanch he was disqualified to hold the office of Adhyaksh of a Zila Parishad.

12. Learned counsel further contended that even if the nomination paper of the first respondent was improperly rejected he had still to show that the rejection of his nomination paper materially affected the result of the election. There were initially three candidates who were seeking election to the office of the Adhyaksh of the Zila Parishad. The nomination papers of two were rejected and the appellant was declared elected because there was no other person in the field. Learned counsel sought to argue that because the appellant belonged to a party which had a majority among the members of the Zila Parishad the result of the election was not affected by the rejection of the nomination paper of the first respondent. There is no force in this contention. The very fact that the nomination paper of the first respondent was improperly rejected is sufficient to invalidate the election of the appellant. It is difficult to speculate on the result of the election in case the first respondent was himself in the field. There is thus no force in the contention of the learned counsel that the result of the election was not materially affected by the improper rejection of the nomination paper of the first respondent.

13. The appeal fails and is dismissed. No one has appeared on behalf of the respondents, we, therefore, make no order as to costs.

RGD

Appeal dismissed.

AIR 1969 ALLAHABAD 68 (V. 56 C 12)
S. N. KATJU, J.

Ram Dulari Saran, Applicant v. Sri Yogeshwar Sri Ram Balbhacharya Ji and others, Respondents.

Criminal Misc. (Contempt) Appln. No. 16 of 1967, D/- 17-1-1968.

JL/EL/E758/68

(A) Contempt of Courts Act (1952), S. 1 — Proceedings before Court involving question as to status of community — Public comments thereon, when amounts to contempt of Court.

It is a well-known and equally well understood rule of law that all debates and expressions of opinion on a question which is the subject matter of dispute before a court should be hushed as long as the court is seized of the controversy. No one has a right to express his views publicly on merits of claims of contending parties in a suit pending before a court of law. Where, however, the nature of the controversy itself has a broad sweep affecting a very large section of people and is not confined to contending parties only, then in such a case, the Court would take notice of only such comments which pointedly refer to the proceedings before it and which may be construed to interfere with the judicial process.

(Paras 10, 12)
Where the court is called upon to adjudicate upon a question involving the consideration of the precise status of a community or caste, affecting a large section of the Hindu Society, a general discussion outside the Court on the question cannot entirely be shut out and on any such discussion or public debate being brought to the notice of the court, it would not be sensitive and would not look upon such discussion or comment as amounting to contempt of court. The nature and the scope of a controversy of this kind being too wide the court can only insist that there should be no comments outside the court with regard to matters pertaining to the dispute before it. If, however, a particular comment on the question directly refers to the contending parties before a court and if any criticism is offered which pointedly amounts to taking sides in the dispute before the court then in such a case the court may treat the impugned comment as amounting to contempt.

(Para 10)
Comments made by the accused during the pendency of appeal to the effect that the lower court has erred in deciding the status of a particular community does not amount to contempt of court; his further comment, however, that he supports the claim of one of the parties to appeals, clearly amounts to contempt of court.

(Paras 11, 12)
(B) Civil P. C. (1908), S. 9 — Court deciding status of caste in Hindu society — Nature of its jurisdiction.

The question of caste, in the Hindu Society, has always been a matter primarily for the caste itself and for the Hindu society. All that a court could do is to recognise what has been declared and decided by the people themselves on the evidence before it. It is true that some-

times a court has to decide the precise status of a particular caste in a dispute between the parties, but primarily the decision of the court would deal only with the controversy between the contending parties before it. A court could neither take upon itself the task of finally and conclusively declaring for all times the status of a particular caste or section of the Hindu society nor could it expect that the verdict would be the last word on the subject. This is a matter which is primarily for the people themselves and the courts could only give effect to what has been decided by the people. The pattern of Hindu society is changing and it must keep pace with the fast altering condition. In what manner a section of people belonging to the Hindu community call themselves or treat themselves must always rest with them and the other sections of the Hindu society.

(Para 11)

Krishan Pal Singh, for Applicant;
Faujdar Rai, for Respondents.

ORDER :— This is an application by Mahant Ram Dulari Saran who alleges himself to be the Chela of Mahant Siabar Saran for punishing the respondents for contempt of court. The first respondent Sri Yogeshwar Sri Ram Balbhacharya Ji is the printer and publisher of a Hindi Weekly called 'Virakt,' the second respondent is 'Virakt' through its proprietor, Brahmachari Sri Basudevacharya, the third respondent is Brahmachari Sri Basudevacharya, the fourth is Sri Ram Gopal Pandey, the editor of Virakt while the fifth respondent is one Mahabir Das.

2. It was alleged that one Ram Priya Saran had constructed a temple in Mohalla Ram Kot, Ayodhya city, wherein he had installed a deity called Thakur Anand Behari ji and had endowed certain properties to the deity. Ram Priya Saran had appointed himself as the first sarbarakar of the temple and its properties and had mentioned in the deed of trust executed by him that on his death his chela Siabar Saran would become the Sarbarakar of the endowment. Thereafter, Siabar Saran was empowered to appoint his successor in accordance with the conditions laid down in the deed of trust. One of the qualifications for a Sarbarakar mentioned in the deed of trust is that the person to be appointed as Sarbarakar should be of good character and he should be a 'Vaishnava Virakt Ramanandi Brahman.' Mahant Siabar Saran had succeeded his Guru Ram Priya Saran as the Sarbarakar of the temple. He died on 6-10-1959 without appointing any successor. The claimants to the Mahantship after the death of Mahant Siabar Saran are the petitioner Ram Dulari Saran and the 5th respondent Mahabir Das. The fifth respondent says that his correct name is Mahabir Saran

and the petitioner has wrongly described him as Mahabir Das.

3. Suit No. 22 of 1962 was instituted by Mahabir Das in the court of the Addl. Civil Judge, Faizabad for declaration that he was the Sarbarakar of the temple and its properties and possession of the endowed properties be given to him. Suit No. 1 of 1963 was filed by the petitioner, Ram Dulari Saran, for declaration that he was the chela of the deceased Mahant and he was the Sarbarakar of the endowed properties. It appears that the fifth respondent Mahabir Das is Bhumihaar by caste while the petitioner Ram Dulari has a wife and children. The right of the petitioner Ram Dulari Saran to succeed to the deceased Mahant was challenged by Mahabir Das on the ground that Ram Dulari Saran being a householder could not be said to be Virakt person and, therefore, he was disqualified from becoming the Sarbarakar of the endowment. Ram Dulari Saran assailed the right of the fifth respondent Mahabir Das to succeed to the Mahantship on the ground that since Mahabir Das was a Bhumihaar and Bhumihaars are not Brahmans therefore he was disqualified from succeeding to the Mahantship of the temple.

4. Both the aforesaid suits were consolidated and heard together by the Additional Civil Judge of Faizabad. He, by his judgment dated 30-5-1966, dismissed the suit instituted by the fifth respondent (Suit No. 22 of 1962) and decreed the suit of the petitioner (Suit No. 1 of 1963). He held that Ram Dulari Saran was the Chela of the deceased Mahant Siabar Saran and at the time of the death of the latter on 6-10-1959 Ram Dulari Saran had renounced his Grishasth life and thus he had become 'Virakt Ramanandi Brahman'. The Court below further held,—

".....the Bhumihaars may call themselves Bhumihaar Brahmans but it is nowhere established that they are really Brahmans....."

Accordingly I hold that Mahabir Saran plaintiff of suit no. 22 of 1962 is not a Brahman and he is not qualified for appointment as Mahant and Sarvarakar of the temple Anand Bhawan Behari Ji as contemplated by endowment deed, dated 23-8-1940."

The fifth respondent filed an appeal against the aforesaid decree of the Additional Civil Judge of Faizabad on 18-7-1966 in the court of the District Judge, Faizabad and it is still pending in that court.

5. The impugned articles in the 'Virakt' appeared in its issues dated 9-8-1966 and 23-8-1966. The first article which appeared in the issue of Virakt dated the 9th August 1966 is its editorial while the second article is by Sri Basudevacharya, the third respondent before me. The editorial appearing in the Virakt of 9-8-1966

starts with a generalisation that only the persons competent to handle particular problems should deal with them. The persons suffering from physical disorders should go to a doctor while a litigant should approach a lawyer. It will not be proper for a litigant to go to a doctor and for a patient to approach a lawyer. Then the editorial refers to the suits before the Additional Civil Judge of Faizabad and the decision of the court in the aforesaid suits. It says that in the aforesaid suits the rival claimants were two persons one of whom was a "Saryupari Householder Brahman" while the second was a "Virakt Bhumi-har Brahman". Then it goes on to say that the court has declared a Brahman Bhumi-har person as a 'shudra' who was incompetent to perform the puja of the Supreme deity. It adds that to put a particular community in the category of Shudras and non-Brahmans and holding them incompetent to perform the Puja of the Supreme Being was beyond the powers of the court. It further said that a householder could not be a Sarbarakar of a 'Virakt Vaishnava temple'. Then the editorial proceeds further and refers to the persons connected with the Math.

6. In the article contributed by the third respondent Brahmachari Sri Basudevacharya in the issue of the 'Virakt' dated 23-8-66, there is a general expression of opinion of the writer that Bhumi-hars are Brahmans. He describes their contribution in the various walks of life and says that they have been recognised as Brahmans since long. Then he refers to the decision of the court in the aforesaid two suits and expresses the view that if the decree of the court is not set aside by a superior court then in that case the temple in dispute in the aforesaid two suits would pass out of the hands of a 'Virakt' and would go into the hands of a householder and he expresses his disapproval of such an eventuality. Then he further says that "All this should not be. Therefore, I would like the Virakt Bhumi-har Brahman to occupy the position of the Mahantship of that temple and in the circle of Mahants of Ayodhya the said Bhumi-har Virakt Brahman Sadhu who is the chela of the deceased Mahant has been accepted and he has been recognised as such by the deceased Mahant who had given him the Mahantship and he has been supported by me since the very beginning." He concludes by saying that as a result of the decision of the court in the aforesaid two suits the Bhumi-har Brahmans have been confronted with a question of life and death for them and he appeals to the Bhumi-har Brahman community to take steps for the setting aside of the aforesaid decision of the court.

7. The petitioner has stated that the

fifth respondent who is claiming to succeed as Sarbarakar of the endowment got respondents 1, 3 and 4 interested in the matter and they wrote the aforesaid articles in the Virakt in support of his claim and they were written "at the instance and with the connivance of respondent no. 5 and to deprive the applicant from the Mahantship of the temple as well as to prejudice the mind of the appellate court as well as to scandalise the wisdom and judgment of the learned Civil Judge who decided the case against respondent no. 5."

8. There is not sufficient material before me to show that the impugned articles in the Virakt had been written at the instance of and with the connivance of respondent no. 5. The controversy between the petitioner and the fifth respondent had assumed a shape in which not only the parties to the aforesaid two suits were concerned but in which the members of a large community were definitely interested. Bhumi-hars, both by their numerical strength as well as by the position of eminence which they occupy in Uttar Pradesh and in Bihar form an important community and its members must have been concerned by the pronouncement of the court in the aforesaid two suits. The entire community had been declared to be non-Brahmans. Bhumi-hars who call themselves Brahmans must have been agitated by the judicial pronouncement declaring the status of their community and if respondents 1, 3 and 4 leaned towards the side of the 5th respondent it could not be said that it was because they were siding with the 5th respondent in his dispute with the petitioner. It may be that they were prompted to express their views on account of their concern on the verdict of the court with regard to the status of the community which, according to them, had been wrongly determined by the Additional Civil Judge. I, therefore, do not find much force in the contention of the petitioner that the impugned articles in the Virakt had been written at the behest of the fifth respondent.

9. The next question for consideration is whether there are elements of contempt of court in the two impugned articles. The respondents have contended that they were not aware of the fact that an appeal had been preferred from the decree of the Additional Civil Judge on 18-7-1966 in the court of the District Judge of Faizabad. It may be that the third respondent Brahmachari Sri Basudevacharya was unaware of the lodging of the appeal by the fifth respondent. He is the founder of an institution called the "Akhil Bharat-varshiya Virakt Mahamandal". The weekly Virakt is the organ of the aforesaid institution founded by the third respondent. It is likely that the third respon-

dent being away from Faizabad was not actually aware of the fact that the decree of the learned Additional Civil Judge of Faizabad had been subjected to an appeal before the District Judge of Faizabad. But he was certainly aware of the decision of the learned Additional Civil Judge in the aforesaid two suits and he had himself emphasized the necessity of the judgment of the Additional Civil Judge being set aside by a superior Court. Even if he was not aware of the fact that an appeal had already been preferred on 18-7-1966 he must have known that steps were being taken for filing an appeal. Under these circumstances he cannot be said to be wholly unaware of the sub judice nature of the proceedings in the matter.

10. The first respondent and the fourth respondent must have been in any case, aware of the fact that an appeal had been filed in the court of the District Judge of Faizabad on 18-7-1966, and, further, that when the impugned articles appeared in the 'Virakt' of 9-8-66 and 23-8-66 an appeal arising from one of the aforesaid two suits was pending before the appellate court. It has to be seen whether the impugned articles amounted to contempt of court. There are two aspects of the problem which were the subject matter of discussion in the two articles. A question involving the consideration of the precise status of a community may be a subject matter of controversy between the parties and the court has to adjudicate on it. Where, however, the nature of the controversy is such that it is not confined merely to the contending parties before the Court but it overflows and affects a very large section of the people, then in such a case comments involving the general nature of the controversy, apart from the dispute before the court, could not be wholly shut out. The question before the court was whether the Bhumihars are Brahmans or not. The court had interpreted a condition incorporated in the deed of trust. It says that only a Brahman could succeed to the Mahantship of the temple in dispute. The petitioner had assailed the right of the fifth respondent to succeed to the Mahantship on the ground that he was not a Brahman because he was a member of the Bhumihar community and since Bhumihars are not Brahmans he was disqualified from succession. It is difficult to hold, under these circumstances, that a general discussion outside the court on the question whether the Bhumihars are Brahmans or not could entirely be shut out and on any such discussion or public debate being brought to the notice of the court it would be sensitive and would look upon such discussion or comment as amounting to contempt of Court. Where the nature and the scope of a controversy of this kind is

too wide the Court can only insist that there should be no comments outside the court with regard to matters pertaining to the dispute before it. If, however, a particular comment on the question directly refers to the contending parties before a court and if any criticism is offered which pointedly amounts to taking sides in the dispute before the court then in such a case the court may treat the impugned comment as amounting to contempt. It is a well-known and equally well understood rule of law that all debates and expression of opinion on a question which is the subject matter of dispute before a court should be hushed as long as the court is seized of the controversy. Where, however, as I have mentioned above, the nature of the controversy itself has a broad sweep, then in such a case the Court would take notice of only such comments which pointedly refer to the proceedings before it and which may be construed to interfere with the judicial process.

11. Whether the Bhumihars are Brahmans or not is a question which has to be determined primarily by the Bhumihars themselves and relatively by the other sections of the Hindu society. The question of caste, in the Hindu society, has always been a matter primarily for the caste itself and for the Hindu society. All that a Court could do is to recognise what has been declared and decided by the people themselves on the evidence before it. It is true that sometimes a court has to decide the precise status of a particular caste in a dispute between the parties, but primarily the decision of the Court would deal only with the controversy between the contending parties before it. A court could neither take upon itself the task of finally and conclusively declaring for all times the status of a particular caste or section of the Hindu Society nor could it expect that its verdict would be the last word on the subject. As I have said above, this is a matter which is primarily for the people themselves and the courts could only give effect to what has been decided by the people. The pattern of Hindu Society is changing and it must keep pace with the fast altering conditions. In what manner a section of people belonging to the Hindu community call themselves or treat themselves must always rest with them and other sections of the Hindu Society. I am not prepared to take a harsh notice of the comments made by the respondents that the Bhumihars are Brahmans and the court had erred in deciding otherwise.

12. But respondents 1, 3 and 4 did not stop with their expression of disagreement with the verdict of the Court that Bhumihars are not Brahmans. There are passages in the impugned articles in

which they have pointedly referred to the case and the controversy before the Court and have pronounced their opinion on the merits of the dispute between the parties. The third respondent has pointedly said that he supports the claim of the fifth respondent. This clearly amounts to contempt of Court. No one has a right to express his views publicly on the merits of claims of contending parties in a suit pending before a court of law. The Court must see that nothing is done which interferes with the flow of justice during the pendency of a case. The impugned articles appeared at a time when the appellate court was seized of the matter and the expression of opinion, as mentioned above, by respondents 1, 3 and 4 clearly amounts to contempt of court. Considering the nature of the controversy and the importance of the question to the Bhumihars in general who form a large section of the people of Uttar Pradesh and Bihar I cannot overlook the agitation which must have been caused in their minds in consequence of the decision of the Court. In this view of the matter I accept the unqualified apologies tendered by respondents 3 and 4 in the affidavits filed by them and by the first respondent in person before me. The notices issued to the respondents are discharged and the petition is dismissed. Respondents 1, 3 and 4 will pay Rs. 40 each to the State Counsel, Mr. Z. H. Kasimi, as costs within two weeks from today.

DVT/D.V.C. Petition dismissed.

AIR 1969 ALLAHABAD 72 (V 56 C 13)
S. N. SINGH, J.

Smt. Chandravati, Defendant-Appellant v. Shivaji Maharaj and others, Pro forma, Respondents.

Second Appeal No. 494 of 1967, D/- 6-11-1967, against decree of Dist. J., Farukhabad, D/- 31-3-1966.

(A) Limitation Act (1908), S. 10 — Assigns—Term includes legal representatives of assigns — Gift of trust property to B by trustee A — After B's death C, his widow, in possession — Suit by other trustees for possession against C — S. 10 applies.

The word 'assign' used in Section 10 includes the legal representative of the assigns as well. In this view, where a trustee A executes a gift deed of one of the properties of a temple in favour of B and after B's death, his widow C, remains in possession of the property, B and his widow C, not being assigns for valuable consideration, will be covered by section 10 and the property in their

possession could be recovered at any time by the trustees of the temple.

(Paras 10, 13)

(B) Limitation Act (1908), S. 10, Art. 144 — Transfer without consideration of temple property by trustee — S. 10 applies — Transferee cannot hold adversely to deity.

If the argument that where the transfer of trust property by trustee is void Section 10 will not apply is accepted, section 10 would become nugatory for transfers, specially without consideration, of trust property by trustee would always be invalid. (Para 11)

Where therefore a trustee of a temple executes a deed of gift in respect of one of its properties as his own, the possession of the trustee or of his donee or of the legal representative of the donee will not be adverse to the deity as they could not assert any adverse title against the deity during the life of the donor trustee and a suit for possession of the property by other trustees within 12 years of the death of the donor trustee would be within limitation. AIR 1933 Cal 295 & AIR 1954 SC 69 Rel. on; Case law Ref. to.

(Paras 11, 14)

Cases Referred: Chronological Paras

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| (1965) AIR 1965 Pat 390 (V 52) = | |
| 1965 BLJR 509, Anisur Rahman v. Abdul Hayat | 8, 12 |
| (1963) AIR 1963 Mad 213 (V 50) = | |
| (1962) 1 Mad LJ 220, V. Rajaram v. Ramanujam Iyengar | 8, 12 |
| (1961) AIR 1961 All 434 (V 48), Prem Chand v. Satya Deo | 8, 12 |
| (1961) AIR 1961 Ori 102, (V 48) = 26 Cut LT 424, Govinda Jiew Thakur v. Surendra Jena | 8, 12 |
| (1957) AIR 1957 Trav-Co. 269 (V 44) = ILR (1956) Trav-Co. 684, Padmanabha Pillai Raman Pillai v. Secretary, Travancore Devaswom Board | 16 |
| (1954) AIR 1954 SC 69 (V 41) = 1954 SCR 407, Sree Sree Ishwar Sridhar Jew v. Mt. Sushila Bala Dasi | 14 |
| (1933) AIR 1933 Cal 295 (V 20) = ILR 60 Cal 54, Surendrakrishna Roy v. Ishwar Bhubaneshwari | 14 |
| Radha Krishna, for Appellant; P. N. Bakshi, for Respondents. | |

JUDGMENT :— The short point involved in this appeal is as to whether section 10 of the Limitation Act applies to the facts of the present case.

2. One Sri Mangali Prasad was the owner of the house in dispute. He executed a will in favour of his wife Smt. Gomti on 29th June 1936. Through this will be conferred absolute right on Smt. Gomti in respect of his entire property. After the death of Sri Mangali Prasad Smt. Gomti dedicated the entire property left by her husband including the house

in dispute in favour of Sri Shivaji Maharaj, Virajman Mandir Shivala, Ahata Deviji, by waqf deed dated 2nd of August 1946. She appointed herself to be the Mutwalli of the deity and further the waqf deed stipulated that after the death of Smt. Gomti the management of the temple would be done by L. Ram Swarup and other trustees. After the dedication by Smt. Gomti in favour of the deity a suit was instituted by one Dwarka Prasad for the cancellation of the waqf deed claiming title to the property in dispute as the adopted son of Sri Mangali Prasad. This was suit No. 3 of 1947. By this suit Sri Dwarka Prasad wanted the cancellation of the waqf deed and declaration of his title to the property left by Sri Mangali Prasad. The suit was dismissed by the trial court by its judgment dated 15th of April 1948 and in this suit the will executed by Sri Mangali Prasad in favour of his wife as well as the dedication dated the 2nd of August 1946 which had been executed by Smt. Gomti in favour of Sri Shivaji Maharaj were accepted to be valid.

3. Sri Dwarka Prasad preferred an appeal against this judgment which was also dismissed on the ground that Sri Dwarka Prasad was not the adopted son of Sri Mangali Prasad. It appears that during the pendency of the appeal before the first appellate court Smt. Gomti executed a gift deed Ext. A18 on the record in favour of Dwarka Prasad in respect of the house in dispute asserting the property in dispute to be belonging to her. Dwarka Prasad came in possession of the house along with Smt. Gomti and after a short time he died leaving his widow Smt. Chandrawati who continued to live in the house in dispute along with Smt. Gomti. In the year 1959 Smt. Chandrawati turned out Smt. Gomti from the house and thereafter on the 12th of September 1961 Smt. Gomti died. After the death of Smt. Gomti the present suit was instituted by Sri Shivaji Maharaj through L. Ram Swarup the managing trustee of the temple.

4. In the plaint the plaintiff set out the facts as stated above and alleged that the possession of Smt. Chandrawati was permissive till the life time of Smt. Gomti and thereafter in spite of notice Smt. Chandrawati did not vacate the house in dispute, on the contrary asserted title in herself hence the suit.

5. The suit was contested by Smt. Chandrawati who admitted the factum of the death of L. Mangali Prasad and Smt. Gomti. She claimed title to the property by adverse possession. She asserted to be in continuous possession from 1948 the date of the execution of the gift deed in favour of her husband Sri Dwarka Prasad. It was asserted that her husband as well as she remained in adverse proprie-

tary possession for over twelve years and the suit was time barred. There were other pleas also which are not necessary for the present appeal.

6. Relevant issues were framed on the pleadings of the parties and on a consideration of the evidence on the record the trial court repelled all the pleas raised by the defendant appellant and so far as the question of limitation was concerned held that although the donee Sri Dwarka Prasad entered into possession over the house in dispute soon after the execution of the gift deed dated 25th October 1948 and thereafter on the death of Dwarka Prasad Smt. Chandrawati continued in possession but in view of section 10 of the Limitation Act the suit was not barred by limitation. It accordingly held that Dwarka Prasad or defendant Smt. Chandrawati did not become owner after the expiry of twelve years from the date of the execution of the gift deed with the result that the suit for the ejectment of Smt. Chandrawati was decreed.

7. An appeal was preferred against this judgment by Smt. Chandrawati and the learned District Judge by a well considered judgment affirmed the judgment of the trial court and held that in view of Section 10 of the Limitation Act the suit was not time barred.

8. The defendant has come up in appeal to this Court and the learned counsel for the appellant has vehemently argued that the decision of the two courts below about the applicability of section 10 of the Limitation Act was erroneous. His contention is that on the admitted case of the parties the gift dated 21st August 1948 was a void document as such from the date of execution of the gift deed the possession of Dwarka Prasad was adverse to the deity, Dwarka Prasad and thereafter Smt. Chandrawati having completed twelve years the defendant became the owner of the house in suit by adverse possession. According to the learned counsel in the circumstances of this case Article 144 of the Limitation Act 9 of 1908 applied. It was argued that the transaction being void section 10 of the Limitation Act did not apply. He further argued that in any view of the matter, Section 10 of the Limitation Act did not apply to the case because the present suit was neither against the trustee or his legal representatives or assigns. Reliance was placed by the learned counsel in support of his contention on the following cases :-

1. Prem Chand v. Satya Deo, AIR 1961 All. 434,
2. Govinda Jiew Thakur v. Surendra Jena, AIR 1961 Ori 102,
3. V. Rajaram v. Ramanujam Iyengar, AIR 1963 Mad 213, and
4. Anisur Rahman v. Abdul Hayat, AIR 1965 Pat 390.

9. I have considered the submissions of the learned counsel but I am unable to accept them. Section 10 of the Limitation Act reads as follows.—

"Notwithstanding anything hereinbefore contained, no suit against a person in whom property has become vested in trust for any specific purpose, or against his legal representatives or assigns (not being assigns for valuable consideration), for the purpose of following in his or their hands such property, or the proceeds thereof, or for an account of such property or proceeds, shall be barred by any length of time.

For the purposes of this section any property comprised in a Hindu, Muhammadan or Buddhist religious or charitable endowment shall be deemed to be property vested in trust for a specific purpose, and the manager of any such property shall be deemed to be the trustee thereof."

10. This will be seen that in the present case on the findings of fact recorded by the two courts below Sri Dwarka Prasad entered into possession over the house in dispute as donee of Smt. Gomti who was the Mutwalli of the deity and who would be deemed to be the trustee of Sri Thakurji for the purposes of Sec. 10 of the Limitation Act. Dwarka Prasad was an assign without consideration of Smt. Gomti. Smt. Chandrawati legal heir of Sri Dwarka Prasad would be included in the term assign mentioned in Sec. 10 of the Limitation Act with the result that there could be no period of limitation for obtaining possession of the dedicated property from the hands of Smt. Gomti or Sri Dwarka Prasad or Smt. Chandrawati. The contention of the learned counsel that Smt. Chandrawati being the legal representative of the assign, i. e. Sri Dwarka Prasad was not included in the term assign does not appeal to me. In my opinion the word 'assign' used in section 10 of the Limitation Act will include the legal representative of the assigns as well. In this view of the matter Sri Dwarka Prasad and Smt. Chandrawati not being assigns for valuable consideration will be covered by section 10 of the Limitation Act and the property in their possession could be recovered at any time.

11. It was contended on behalf of the appellant relying on the above mentioned decisions that the transaction being void section 10 of the Limitation Act would not apply. There being no valid assignment in favour of Sri Dwarka Prasad the section will not apply. If the argument of the learned counsel is accepted section 10 of the Limitation Act would become nugatory for transfers specially without consideration of trust property by trustee would always be invalid.

12. I have looked into the authorities

cited by the learned counsel for the appellant. In my opinion they are not applicable to the facts of the present case. The case of AIR 1963 Mad 213 has interpreted Articles 134B and 144 of the old Limitation Act. It was held in this case that Art. 134B does not apply to a case wherein a person purchases property from the manager who transferred the property professing himself to be the owner of that property. According to this authority adverse possession starts from the very date of the alienation and in such a case article 134B does not apply. To the same effect is the case of AIR 1961 Ori. 102 wherein it was held that Article 134B does not apply to the transfers which are void ab initio.

In the case of AIR 1965 Pat 390 also it was held that a transfer which is void ab initio in the eye of law is not transfer at all and hence will not come within the scope of Article 134B. Moreover, that Article refers to transfer made by a manager of an endowment. If a person transfers property treating it as his own private property, it is difficult to hold that merely because he happens to be the manager of the endowment on the date of the transfer and the property is the property of the endowment such transfer should come within the scope of that Article. Thus the applicability of either Article 144 or Article 134B would depend on whether the transfer which is sought to be set aside is void ab initio or only voidable at the instance of the succeeding manager. In the case of AIR 1961 All 434 a learned Single Judge of this Court considered section 10 and Articles 134 and 144 of the Limitation Act and on the fact of that case held Article 144 to be applicable and not section 10 of the Limitation Act. In this Allahabad case a trustee of a house in defiance of trust gifted it away as his own property to 'B', his wife, who occupied the said house in her capacity as donee and subsequently sold it to 'C' a third party for valuable consideration. It was held that section 10 of the Limitation Act would have been applicable so far as the trustee and donee were concerned and not the transferee for valuable consideration as such since section 10 was held not to be applicable. Applying Art. 144 of the Limitation Act it was held that the suit having been instituted more than twelve years after the execution of the gift was barred by time. This case is distinguishable on fact. In the present case the suit is (not?) against any person who is a transferee for valuable consideration. Smt. Chandrawati is an heir of the assign who in my opinion is included in the term assign used in section 10 of the Limitation Act. The above authority in my opinion does not help the appellant

rather certain observations of this case help the respondent.

13. In view of what has been said above I am unable to hold that section 10 of the Limitation Act does not apply to the facts of this case. In my opinion the two courts below have rightly applied section 10 of the Limitation Act and decreed the suit.

14. On the facts stated above I am further of opinion that till the life time of Smt. Gomti, Smt. Gomti nor her donee Sri Dwarka Prasad nor Smt. Chandrawati could assert adverse possession against the deity, vide *Sree Sree Ishwar Sridhar Jew v. Sushila Bala Dasi*, 1954 SCR 407 at 416 = (AIR 1954 SC 69 at p. 73) wherein the Supreme Court has approved of the following observations of Rankin C. J. in the case of *Surendrakrishna Roy v. Shree Shree Ishwar Bhuvaneshwari Thakurani*, ILR 60 Cal 54 at p. 77 = AIR 1933 Cal 295 at 304:—

"But, in the present case, we have to see whether the possession of two joint shebait becomes adverse to the idol when they openly claim to divide the property between them. The fact of their possession is in accordance with the idol's title and the question is whether the change made by them, in the intention with which they hold, evidenced by an application of the rents and profits to their own purposes and other acts, extinguishes the idol's right. I am quite unable to hold that it does, because such a change of intention can only be brought home to the idol by means of the shebait's knowledge and the idol can only react to it by the shebait. Adverse possession, in such circumstances, is a notion almost void of content. True, any heir or perhaps any descendant of the founder can bring a suit against the shebait on the idol's behalf and, in the present case, it may be said that the acts of the shebait must have been notorious in the family. But such persons have no legal duty to protect the endowment and, until the shebait is removed or controlled by the court, he alone can act for the idol."

15. Thus the suit having been instituted well within twelve years of the death of Smt. Gomti could in no case be held to be barred by time.

16. After the completion of this judgment learned counsel for the appellant invited my attention to the case of *Padmanabha Pillai Raman Pillai v. Secretary, Travancore Devaswom Board*, AIR 1957 Trav-Co. 269 in support of his contention. In this authority paragraphs 7 and 11 are the relevant paragraphs dealing with the point. I have already referred to the observations of Rankin C. J. above. The same observation has been referred to in paragraph 7 and followed. Paragraph 11 of this authority deals with the circumstance under which Article 144 of

the Limitation Act applies. To the facts of that case section 10 of the Limitation Act had no applicability. In my opinion this case also does not help the appellant.

17. The only point argued before me being one of limitation in view of what I have held above the appeal fails and is hereby dismissed with costs.

DRR

Appeal dismissed.

AIR 1969 ALLAHABAD 75 (V 56 C 14)

LUCKNOW BENCH

G. D. SAHGAL, J.

Ahmad Bux and others, Petitioners v. Smt. Nathoo w/o Ashiq Ali and others, Opposite Parties.

Writ Petn. No. 623 of 1966, D/- 23-5-1968.

Mahomedan Law — Marriage — Dissolution — Hindu wife converting to Islam — Marriage does not automatically stand dissolved — Marriage with a Mahomedan — Legitimacy of child — Evidence Act (1872), S. 112. AIR 1949 Cal 436, Diss.

The marriage tie between a Hindu couple does not stand dissolved automatically after a fixed period on the conversion of the Hindu wife to Islam. It however stands dissolved on the death of the Hindu husband. After the death of such Hindu husband she becomes free to marry the Muslim spouse. Thus if she became a Mahomedan and married the mahomedan husband and a child was born of that union the child would be a legitimate child. AIR 1949 Cal 436, Dissented. Case law discussed.

It may be that if there is no evidence of the actual conversion of the wife to Islam and her marriage with the Mahomedan husband in accordance with the Sheriat and there is evidence that the Hindu husband had died, there will be a presumption from their long course of conduct that they were husband and wife, but that presumption would arise only on the date when the question is considered and not on the date when the child was conceived. (Para 26)

Cases Referred: Chronological Paras

(1949) AIR 1949 Cal 436 (V 36) =	
49 Cal WN 439, <i>Mt. Ayesha Bibi v. Subodh Ch. Chakravarty</i>	13, 16
(1945) 49 Cal WN 745, <i>Sayed Khatoon v. M. Obadiah</i>	12
(1920) AIR 1920 Lah 379 (V 7) =	
ILR 1 Lah 440 = 22 Cri LJ 1, <i>Mt. Nandi v. The Crown</i>	11
(1891) ILR 18 Cal 264, <i>In the matter of Ram Kumari</i>	9, 11
(1887) ILR 10 Mad 218, <i>In re, Mil-lard</i>	8

(1879) ILR 4 Bom 330, Govt. of Bombay v. Ganga 7, 11

Sri K. N. Misra, for Petitioners; Sri Hargur Charan Srivastava, for Respondent No. 1.

ORDER :— This is a petition under Article 226 of the Constitution praying for a writ of certiorari for quashing an order dated the 28th of July, 1966, copy contained in annexure 6, passed by the Deputy Director of Consolidation, Hardoi on an application in revision under section 48 of the U. P. Consolidation of Holdings Act.

2. The dispute relates to number of plots of which one Mangali was the sirdar. He died on the 31st of January, 1962 and after him there were rival claims with respect of them between petitioners nos. 1 to 3 and Mohammad Bux, their brother, father of petitioner no. 4 and husband of petitioner no. 5 on the one hand and Smt. Nathoo, opposite party no. 1, on the other. While petitioners nos. 1 to 3 and Mohammad Bux claimed themselves to be the sister's son of Mangali, Opposite party no. 1 claimed herself to be his daughter. As to opposite party no. 1, the case of the petitioners was that she was not a legitimate daughter of the deceased Mangali.

3. The facts relating to opposite party no. 1 being the daughter of Mangali are that one Rukko was the wife of one Gulab Sweeper, a Hindu. She eloped with Mangali and began to live with him. The petitioner's case is that she was only a concubine of Mangali and opposite party no. 1 being born of them is not a legitimate daughter of Mangali. On the other hand, the case of opposite party no. 1 was that Smt. Rukko embraced Islam and called herself Asghari when her marriage with Gulab stood automatically dissolved. She thus married Mangali according to *Muslim Shariat* and opposite party no. 1 being born of them was their legitimate daughter.

4. Proceedings for mutation relating to the plots in dispute after the death of Mangali started in the Court of the Tahsildar who decided against opposite party no. 1. There was an application in revision before the Additional Collector and that was dismissed. Opposite party no. 1 then went up in revision before the Additional Commissioner but in view of notification being issued relating to the village under section 4 of the U. P. Consolidation of Holdings Act, those proceedings were stayed.

5. Before the consolidation authorities the objection under section 9 of the Consolidation Act was decided by the Consolidation Officer in favour of the petitioners. Opposite party no. 1 went up in appeal and the Assistant Settlement Officer, Consolidation, dismissed that appeal.

She then went up in revision. The Deputy Director, Consolidation, held that Smt. Rukko after leaving Gulab, a Hindu, with whom she was originally married embraced Islam and on her embracing Islam her marriage with Gulab stood automatically dissolved. He further held that though there was no direct proof of her conversion from Hinduism to Islamic faith, from a long course of conduct the conclusion was that she must have been converted to Islam. She changed her name also from Rukko to Asghari. It was in these circumstances that he held that her marriage with Gulab stood dissolved. Again, there was also no direct evidence of marriage between her with Mangali in accordance with Islamic law, but as a result of long course of conduct on account of their being treated as husband and wife and her being described by him as his wife on various occasions, he held that she must have been married to him under the Shariat. Opposite party no. 1 was, in these circumstances, held by him to be a legitimate daughter of Mangali and as such entitled to the plots. The revision was accordingly allowed by an order dated the 28th of July, 1966. It is that order which is sought to be quashed in these proceedings.

6. Learned counsel appearing for the petitioners cited a number of authorities to show that even though Srimati Rukko might have embraced Islam her marriage with Gulab could not stand dissolved and as Islam does not allow polyandry she could not even under the Shariat marry Mangali and be his wife. She was at the most living in a state of concubinage with Mangali. Her marriage tie with Gulab had not been dissolved and any child born of them must be held to be an illegitimate child. The Deputy Director has, according to the argument of the learned counsel, committed a manifest error of law in holding that she was a legitimate child of Mangali.

7. The authorities that were cited on behalf of the petitioners are:

The first case cited is a Division Bench case of the Bombay High Court, viz. the Government of Bombay v. Ganga, (1879) ILR 4 Bom 330, where it was held that the conversion of a Hindu wife to Mahomedanism does not, ipso facto, dissolve her marriage with her husband, she cannot, therefore, during his life-time enter into any other valid marriage contract, her going through the ceremony of Nikah with a Mahomedan is, consequently, an offence under section 494 of the Indian Penal Code.

8. The next case cited is also a Division Bench case of the Madras High Court viz. Millard in re, (1887) ILR 10 Mad 218. That was a case of woman, who was baptised in infancy into the Roman

Catholic Church, but subsequently relapsed, with the rest of her family, into Hinduism and was married to a Hindu. Her Hindu husband since discarded her, and alleged that he would not have married her if he had known that she had been baptised. She was subsequently readmitted into the Roman Catholic Church and married by a priest to a Roman Catholic Christian during the life time of her Hindu husband. It was held that her marriage with the Hindu husband was subsisting and valid at the time of her Christian marriage; that she was guilty of the offence of bigamy and that the priest was guilty of abetting that offence. This case does not relate to a woman who was converted to Islam and is thus not a case exactly in point though it does indicate that by the conversion of a Hindu wife to another religion her marriage with her Hindu husband does not automatically stand dissolved.

9. We now come to a case of the Calcutta High Court, viz., in the matter of Ram Kumari, (1891) ILR 18 Cal 264 which was also heard by a Division Bench. In that case a Hindu woman was married according to Hindu rites to a Hindu of the same caste. Subsequent to that marriage she became a convert to Mahomedanism and then married a Mahomedan. She was charged with and convicted of an offence under section 494 of the Indian Penal Code. It was held that there was no authority in Hindu Law for the proposition that an apostate is absolved from all civil obligations, and that so far as the matrimonial bond is concerned, such a view would be contrary to the spirit of that law, which regards it as indissoluble and as such the marriage between her and her Hindu husband under the Hindu Law was not dissolved by her conversion to Mahomedanism. It was further held that as the validity of the second marriage depended on the Mahomedan Law and as that law does not allow a plurality of husbands, it would be void or valid according as the first marriage was or was not subsisting at the time it took place.

According to certain authorities cited before that Bench when the wife becomes a convert to the Musalman faith, and the husband is an unbeliever, the Magistrate is to call upon him to embrace Islam, and if he does so, the woman continues his wife, but if he refuses, the Magistrate must separate them; and if the wife embrace the Mahomedan faith in a foreign country, and the husband is an unbeliever, separation takes place on the expiration of three terms of the wife's courses. That was, however, not a case when the wife embraced Islam in a foreign country. The woman had not given any notice to her former husband nor had she sought the intervention of

the Courts of Justice as she might have done by instituting a suit after notice to the husband for a declaratory decree that under the Mahomedan law, which was her personal law since her conversion, her former marriage was dissolved and that she was competent to marry again. In the circumstances the rule of Mahomedan Law cited before the Court was not given effect to.

10. This case supports the petitioners when it is urged on their behalf that the marriage of Srimati Rukko with Gulab who subsequently began to call herself Srimati Asghari did not stand dissolved automatically on her conversion to Islam and as she continued to be the wife of Gulab, opposite party no. 1, could not be a legitimate child of Mangali from her.

11. We now come to a case of the Lahore High Court viz. Mt. Nandi v. The Crown, ILR 1 Lah 440=(AIR 1920 Lah 379) which has been decided by a single Judge, where the accused, Mussamat Nandi, alias Zainab, the wife of the complainant, a Chamar, changed her religion and became a Musalman, and a month and four days later married Mussalman named Rukan Din. She was charged with an offence under Section 494 of the Indian Penal Code and was held to be guilty. The conviction was upheld in revision by Abdul Raof, J. who held that the mere fact of her conversion to Islam did not dissolve the accused's marriage with the complainant which could only be dissolved by a decree of a Court. The following passage from Ameer Ali's Muhammadan Law, Volume II at page 437 was cited in that case:—

"Where the parties are scripturalists and the wife becomes a convert to Islam the same procedure would be followed, viz., if the conversion takes place in a country subject to the laws of Islam, the faith will be offered for acceptance to the husband and on his refusal the judge will make a decree for separation or cancellation of the marriage."

There had been no decree of this kind in the case and the learned Judge pointed out that it could not be denied that India was Dar-ul-Islam, where Muhammadan Law is administered. Therefore, dissolution of marriage could not have taken place in the case without a decree of Court. The two cases cited earlier, viz., (1879) ILR 4 Bom 330 and (1891) ILR 18 Cal 264 where referred to and followed.

12. The last case on which reliance was placed by the learned counsel is a single Judge case of the Calcutta High Court, viz., Sayade Khatoun v. M. Obadiah, (1945) 49 Cal WN 745 where it was held that a marriage solemnized in India according to one personal law cannot be dissolved according to another personal law, simply because one of the parties has changed his or her religion. It was

a case for a declaration under section 42 of the Specific Relief Act that the plaintiff's marriage to the defendant had been dissolved and that the plaintiff had regained the status of an unmarried woman. The plaintiff's case was that she and the defendant were both members of the Jewish Community and she was married to the defendant according to Jewish rites at a synagogue in Calcutta. The marriage, however, was not consummated and the defendant deserted her. She became a convert to Islam and was received into Islamic faith in the presence of the Imam of the Nakhoda Mosque in Calcutta. Thereafter she wrote several letters to her husband calling upon him to be so good as to embrace Islam but no heed was paid by him. It was in these circumstances that she had filed the suit. Her suit was dismissed on the grounds already referred to above.

13. On the other hand, learned counsel for opposite party no. 1 has relied on another authority of the Calcutta High Court also a single Judge case viz., *Musst. Ayesha Bibi v. Subodh Ch. Chakravarty*, 49 Cal WN 439 = (AIR 1949 Cal 436) which has been specifically dissented from in the above case. In this case it has been pointed out that while the Hindu Law does not lay down that upon one spouse forsaking the religion, the marriage is dissolved, it does not also lay down that such marriage is not dissolved. British India, as it then was, according to the learned Judge, was not a country under Islamic rule and presentation of Islam to the unconverted spouse by the Kazi was not necessary. The position under the Mahomedan Law as administered in British India according to the view of the learned Judge was that after conversion of the wife, the marriage is automatically dissolved after a fixed period of time either by the expiration of three menstrual periods of the wife, or, alternatively, in certain circumstances, after the lapse of three months, unless the husband adopts the Muslim faith before the expiration of the period.

14. In view of this authority the suggestion of the learned counsel on behalf of opposite party no. 1 was that it was not necessary to decide as to which of the two views was correct. It was sufficient, according to his submission, for the purpose of deciding, the case to say that the point raised was not free from doubt and difficulty and if the Deputy Director had taken a view which is supported by a judgment on which opposite party no. 1 relies, it cannot be said that he has committed a manifest error of law so that his order becomes liable to be quashed by a writ of certiorari.

15. It is, however, not possible to accept this submission. If the view for which the learned counsel for the peti-

tioners has found support in a long trend of authority is correct, namely, that the marriage of Smt. Rukko (later on Smt. Asghari) with Gulab could not automatically be dissolved after a fixed period of time by accepting Islam, the question still would arise as to whether Gulab had died before Smt. Asghari could be said, after accepting Islam, to have been married to Mangali and whether opposite party no. 1 Smt. Nathoo was born before they were married or after they were married. If the marriage of Smt. Rukko was not automatically dissolved on her accepting Islam, it would certainly be dissolved on the death of Gulab and if Smt. Rukko, who subsequently became Smt. Asghari after accepting Islam, married Mangali and opposite party no. 1 was born after that marriage, opposite party no. 1 would be the legitimate daughter of Mangali.

16. If the other view, for which support has been found by the learned counsel for opposite party no. 1, as to the dissolution of the marriage tie between Gulab and Smt. Rukko is correct, then it will still have to be decided as to whether Smt. Rukko accepted Islam after having remained in the concubinage of Mangali for some time or she accepted Islam as soon as she was enticed away by him and was married to Mangali soon after the expiry of the period of time, referred to above, and whether Smt. Nathoo, opposite party no. 1, was born when she was living in a state of concubinage with Mangali or she was born after her mother had been converted to Islam and her marriage tie with Gulab had been dissolved and she had been married with Mangali according to Islamic Laws. The long course of conduct of Mangali and Smt. Asghari of treating themselves as husband and wife and being accepted as such in society and also Mangali recognising Smt. Asghari as his wife too would not be of much help in the case, for it would at the most lead to a presumption if the marriage of Smt. Rukko as Smt. Asghari with Gulab stood dissolved on her accepting Islam, that they were husband and wife on the date the matter actually came up for consideration, there being no presumption that they must have been husband and wife on the date opposite party no. 1 was conceived of their union. The view of the law taken by Ormond, J., in *Ayesha Bibi's* case, 49 Cal WN 439 = (AIR 1949 Cal 436) (supra), however, does not appear to be correct for not only is against the long trend of authority, already referred to above, the premises on which it is based, with respect also do not lead to the conclusion arrived at by the learned Judge.

(17) In the first place, there does not seem to be any valid reason why the learned judge should have applied

the law which is applicable to cases where the wife adopts Mussalman faith in a foreign country: whether British India as it then was, Dar-ul-Islam or Dar-ul-Harb, the analogy of party to marriage adopting Islamic faith in a foreign country in which case the cutting off of the marriage tie is suspended for the completion of three menstrual periods and thereafter if the other party also adopts the faith before their completion, the marriage remains subsisting, does not apply.

18. Secondly, the learned Judge has taken note of a number of considerations as to why the marriage on such conversion after the expiry of the period, above stated, should stand dissolved.

19. He says that the husband has no right of cohabitation with his wife after her conversion into Islam since the cohabitation of a Hindu with a non-Hindu was not allowed. He was, probably impressed by a case before him to the effect that the parties in that case were Brahmins. He has not cited any authority under which it may be said that cohabitation of a Hindu with a non-Hindu was not allowed.

20. Then he pointed out that the sacraments, which are generally performed by married parties under the Hindu Law and religion, could not be performed by the wife and the husband was not entitled to ask her to do so. But, does it mean that on that account the marriage should stand dissolved?

21. Again, regarding the preparation of his food, the judge found that she could no longer take any part in this nor could the husband ask her to do so and that he was unequivocally prohibited from taking any food prepared by her. Here again, this does not appear to be a consideration germane to the issue as to whether such a woman ceases to be the wife of a person to whom she is married.

22. Then he goes on to point out that the future children the wife may have by a later Mohammedan spouse would not be entitled to be maintained by the Hindu husband. This argument the learned Judge has advanced because he thinks that under the Mahomedan Law the marriage of such a woman with a Mahomedan would be valid and her marriage with her Hindu husband would stand dissolved. This, to my mind, means begging the question, because, the question to be determined is as to whether the earlier marriage with the Hindu husband stands dissolved.

23. Then, as to the maintenance of the wife, he says that under the Hindu Law if the wife deserts her husband, the husband ceases to have any liability to maintain her. He may not be under a liability to maintain her, if this position is accepted, but does it sever the marriage tie?

24. On the whole, therefore, I am not satisfied, with respect, that the learned Judge was right in holding that the marriage in such a case would stand dissolved after the expiration of a certain fixed period on the conversion of the wife to Islam. That view, therefore, to my mind, appears to be manifestly erroneous and cannot be accepted.

25. Even if the view that the marriage tie of Smt. Rukko (later on Smt. Asghari) did not stand dissolved with Gulab on her conversion to Islam is correct, as I have held it to be correct, the question would still arise whether it could be said that opposite party no. 1 Smt. Nathoo could not be the legitimate child born of Mangali and Smt. Asghari.

26. If Gulab died some time after Smt. Rukko left him and the latter got converted to Islam and married Mangali and Smt. Nathoo was born of that marriage then though the marriage of Smt. Rukko with Gulab did not stand dissolved on her conversion to Islam, it stood dissolved on his death and Smt. Nathoo would, in the circumstances, be a legitimate child of Mangali and Asghari. It may be that if there is no evidence of the actual conversion of Smt. Rukko to Islam and her marriage with Mangali in accordance with the Shariat and there is evidence that Gulab had died, there will be a presumption from their long course of conduct that Mangali and Asghari were husband and wife, but that presumption would arise only on the date when the question is considered and not on the date when Smt. Nathoo was conceived. For that, the matter has to be investigated into. In the circumstances, even if the view of the Deputy Director is wrong that the marriage tie between Gulab and Rukko stood dissolved on her conversion to Islam, the matter has to be investigated further to find out whether opposite party no. 1 could still be the legitimate daughter of Mangali.

27. Thus the marriage tie between Gulab and Smt. Rukko (Smt. Asghari) did not stand dissolved automatically after a fixed period on the conversion of Smt. Rukko to Islam. It however, stood dissolved on the death of Gulab. After the death of Gulab she was free to marry Mangali, if she became a Mahomedan and married Mangali and if Smt. Nathoo, opposite party no. 1, was born of that union, she would be their legitimate child. The Deputy Director, therefore, should have decided the case in the light of these observations.

28. Altogether, therefore, the order of the Deputy Director of Consolidation has to be quashed, who has to decide the question afresh in the light of the observations made above.

29. The petition is accordingly allowed with costs and the order of the Deputy

Director of consolidation dated the 28th of July, 1966 (copy contained in annexure 6) quashed, who shall decide the matter again in accordance with law.

Petition allowed.
MVJ/D.V.C.

AIR 1969 ALLAHABAD 80 (V 56 C 15)

RAJESHWARI PRASAD, J.

A. K. Chakravarty and another, Applicants v. The State, Opposite Party.

Criminal Revn. No. 2156 of 1965, D/- 27-11-1967, from order of S. J., Varanasi, D/- 11-11-1965.

Prevention of Food Adulteration Act (1954), S. 10(7) — Interpretation of — Requirement of presence of two witnesses is mandatory — Exception — Evidence must show impossibility in complying with the requirement.

A plain reading of sub-section (7) of section 10, makes it clear that the provision is intended to be mandatory in cases where it is possible to comply with the same. The exceptions to that mandatory rule are those cases where it is not possible to comply with that rule. The word used in the section is "shall" and not "may". The phrase "as far as possible" governs the further clause "not less than two persons to be present at the time". It can be read to lay down that if it is not possible to call two persons, it is permissible only to call one person. Therefore, in cases where there is no evidence to show that it was not possible to comply with the requirement of sub-section (7) of Section 10, compliance with that sub-section must be made. It would be open to the prosecution to show that under the circumstances of the case, it was not possible to comply with that requirement, but in the absence of any circumstance to that effect it cannot be said that it was intended to leave the matter entirely in the discretion of the Food Inspector to call witnesses or not to call witnesses when action was taken under clause (a). Section 10 sub-section (1) of the Act. It could not have been intended to give the Food Inspector a power to discriminate one case from another. (Para 6)

If on the evidence adduced by the prosecution a finding is returned that taking of sample has been successfully established, the omission of Food Inspector in not complying with sub-section (1) loses its importance. But where the question itself is whether testimony of Food Inspector has proved the purchasing of the sample in the manner alleged by the prosecution, the absence of evidence to show why it was not possible to call two witnesses at the time when action was taken under

S. 10(1)(a) and absence of printed receipt from the firm for the alleged sale, raise doubt about correctness of the testimony of Food Inspector and conviction cannot be based on the sole testimony of the Food Inspector. 1960 All LJ 419 & 1959 All LJ 624, Disting. (Paras 8 & 9)

Cases Referred: Chronological Paras
(1960) 1960 All LJ 419=1960 All WR (HC) 296, Municipal Board, Kanpur v. Mohan Lal 8
(1959) 1959 All LJ 624=1959 All WR (HC) 482, Mohd. Shafaat Husain v. State 8

Narendra Kumar and S. K. Dhaon, for Applicants.

ORDER :— Both the petitioners have been convicted under Sections 7/16 Prevention of Food Adulteration Act. The sentence awarded to Sri A. K. Chakravarty is that of a fine of Rs. 2,000 and in default to undergo rigorous imprisonment for one year. The sentence awarded to Sri A. K. Bhattacharya petitioner is also that of a fine of Rs. 1000 only and in default to undergo six months' rigorous imprisonment.

2. There is a private limited company in the town of Varanasi known as "Healthway Private Ltd." The business that it carries on is of manufacture and sale of milk powder known as 'Shishu Milk Food'. Petitioner Sri A. K. Chakravarty is the Director and the petitioner Sri A. K. Bhattacharya is an employee thereof. He is a salesman according to the case of the prosecution. On 15th June 1964, the Food Inspector Sri Vijay Bahadur Srivastava (P. W. 1) obtained sample of milk powder which on analysis was found to be deficient. Petitioner Sri A. K. Chakravarty pleaded that when the sample was taken, he was not at Varanasi but was at Calcutta. The other petitioner Sri Bhattacharya pleaded that there was no sale of any sample in this case. The Food Inspector took the sample from the condemned stock stored in the godown. No price was received for the same. Nor was entry made thereof in the account books of the company. No regular receipt on the prescribed form of the company was given for the same. It was also alleged that he was not the salesman of the company and consequently he had no authority to sell the same to the Food Inspector.

3. The conviction of the petitioner in this case is based solely on the testimony of the Food Inspector Sri Vijay Bahadur Srivastava (P. W. 1). No other witnesses were produced by the prosecution.

4. In support of the revision petition, it has been urged that the Food Inspector did not comply with the provisions of Section 10, sub-section (7) Prevention of Food Adulteration Act and on that basis it has been urged that the conviction of the petitioners on the sole testimony of

the Food Inspector should not be maintained.

5. There is force in the submission. Before, I deal with the actual implications of sub-section (7) of section 10 of the aforesaid Act, it should be useful to reiterate that in this case, the contention on behalf of the petitioners is that there was no sale as alleged by the prosecution and that at any rate, the prosecution had failed to establish any such sale. It is further the case of the petitioners that the sample was taken from condemned consignment in the godown. The question that directly arises in this case, therefore, is whether the prosecution has succeeded in establishing that there was a sale and if so whether it related to an article which was not condemned and stored in the godown. It is in this light that the omission of the Food Inspector in not complying with sub-section (7) of section 10 has to be considered in this case. Sub-section (7) of section 10 reads as follows:—

"Where the Food Inspector takes any action "under clause (a) of sub-section (1), sub-section (2), sub-section (4) or sub-section (6), he shall, as far as possible, call not less than two persons to be present at the time when such action is taken and take their signatures."

6. A plain reading of the above-sub-section (7) of Section 10, makes it clear that the provision was intended to be mandatory in cases where it was possible to comply with the same. The exceptions to that mandatory rule are those cases where it is not possible to comply with that rule. The word used in the section is "shall" and not "may". The other possible interpretation of the above rule of law is that the phrase "as far as possible" governs the further clause "not less than two persons to be present at the time." It can be read to lay down that if it is not possible to call two persons, it is permissible only to call one person. In my opinion, in cases where there is no evidence to show that it was not possible to comply with the requirement of sub-section (7) of Section 10, compliance with that sub-section must be made. It would be open to the prosecution to show that under the circumstances of the case, it was not possible to comply with that requirement, but in the absence of any circumstance to that effect, it cannot be said that it was intended to leave the matter entirely in the discretion of the Food Inspector to call witnesses or not to call witnesses when action was taken under clause (a) section 10 sub-section (1) of the Act. It could not have been intended to give the Food Inspector a power to discriminate one case from another.

7. In the instant case, there is absolutely no evidence to show why it was not possible to call two witnesses at the

time when action was taken under clause (a) of sub-section (1) of Section 10. This being so, the testimony of the Food Inspector by itself loses its value to a great extent and the conviction of the petitioners on that testimony alone would not be warranted.

8. My attention has been invited to a Division Bench decision of this Court in the case of *Municipal Board, Kanpur v. Mohanlal*, 1960 All LJ 419. That case is clearly distinguishable on the basis that in that case there was evidence of the Food Inspector to show that he did try to get independent persons to witness the taking of the sample but none of them were willing to oblige and that he was forced to seek the assistance of the Municipal peon, who had accompanied him in that behalf. It was under those circumstances that importance was not attached to the omission of the Food Inspector in not complying with that rule of law. Reference was also made to another Single Judge decision in the case of *Mohd. Shafaat Husain v. State*, (1959) All LJ 624. In that case on the evidence that was adduced by the prosecution, a finding was returned that the taking of sample had been successfully established. In view of that finding, the omission of the Food Inspector in not complying with sub-section (7) of section 10 loses its importance. In the instant case, as I have mentioned above, the question that has arisen is itself to the effect whether the testimony of the Food Inspector has proved the purchasing of the sample in the manner as alleged by the prosecution. That decision, therefore, also is not applicable on the facts of the present case.

9. Apart from absence of any independent witness to prove the taking of the sample and the sale, there is the further circumstance in this case, that the receipt which has been proved to establish the sale in question is not on the printed receipt of the firm nor are there entries of the amount in the firm's register which was said to have been paid by the Food Inspector. It was urged that it is usual that the Food Inspector carry their own receipt books and obtain receipts from sellers on the same. In the instant case, however, we find that other Inspectors also took sample on the same date from the said firm of other articles. The receipts granted for those purchases are receipts on the printed receipt forms of the firm. There does not appear to be any reason why on the same date, a receipt was given to the Food Inspector concerned, not on the printed receipt of the firm, but on other forms. The absence of witnesses and the absence of a receipt on the receipt form of the firm, raises doubt about the correctness of the testimony of the Food

Inspector. This being so, the conviction of the petitioners based on the sole testimony of the Food Inspector in this case cannot be upheld. The prosecution case, cannot be said to be free from reasonable doubt.

10. The petition in revision is allowed. Order of conviction of the petitioners under sections 7/16 Prevention of Food Adulteration Act is set aside. The petitioners are acquitted. Fine if realised will be refunded.

Revision allowed.

CWM/D.V.C.

AIR 1969 ALLAHABAD 82 (V 56 C 16)
A. K. KIRTY, J.

Kailash Nath Agarwal, Applicant v. Amar Nath Agarwal and others, Opp. Parties.

Civil Revn. No. 306 of 1967, D/- 5-1-1968, against judgment and order of Munsif, West Allahabad, D/- 5-12-1966.

(A) Criminal P. C. (1898), Ss. 146, 145 — Reference to Civil Court under S. 146 (1) — Civil Court has jurisdiction and is legally competent to require the person whose affidavit was filed before Magistrate under S. 145(1) to attend Court for purposes of cross examination — But this is discretionary — 'Evidence' here includes affidavit — Civil P. C. (1908), O. 19 — Evidence Act (1872), S. 1.

In proceedings under S.145 the parties have right to apply to the Magistrate to summon a person whose affidavit has been filed to be examined by the magistrate. It would be open to a party to apply to the magistrate to summon and examine a person under the first proviso to section 145(4), and, if the Magistrate thinks it fit to do so, to seek permission to put some question or questions to the person summoned. Under Section 145(9) the Magistrate has been given a discretionary power to issue a summons to any witness, on the application of either party, directing him to attend to be examined and to be subjected to cross-examination, if so required. (Para 5)

The question which is referred to the Civil Court under section 146(1) of the Code is a pure question of fact which apparently the Magistrate concerned was unable to decide for himself even after holding an enquiry under Section 145. The power of the Civil Court to hold and conduct the proceedings arising out of a reference under Section 146(1) of the Code must be comprehensive enough to include all legally permissible modes of holding and conducting a judicial proceeding for the purpose of recording a categorical finding on a question of fact. In the absence of any bar, imposed ex-

pressly or by necessary implication, nothing in Section 146(1-A) should be read or construed as being restrictive of the ordinary powers of the Civil Court exercisable when performing its judicial duty of giving finding on a disputed question of fact. The proceeding on a reference under Section 146(1) is a civil proceeding within the meaning of section 141 of the Code of Civil Procedure. S. 146 (1-A) cannot be read and construed in isolation but must necessarily be read and construed in the setting in which it has been placed by legislature. Therefore, in a proceeding before the Civil Court under section 146 (1) its powers and the rights of the parties will, at least, be the same as those of the Magistrate and the parties in a proceeding under section 145.

(Paras 6, 7)

In the context and in the setting in which the expression 'evidence' has been used in Section 146(1-A) it can be reasonably held that it includes the affidavits which by virtue of the provisions of section 145(1) of the Code form part of the evidence on record in the proceeding, even though the Evidence Act does not apply to affidavits.

The proceeding arising on a reference under section 146(1) of the Code being a proceeding in the Civil Court, under section 141 of the Code of Civil Procedure, the provisions of Order 19 of that Code, at least in so far as the taking of further evidence produced by the parties is concerned, will also be applicable. Therefore, if further evidence is given by a party filing affidavits, the other party or parties cannot be denied the right, as available under Order 19 itself, to cross-examine the deponents of those affidavits.

(Para 6)

Section 146(1-A) of the Code gives rights to the parties to produce further evidence. A person whose affidavit has been filed as evidence against a party cannot certainly be summoned by him as his own witness to give further evidence on his behalf. The affidavit essentially partakes the nature of statement made during examination-in-chief and, therefore, the deponent cannot be called by the party against whom he has already given his testimony as a witness for that party. He can only be cross-examined and also re-examined if necessary, in accordance with law.

(Para 9)

Cross-examination is one of the most effective and universally recognised means of probing into and testing the credibility of a witness and the veracity of his testimony. The right to cross-examine a witness is a very valuable right. In the absence of any express and absolute bar imposed by law, this right cannot be denied to a party in a proceeding in the Civil Court arising on a reference under section 146(1) of the Code. But while it

would be open to a party to make an application in the Civil Court to summon the person or persons, whose affidavits are to be read in evidence against him, for cross-examination, the matter must be held to be within the judicial discretion of the Civil Court.

The powers of the Civil Court should be analogous to those which it can exercise under the provisions contained in Order 19 of the Code of Civil Procedure. It can be reasonably held that in disposing of an application for summoning person or persons the Civil Court should act as if the affidavit or affidavits filed by them are affidavits filed under Order 19 of the Code of Civil Procedure.

(Para 10)

(B) Civil P. C. (1908), S. 115 — Reference to Civil Court under S. 146(1), Criminal P. C. — Civil Court refusing to summon deponent of affidavit filed before Magistrate for being cross-examined — It is "case decided" in Civil Court subordinate to High Court — Decision directly affects Court's jurisdiction and is revisable — Criminal P. C. (1898), S. 146.

(Para 11)

Cases Referred: Chronological Paras

- (1966) AIR 1966 SC 1888 (V 53) = 1966 Cri LJ 1514, Ram Chandra Aggarwal v. State of Uttar Pradesh 6
- (1965) AIR 1965 All 294 (V 52) = 1965(2) Cri LJ 39, Lalta Ram v. Dalip Singh 5
- (1965) AIR 1965 Pat 104 (V 52) = 1965(1) Cri LJ 328, Naina Sah v. Ramrup Sah 5
- (1964) AIR 1964 Ker 308 (V 51) = 1964 (2) Cri LJ 682, Narayanan Kuttu v. Sekhara Menon 5
- (1964) AIR 1964 Mad 263 (V 51) = 1964 (1) Cri LJ 674, Challamuthu Padayachi v. Rajavel 5
- (1962) AIR 1962 All 68 (V 49) = 1962(1) Cri LJ 116, Mirza Mohd. Aziz v. Safdar Husain 5
- (1962) AIR 1962 Pat 249 (V 49) = 1962 (1) Cri LJ 749, Sohan Mushar v. Kailash Singh 5
- (1962) AIR 1962 Pat 253 (V 49) = (1962) 1 Cri LJ 752, Mt. Sarfi v. Mt. Sugo 5
- (1960) AIR 1960 Andh Pra 500 (V 47) = 1960 Cri LJ 1305, Pular Venkata Subba Reddy v. State of Andhra Pradesh 5
- (1960) AIR 1960 Pat 240 (V 47) = 1960 Cri LJ 343, Jamulur Jamular Rahman v. Abdul Aziz 5
- (1960) AIR 1960 Pat 505 (V 47) = 1960 Cri LJ 1477, Rudra Singh v. Bimla Debi 5
- (1960) AIR 1960 Pat 513 (V 47) = 1960 Cri LJ 1486, Arjun Singh v. Singeshwar Chaudhary 5
- (1960) AIR 1960 Raj 15 (V 47) = 1960 Cri LJ 116, Bahori v. Ghure 5

S. S. Bhatnagar, for Applicant, Gyan Prakash and G. P. Mathur, for Opposite Parties.

ORDER :— This case arises out of proceedings under section 145 of the Code of Criminal Procedure (hereinafter called the Code).

2. The Magistrate concerned made a reference to the Munsif, West Allahabad under Section 146(1) of the Code to decide the question whether any and which of the parties was in possession of the subject of dispute on the material date. After the parties had appeared before the Civil Court, an application was made by Kailash Nath Agarwal praying that the first party and other persons, whose affidavits had been filed before the Magistrate under Section 145(1) of the Code be summoned for purposes of cross-examination. This application was opposed and was dismissed by the learned Munsif holding that it was not within his power to call upon the persons concerned to attend the court for subjecting themselves to cross-examination. Against this order Kailash Nath Agrawal has filed the present revision under Section 115 of the Code of Civil Procedure. It has been submitted on his behalf that the learned Munsif has, upon an erroneous and mis-conceived view of the law and upon a misinterpretation of Section 146(1-A) of the Code, failed to exercise jurisdiction and power vested in the Civil Court by law. The question which falls for decision is whether the Civil Court, to which reference under Section 146(1) of the Code has been made, has any jurisdiction or is legally competent to require the person or persons whose affidavits were filed before the Magistrate under Section 145 (1) of the Code to attend the Court for purposes of cross-examination.

3. The learned counsel for the contesting opposite party supported the order of the Court below. He contended that the powers and duties of the Civil Court to which a reference is made under Section 146(1) of the Code are entirely circumscribed by sub-section (1-A) of that section itself. Section 146(1-A), it was submitted, is exhaustive and provides a complete machinery for disposal of reference made to the Civil Court under Section 146 (1) of the Code. It was also submitted that outside Section 146(1-A) of the Code the Civil Court has no other power. The argument, if I may say so, is based on a mechanical paraphrasing and dogmatically rigid interpretation of section 146(1-A) of the Code.

4. To resolve the controversial question involved in the case and to arrive at a proper decision thereon it would be necessary to examine the relevant provisions of Ss. 145 and 146 of the Code.

Section 145(1) of the Code requires the Magistrate concerned, on being satisfied

that a dispute likely to cause a breach of the peace exists concerning any land or water or boundaries thereof, to make an order in writing, stating the grounds of his being so satisfied, and requiring the parties concerned in such dispute to attend his court in person or by pleader, within a time to be fixed by such Magistrate, and to put in written statements of their respective claims as respects the fact of actual possession of the subject of dispute and further requiring them to put in such documents or to adduce, by putting in affidavits, the evidence of such persons, as they rely upon in support of such claims. After making the aforesaid order, which is commonly described as the preliminary order, the Magistrate is required to hold an enquiry as to possession under Section 145(4) of the Code. Section 145(4) of the Code reads:—

"The Magistrate shall then, without reference to the merits or the claims of any of such parties to a right to possess the subject of dispute, peruse the statements, documents, and affidavits, if any, so put in, hear the parties and conclude the inquiry, as far as may be practicable within a period of two months from the date of the appearance of the parties before him and, if possible, decide the question whether any and which of the parties was at the date of the order before mentioned in such possession of the said subject:

Provided that the Magistrate may, if he so thinks fit, summon and examine any person whose affidavit has been put in as to the facts contained therein:

Provided further that, if it appears to the Magistrate that any party has within two months next before the date of such order been forcibly and wrongfully dispossessed, he may treat the party so dispossessed as if he had been in possession at such date:

Provided also that, If the Magistrate considers the case one of emergency, he may at any time attach the subject of dispute, pending his decision under this section."

Sub-section (9) of section 145 of the Code provides:—

"The Magistrate may, if he thinks fit, at any stage of the proceedings under this section, on the application of either party, issue a summons to any witness directing him to attend or to produce any document or thing."

Therefore Section 145 of the Code itself requires the Magistrate concerned to hold an enquiry as to possession before passing final order under sub-section (6) thereof, and invests him with jurisdiction and power to summon and examine, if he so thinks fit, any person whose affidavit has been filed under sub-section (1) and also to summon witnesses at any stage on the application of either party under sub-section

(9) of the section. Section 145(6) of the Code which requires and empowers the Magistrate to pass final orders reads:

"If the Magistrate decides that one of the parties was or should under the (second proviso) to sub-section (4) be treated as being in such possession of the said subject, he shall issue an order declaring such party to be entitled to possession thereof until evicted therefrom in due course of law, and forbidding all disturbance of such possession until such eviction and when he proceeds under the (second proviso) to sub-section (4), may restore to possession the party forcibly and wrongfully dispossessed."

5. Under Section 145(4) of the Code the Magistrate is not only required to hold an enquiry but to decide, if possible, the question of actual possession. The making of a reference to the Civil Court under Sec. 146(1) of the Code is an exception, recourse to which can be had only when the Magistrate is unable to come to decision on the question of possession even after performing his duties under Section 145(4). The enquiry by the magistrate under section 145 is summary but nonetheless, judicial. It has been held that the Magistrate's powers are not confined to the first proviso to Section 145(4) and section 145(9) only. He can examine witnesses under Section 540 of the Code also. (See *Lalta Ram v. Dalip Singh*, AIR 1965 All 294; *Bahori v. Ghure*, AIR 1960 Raj 15; *Mirza Mohd. Aziz v. Safdar Husain*, AIR 1962 All 68; *Challamuthu Padayachi v. Rajavel*, AIR 1964 Mad 263. The statements, affidavits and documents filed by parties in pursuance of the preliminary order under section 145(1) are required to be perused by the Magistrate under Section 145(4). The word "peruse" in Section 145(4) has been held to mean "to go through critically; to read thoroughly or carefully". It is an expression of wide import. It has a judicial significance. (See *Mt. Sarfi v. Mt. Sugo*, AIR 1962 Pat 253; *Sohan Mushar v. Kailash Singh*, AIR 1962 Pat 249; *Pulur Venkata Subba Reddy v. State of Andhra Pradesh*, AIR 1960 Andh Pra 500; *Arjun Singh v. Singeshwar Chaudhary*, AIR 1960 Pat 513; *Rudra Singh v. Bimla Debi*, AIR 1960 Pat 505; *Jamulur Rahman v. Abdul Aziz*, AIR 1960 Pat 240; *Narayanan Kutty v. Sekhara Menon*, AIR 1964 Ker 308; *Naina Sah v. Ramrup Sah*, AIR 1965 Pat 104. The law having imposed this duty on the Magistrate has also provided him with necessary power to summon and examine any deponent whose affidavit has been filed so that, whenever he thinks fit, he may probe into and test the veracity of the assertions made in the affidavit. It is, however, difficult to understand or appreciate how the Magistrate can himself hit upon the deponent or deponents who should be summoned and examined. Evidently this can

ordinarily and appropriately be done on the basis of information and material furnished by the parties themselves. Again, a person who has been summoned cannot be properly and effectively examined by the Magistrate all by himself. He will have necessarily to depend on information, particulars and materials furnished by parties.

Therefore, although a discretionary power has been given to the Magistrate under the first proviso to Section 145(4), the occasion or necessity for the exercise of this power, in practice, almost invariably will be found to have been furnished by the parties. If this be the real position and, in my opinion, it is, there does not appear to exist any cogent reason why the parties should have no right to apply to the Magistrate to summon a person whose affidavit has been filed to be examined by the Magistrate. The examination will obviously be in the nature of cross-examination and this can also be naturally done by the Magistrate with the assistance of the parties. If this be so, it is again difficult to find a cogent reason why the parties, subject to the permission and control of the Magistrate, cannot have a right to participate in the examination of the person. I am, therefore, of opinion that it would be open to a party to apply to the Magistrate to summon and examine a person under the first proviso to Section 145(4), and, if the Magistrate thinks it fit to do so, to seek permission to put some question or questions to the person summoned. There is nothing in Sec. 145, Cr. P. C. which expressly or by necessary implication would entail denial of this limited right to the parties. Under Section 145(9) the Magistrate has been given a discretionary power to issue a summons to any witness, on the application of either party, directing him to attend. To attend what for? Obviously to be examined and to be subjected to cross-examination, if so required. This would also lend support to the view expressed earlier that the first proviso to Section 145(4) cannot be held to preclude the parties from exercising even such limited rights as have been indicated above.

Having considered the powers and duties of the Magistrate under Section 145 and the rights of the parties, the provisions of section 146 of the Code may now be examined. Section 146(1) of the Code which provides for reference to the Civil Court, omitting the proviso, reads as follows:—

"If the Magistrate is of opinion that none of the parties was then in such possession, or is unable to decide as to which of them was then in such possession, of the subject of dispute, he may attach it, and draw up a statement of the facts of the case and forward the record of the proceeding to a Civil Court of com-

petent jurisdiction to decide the question whether any and which of the parties was in possession of the subject of dispute at the date of the order as explained in sub-section (4) of Section 145; and he shall direct the parties to appear before the Civil Court on a date to be fixed by him."

6. The question which is referred to the Civil Court under Section 146(1) of the Code is a pure question of fact which apparently the Magistrate concerned was unable to decide for himself even after holding an enquiry under Section 145. A judicial finding on this question is required to be given by the Civil Court to which a reference is made under Section 146(1) of the Code. Its duties and powers are to be found in the following sub-sections of that section:

"(1-A) On receipt of any such reference, the Civil Court shall peruse the evidence on record and take such further evidence as may be produced by the parties respectively, consider the effect of all such evidence and after hearing the parties decide the question of possession so referred to it.

(1-B) The Civil Court shall, as far as may be practicable, within a period of three months from the date of the appearance of the parties before it, conclude the enquiry and transmit its finding together with the record of the proceeding to the Magistrate by whom the reference was made; and the Magistrate shall, on receipt thereof proceed to dispose of the proceeding under Section 145 in conformity with the decision of the Civil Court.

(1-C) The costs, if any, consequent on a reference for the decision of the Civil Court shall be costs in the proceedings under this section."

The finding given by the Civil Court must be given effect to by the Magistrate and the proceedings under Section 145 must be disposed of in conformity with the decision of the Civil Court. The finding, once given, can neither be appealed against, nor revised nor reviewed. The final order passed in the proceedings under Sec. 145 in conformity with the finding of the Civil Court has been made under Section 146(1-E) subject to subsequent decision of a Court of competent jurisdiction only. It is a finding of considerable importance and consequence for the parties. Obviously, therefore, the power of the Civil Court to hold and conduct the proceedings arising out of a reference under Section 146(1) of the Code must be comprehensive enough to include all legally permissible modes of holding and conducting a judicial proceeding for the purpose of recording a categorical finding on a question of fact. In the absence of any bar, imposed expressly or by necessary implication, nothing in section 146(1-A) should be

read or construed as being restrictive of the ordinary powers of the Civil Court exercisable when performing its judicial duty of giving finding on a disputed question of fact. By doing so the legislative purpose and intent of providing for reference to the Civil Court may be stultified. The proceeding arising on a reference under section 146(1) to the Civil Court is a Civil proceeding within the meaning of Section 141 of the Code of Civil Procedure. This has been held by the Supreme Court in *Ram Chandra Aggarwal v. State of Uttar Pradesh*, AIR 1966 SC 1888.

7. The true import and effect of the words "the Civil Court shall peruse the evidence on the record " in Section 146(1-A) of the Code on which the entire argument of the opposite party is based, in my opinion, is only this that the Civil Court is not required to start the entire proceedings de novo. This will be clear from sub-secs. (1) and (1-A) of Section 146 of the Code itself. The proceedings which originated under Section 145(1) of the Code remains, so to say, in a state of animated suspension for the time being when a reference to the Civil Court is made under Section 146(1) by the Magistrate because of his inability to decide the question of possession. The proceeding in the Civil Court consequent upon the reference is not original. It is in reality a continuation of and complementary to the proceeding under Section 145 of the Code. The jurisdiction of the Civil Court commences on receipt of the reference and ceases with the transmission of its finding to the Magistrate together with the record of the proceeding. In exercise of its jurisdiction the Civil Court has to perform an important judicial duty of holding a limited enquiry and deciding objectively the question of possession referred to it. Does it stand to reason that the legislature while imposing a definite responsibility and an onerous duty on the Civil Court deprived it of its ordinary powers and denied to it even those powers which are exercisable by the Magistrate under Section 145 of the Code? After all it is only the inability of the Magistrate to come to a decision on the question of possession that occasions the reference to the Civil Court. Divorced from its context and literally read in isolation, Sec. 146(1-A) would ostensibly mean that if the parties do not produce any further evidence, the Civil Court shall have to peruse the evidence on record, hear the parties and decide the question of possession that very question which the Magistrate did not find it possible to decide after perusing the same evidence and hearing the parties. If the affidavits are evenly balanced and comprise the entire evidence, is the question of possession to be ultimately decided by the Civil

Court by tossing a coin? Literally, the Civil Court cannot even be said to have the power "to peruse" the statements filed by the parties under Section 145(1) of the Code and to consider whether and to what extent the affidavits filed and relied on by the parties as evidence are consistent with the statements. The Civil Court, on such interpretation of Sec. 146(1-A), will have no power to summon any deponent and to examine him even when after perusing the affidavits it might consider necessary and appropriate to do so for a proper decision of that very question which it has been called upon to decide. If the whole gamut of the powers of the Civil Court is to be literally confined to section 146(1-A), one may wonder what is the enquiry which the Civil Court is to hold and which it is required to conclude under Section 146(1-B) of the Code. In my opinion, section 146(1-A) cannot, therefore, be read and construed in isolation but must necessarily be read and construed in the setting in which it has been placed by legislature. The setting consists of the provisions of Sections 145 and 146 of the Code and there is, to my mind, nothing in those sections which, either expressly or by necessary implication, so curtails or restricts the powers of the Civil Court as has been contended for by the learned counsel for the opposite party. It must, therefore, be held that in a proceeding before the Civil Court arising on a reference under Section 146(1) of the Code its powers and the rights of the parties respectively will, at least, be the same as those of the Magistrate and the parties in a proceeding under section 145. I have already indicated what, in my opinion, these powers and rights are.

8. In one respect there is a difference in the language used in Section 145(4) and section 146(1-A) of the Code. In the former it is provided: "The Magistrate shall peruse . . . the documents and affidavits", whereas in the latter it is provided: ". . . the Civil Court shall peruse the evidence on record". Whether this difference has any special significance or whether in section 146(1-A) the words 'the documents and affidavits' have been condensed into the expression 'evidence' is not easily discernible. Evidence under the Evidence Act means oral and documentary evidence and the provisions of this Act do not apply to affidavits. However, in the context and in the setting in which the expression 'evidence' has been used in Section 146(1-A) it can be reasonably held that it includes the affidavits which by virtue of the provisions of section 145(1) of the Code form part of the evidence on record in the proceeding. Without being punctilious and importing a fiction, the affidavits on the record of the proceedings may perhaps

also be placed by the Civil Court under the category of affidavits which under order 19 of the Code of Civil Procedure can be filed or read in evidence and cross-examination may also be permitted by the Civil Court accordingly. To my mind, the importation of such fiction will neither be arbitrary nor whimsical, but will be a conducive method by which a glaring anomaly and inconsistency between one set of evidence and another in the same proceeding and before the same Court can be eliminated. Section 146(1-A) of the Code itself makes it obligatory on the Civil Court to 'take such further evidence as may be produced by the parties respectively'. When a party examines a witness under section 146 (1-A) the provisions of the Evidence Act will be applicable and the other party or parties will have a right to cross-examine such witnesses. The proceeding arising on a reference under Section 146 (1) of the Code being a proceeding in the Civil Court, under Section 141 of the Code of Civil Procedure, the provisions of Order 19 of that Code, at least in so far as the taking of further evidence produced by the parties is concerned, will also be applicable. Therefore, if further evidence is given by a party filing affidavits, the other party or parties cannot be denied the right, as available under Order 19 itself, to cross-examine the deponents of those affidavits. The evidence on record thus will consist of one set of affidavits of persons not amenable to cross-examination at all and of another set of affidavits or deposition of persons who have been or, at the instance of the party concerned, could have been subjected to cross-examination. I am unable to accept as correct any interpretation of section 146(1-A) of the Code which will create such incongruity. Further, if persons whose affidavits have been filed in pursuance of notice under Section 145(1) of the Code are held to be immune from being subjected to cross-examination by any party to the proceedings either before the Magistrate or the Civil Court, testimony which might have been shown by proper cross-examination to be perjured, tainted or worthless, will pass as good and unimpeachable evidence.

9. The learned counsel for the opposite party contended that under Section 146 (1-A) of the Code itself it would be open to a party desiring to cross-examine a person whose affidavit has been filed as evidence against him, to summon that person as his witness, to get him declared to be hostile and to cross-examine him thereafter. This suggested device can neither be legally resorted to under section 146(1-A) nor should be permitted to be resorted to by a court of law. Section 146(1-A) of the Code gives rights to the parties to produce further evidence.

A person whose affidavit has been filed as evidence against a party cannot certainly be summoned by him as his own witness to give further evidence on his behalf. The affidavit essentially partakes the nature of statement made during examination-in-chief and, therefore, the deponent cannot be called by the party against whom he has already given his testimony as a witness for that party. He can only be cross-examined and also re-examined if necessary, in accordance with law.

10. Cross-examination is one of the most effective and universally recognised means of probing into and testing the credibility of a witness and the veracity of his testimony. The right to cross-examine a witness whose evidence is sought to be used against a party is a very valuable right. In the absence of any express and absolute bar imposed by law I am not prepared to deny this right, to a party in a proceeding in the Civil Court arising on a reference under Section 146 (1) of the Code. I am, however, also not prepared to hold that any person whose affidavit had been filed under Section 145(1) of the Code can as of right be got summoned and cross-examined by the party against whom the affidavit is to be read in evidence. After all the proceeding is a summary one in which the rights and liabilities of the parties or their title to the property which is the subject of the dispute cannot be gone into. The enquiry has got to be concluded with expedition. Therefore, while holding that it would be open to a party to make an application in the Civil Court to summon the person or persons, whose affidavits are to be read in evidence against him, for cross-examination, the matter must be held to be within the judicial discretion of the Civil Court. It will be for the Civil Court, having regard to the facts and circumstances of each case and the reasons stated in such application to summon or not to summon any or all the persons sought to be summoned and to permit, subject to its control, the cross-examination of the person or persons summoned. In regard to summoning persons for cross-examination and their cross-examination in a proceeding arising on a reference under section 146 (1) of the Code, the powers of the Civil Court, in my opinion, should be analogous to those which it can exercise under the provisions contained in Order 19 of the Code of Civil Procedure. Therefore, in my opinion, it can be reasonably held that in disposing of an application for summoning person or persons the Civil Court should act as if the affidavit or affidavits filed by them are affidavits filed under Order 19 of the Code of Civil Procedure.

11. There is just one thing which remains to be considered. The learned counsel for the opposite party had in the course of his arguments also submitted that the order passed by the court below is not a case decided within the meaning of Section 115 of the Code of Civil Procedure. This argument is without force. The proceeding being a Civil proceeding in a court subordinate to the High Court, even some interlocutory orders may amount to cases decided so as to be revisable under Section 115. The Civil Court by its order decided a disputed question arising in the proceeding. This decision directly affects its own jurisdiction and is likely to affect the ultimate finding which it is required to give on the question referred to it under S. 146(1) of the Code. In my opinion, the order passed by the learned Munsif in the instant case is revisable under Sec. 115, Code of Civil Procedure.

12. The revision is allowed. The order of the court below is set aside and it is directed to consider the application filed by the applicant on merits and to pass such order thereon as it might think just and appropriate in the light of the observations made in this Judgment. The parties shall bear their own costs.

RGD

Revision allowed.

AIR 1969 ALLAHABAD 88 (V 56 C 17)

G. D. SAHGAL, J.

Balak Ram Vaish, Applicant v. Badri Prasad Avasthi, Opposite Party.

Election Petn. No. 1 of 1967, D/- 27-10-1967.

(A) General Clauses Act (1897) S. 24 — U. P. Home Guards Adhiniyam (29 of 1963) S. 15 — Appointment made under executive orders in force prior to coming into force of Adhiniyam — Appointment cannot be deemed to have been made under the Adhiniyam by virtue of S. 24 of General Clauses Act.

(Para 16)

(B) Constitution of India, Art. 191 — State Legislature Members Prevention of Disqualifications Act (U. P. Act 19 of 1951) S. 3 — State Legislature Members (Prevention of Disqualifications) (Second) Act (U. P. Act 13 of 1952), S. 3(2) — Person appointed as Adjutant under executive orders in force prior to coming into force of U. P. Home Guards Adhiniyam (29 of 1963) — He holds 'an office of profit' within meaning of Art. 191, under Government of Uttar Pradesh — He is not exempted from disqualification attached to his office either under U. P. Act 19 of 1951 or under Act 13 of 1952.

BL/IL/A922/68

The three tests for deciding whether a person holds 'an office of profit under Government' within meaning of Art. 191 of the Constitution are:

(1) What authority has the power to make the appointment to the office.

(2) What authority can take disciplinary action and remove or dismiss the holder of the office and

(3) by whom and from what source is his remuneration paid: AIR 1958 Bom 314, Rel. on: Case law Ref. (Para 36)

In order to come under the provision made by S. 3 of U. P. Act 19 of 1951, three things are requisite. The officer must be an honorary officer, he must be an officer appointed for the purpose of a special duty and thirdly he must have been in receipt merely of compensatory allowance in accordance with any general or special order applicable thereto.

(Para 40)

The Home guards are auxiliary to the police and they are required to render assistance to the community in emergency but generally they are to help in maintaining internal security. It cannot be said to be a special duty. If the word, "special" is used in such a wide meaning, then a Judge who performs judicial duty will be held to hold a special duty. Medical officer to the Government would also be holding special duties and so will the other officers of the Government, for the duties of each class are of a special type. A special duty in the context connotes a particular type of duty which is allotted to an officer. A person is appointed on special duty by Government when special type of work is to be done for the Government not on a permanent basis but as a result of some special circumstance. For instance, the Government may appoint an officer to examine into the text books prescribed for various examinations and a person so appointed will be an officer on special duty. His office will be terminated as soon as his work will finish. A person may be appointed to revise the manuals of any department. Such an officer also will be an officer on special duty.

(Para 42)

Held an Adjutant appointed under executive orders issued prior to coming into force of the U. P. Home Guards Adhiniyam, 1963, held an office of profit under Government of Uttar Pradesh. It was the nature of the payment made to Adjutant or what has sometimes been described as the "pith and substance" that was to be looked into. A rose would smell as sweet call it by whatever name. So it was not the name that was given by the Government to a certain payment. It was the nature of the payment that would determine as to whether the payment could be said to be a remuneration for the post. The payment was a periodical payment made from month to month. It was not

made specifically for a certain period when the Adjutant attended to the parades. It was not also a payment which was made to him only during the course of his training. The payment, therefore, was neither a stipend nor an allowance by way of meeting out-of-pocket expenses. It was a consolidated sum paid every month. It was not stated that this payment was made for attending the parades only. The payment was attached to the office. The payment, no doubt, was a small amount, but that was not the question. It was a remuneration paid for the services. The services might have been offered at personal sacrifice in the national cause, but that did not take out the remuneration paid for the services from the category of its being "profit" which the office of an Adjutant brought to its incumbent. He was not exempted under the provisions of S. 3 of U. P. Act 19 of 1951. The office of Adjutant was not honorary. It was not an office held for the purpose of special duty also. His was also not a case in which he was paid a compensatory allowance. He was paid a salary. He was also not exempt from being a member of the Uttar Pradesh State Legislature, for though he was holding an office which was not a whole time office, it was remunerated by salary if not by fees. In order to come under S. 3(2) of the Act for purposes of exemption, it should not only be an office which is not a whole-time one but also an office which is not remunerated by salary.

(Paras 36, 41, 43, 44, 45)

(C) Constitution of India, Art. 191 — U. P. Zamindari Abolition and Land Reforms Act (1 of 1951), S. 127-B — U. P. Zamindari Abolition and Land Reforms Rules 1952, R. 114 — State Legislature Members (Prevention of Disqualifications) Act (U. P. Act 19 of 1951), S. 3 — State Legislature Members (Prevention of Disqualifications) (Second) Act (U. P. Act 13 of 1952), S. 3(2) — Panel lawyer of Gaon Sabhas at Tahsil Head-quarters — He holds an office of profit under Government within meaning of Art. 191 — Not exempted under U. P. Act 19 of 1951 and U. P. Act 13 of 1952.

A panel lawyer having been appointed by the State Government under S. 127-B of the U. P. Zamindari Abolition and Land Reforms Act, 1951, to conduct suits and proceedings by and against the Gaon Sabhas in the Tehsil holds an office under the State Government being under the control of the State Government or its officers. The office is an office of profit as it brings him remuneration in cases in which he is engaged. The source of payment, no doubt, is the Gaon Sabha Fund, but that is not the determining criterion. The appointing authority, as shown in the order of appointment is an officer of the State Government. The authority is vest-

ed with the power to terminate his appointment. The authority determines his remuneration as prescribed under the rules. The source, no doubt, is the Gaon Sabha Fund, but the payment is controlled by the Collector. The Government determines the manner in which the duties of the office are discharged and also gives directions in that behalf. The office cannot but be an office of profit under the Government of Uttar Pradesh.

(Para 59)

Obviously, this is not an office for the performance of any special duty, for this is a work which can be done by any other qualified lawyer provided he is appointed to the post. It is not a case where the office is honorary or only compensatory allowance is payable within the definition of that term under S. 2 of Act 19 of 1951. It is, no doubt, not a whole time office, but it is remunerated by fees though not by salary. The provisions of Act 13 of 1952 also are thus not helpful. The panel lawyer, therefore, holds an office of profit within the meaning of that term under Art. 191 of the Constitution on account of his being a panel lawyer of the Gaon Sabhas in the Tahsil and he is not exempted under U. P. Act 19 of 1951 and U. P. Act 13 of 1952.

(Paras 60, 61)

(D) Representation of the People Act (1951), Ss. 77 and 123(6) — Corrupt practice—Irregularity in maintaining accounts — Does not fall under S. 123(6).

The corrupt practice does not consist in not maintaining the account as required by sub-sec. (1) of Sec. 77, but it consists of incurring or authorising an expenditure in contravention of S. 77, which would be a case where the total of the expenditure exceeds the amount prescribed under the rules, as mentioned in sub-sec. (3) of S. 77. It is the incurring or authorising an expenditure in contravention of S. 77 which has been made a corrupt practice and not an irregular maintenance of accounts. It would thus appear that the only contravention of Sec. 77 which falls under S. 123(6) is the contravention of sub-sec. (3) of S. 77. The irregularity in maintaining accounts does not fall under S. 123(6) of the Act at all. AIR 1959 All 264 and AIR 1959 All 427, Foll.

(Para 66)

Cases Referred: Chronological Paras

(1964) AIR 1964 SC 254 (V 51)=	
(1964) 4 SCR 982, Guru Gobinda Basu v. Sankari Prasad Ghosal	33, 58
(1964) AIR 1964 All 179 (V 51)=	
ILR (1964) 1 All 929, Cheddu Singh v. Monohar Singh	29, 32
(1964) 1964 All LJ 902, Pannalal v. Har Narain	30, 35
(1963) 67 Cal WN 558, G. Basu v. Sankari Prasad Ghosal	31

- (1961) AIR 1961 SC 218 (V 48) =
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 v. State of Uttar Pradesh 54
- (1959) AIR 1959 All 264 (V 46) =
 ILR (1958) 2 All 468, Ghayyar Ali
 Khan v. Keshav Gupta 65, 66
- (1959) AIR 1959 All 427 (V 46) =
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 v. Jamuna Singh 65, 67
- (1959) AIR 1959 Raj 227 (V 46) =
 ILR (1958) 8 Raj 875, Hoti Lal
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- (1958) AIR 1958 SC 52 (V 45) =
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 Rikhab Chand 27, 33
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 Laxman Borkar 24, 36, 56
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 23, 24, 35
- (1953) 4 Ele LR 422, In the matter
 of Vindhya Pradesh Legislative
 Assembly Members 53
- (1953) 8 Ele LR 84 (Ele. T.-All),
 Govind Malaviya v. Murli Manohar
 58
- Bishen Singh, for Applicant; S. D.
 Misra for Opposite Party.

SAHGAL, J.:— At the last general election held on the 15th of February, 1967 there were eleven candidates for election to the U. P. Legislative Assembly from the Lucknow Cantonment Constituency No. 104. A declaration was made on the 23rd of February, 1967 of the result of the election and respondent no. 1 was declared duly elected. This petition has been filed by one of the candidates Balak Ram Vaish challenging that election with a prayer that the election of Badri Prasad Awasthi (respondent no. 1) be declared void and that the petitioner be declared elected as a member of the U. P. Legislative Assembly.

2. Respondent no. 1 was an adjutant in the Home Guards Organisation and one of the grounds taken in the petition is that being an adjutant under the U. P. Home Guards Adhiniyam, 1963, (hereinafter to be described as the Adhiniyam), he held an office of profit within the meaning of that term under Article 191 of the Constitution and as such was disqualified for being chosen as, and for being a member of the U. P. Legislative Assembly.

3. It was also pleaded that respondent No. 1 was a panel lawyer having been appointed by the State Government to conduct suits and other proceedings by and against the Gaon Sabhas in the Tahsil of Mohanlalganj, district Lucknow with

effect from the 15th of September, 1965, the appointment being made by the State Government of Uttar Pradesh under Section 127-B of the U. P. Zamindari Abolition and Land Reforms Act (Act I of 1951) (hereinafter to be described as the Abolition Act) and this post also was an office of profit within the meaning of that term under Article 191 of the Constitution thus disqualifying him for being chosen as, and for being, a member of the Legislative Assembly.

4. The petitioner also pleaded that respondent no. 1 had not maintained accounts in accordance with the provisions of section 77 of the Representation of the People Act, 1951 (hereinafter to be described as the Representation Act) and he had failed to show in his return of expenses a sum of Rs. 50 advanced by him to one Chamman. He had also failed to show the expenses incurred by him on the polling day. This amounted, according to the petitioner, to a corrupt practice under section 123(6) of the Representation Act.

5. Respondent no. 1 denied that he was an adjutant under the Adhiniyam but claimed that he was one under a Government Scheme promulgated prior to the Adhiniyam. His contention was that whether he be an adjutant in the Home Guards under the Adhiniyam or under the Scheme, he did not hold an office of profit and, even if he held an office of profit he was exempt from the disqualification mentioned in Article 191 of the Constitution under the provisions of U. P. Act XIX of 1951 and U. P. Act XIII of 1952.

6. It was admitted that respondent no. 1 was a panel lawyer of the Gaon Sabhas in the Tahsil of Mohanlalganj but it was denied that it amounted to his holding of an office of profit and in this case also it was pleaded, though unfortunately no issue seems to have been struck, specifically on this aspect of the case, that he was exempt from disqualification, if any under the two Acts, referred to above. The fact that no issue has been struck on this aspect of the case is not material as it is a pure question of law and I have been addressed on this aspect of the case also.

7. As to the expenses incurred on the polling day, it was pleaded that no expenses were incurred by respondent no. 1 on the polling day and that the amount of Rs. 50 advanced by him to Chamman has been entered in the return of expenses. In any case, it was asserted that the failure to show the expenses incurred on the polling day or the payment of a sum of Rs. 50 advanced to Chamman in the return of expenses did not amount to a corrupt practice under section 123(6) of the Representation of the People Act.

8. There were other pleas also taken in the case, but we are not concerned with those pleas and they are not to be determined at this stage, only the pleas which raised pure questions of law having been heard at this stage under Order XIV Rule 2 of the Code of Civil Procedure at the request of respondent no. 1.

9. Five issues were struck in the case, but the following only are relevant for purposes of enquiry at this stage:

1. Whether respondent no. 1, the returned candidate, is an adjutant under the U. P. Home Guards Adhiniyam, 1963? If so, does he hold an office of profit within the meaning of that term under Article 191 of the Constitution and as such was he not eligible for and was disqualified to be elected to the U. P. Legislative Assembly?

Even if respondent no. 1 was not an adjutant under the U. P. Home Guards Adhiniyam, 1963, but was one under a Government Scheme promulgated prior to that Adhiniyam, can he still be said to hold an office of profit?

Even if he be an adjutant under the U. P. Home Guards Adhiniyam, 1963, can it at all be said that he holds an office of profit?

Even if it be held that he holds an office of profit is he exempt under U. P. Act XIX of 1951 and U. P. Act XIII of 1952?

2. Whether respondent no. 1 holds an office of profit within the meaning of that term under Article 191 of the Constitution on account of his being a panel lawyer of the Gaon Sabhas in the Tahsil of Mohanlalganj?

5. Has respondent no. 1 failed to show the expenses incurred by him on the polling day in his return and were such expenses incurred at all on that date?

Has he failed to show in his return of expenses a sum of Rs. 50 advanced by him to one Chamman?

If respondent no. 1 has failed to show the expenses incurred by him on the polling day and/or to show in his return the expenses to the extent of Rs. 50 advanced by him to Chamman, will it amount to a corrupt practice under section 123(6) of the Representation of the People Act, 1951?

10. By an order dated the 16th of October, 1967 I directed that the case shall be put up for the decision of the 2nd, 3rd and 4th parts of issue no. 1, issue no. 2 and 3rd part of issue no. 5 at this stage. It may be pointed out that even though the first part of issue no. 1 was not ordered to be put up at this stage for arguments, it has been covered by the arguments advanced and as to issue no. 2, an important aspect of the matter as to whether even if it be held that respondent no. 1 holds an office of

profit within the meaning of that term under Article 191 of the Constitution, is he exempt under the provisions of U. P. Act XIX of 1951 and U. P. Act XIII of 1952, also has been covered and has already been argued out. It being a pure question of law, which has been argued out at length, no prejudice has been caused to any party on account of this aspect of the matter being not specifically struck in the form of an issue in the case.

FINDINGS.

11. Issue No. 1:— The Uttar Pradesh Home Guards Adhiniyam, 1963 (U. P. Act XXIX of 1963) provides for the constitution of a force known as the Uttar Pradesh Home Guards for utilising its services for duties in times of emergency and serving as an auxiliary to the police for the maintenance of law and order. A "home guard" under the Act means a person who is enrolled as such, and includes an officer appointed under this Act. The functions of the home guards under the Act are provided in Section 4 of the Adhiniyam and their functions are covered by the purposes for which the Adhiniyam has been framed. The Home Guards are to serve as an auxiliary to the police, and when required, help in maintaining public order and internal security. They will help the community in air raids, fires, floods, epidemics and other emergencies. They will function as an emergency force for such special tasks as may be prescribed and they will provide functional units for essential services and will perform such other duties relating to any measure of public welfare as may be prescribed. Appointment of certain officers including a Commandant General of Home Guards is also contemplated under Sec. 5 of the Adhiniyam. Other officers apart from the Commandant General may also be provided on such terms and conditions as may be prescribed. The prescribing of the conditions, according to the definition of the word "prescribe", is left to be made under the rules framed under S. 15 of the Adhiniyam. The superintendence of the Home Guards is to vest in and to be exercised by the State Government. Sub-section (3) of Section 6 provides that subject to the overall control and direction of the District Magistrate in any area within the district, the administrative control and direction of the Home Guards in that area shall vest in such officers as may be prescribed. Section 7 provides for the enrolment and it describes as to what an application for enrolment shall contain. A certificate is to be issued to him for appointment in the form set out in the Second Schedule under the seal and signature of such officer as may be prescribed as a result of which he shall be vested with the powers and privileges contemplated under the Act and shall be subject to the duties of

a Home Guard, Officers and other members of the Home Guards are expected to wear such uniforms as may be prescribed. The District Magistrate may by order call out any Home Guard attached to a unit posted in the district for duty in any area within the district and the Commandant General or such officer of the Home Guards, as may be authorised by him in this behalf, may call out any Home Guard for duty in any part of the State or outside the State. Section 10 of the Adhiniyam provides that a Home Guard acting in the discharge of his functions under the Act shall be deemed to be a public servant within the meaning of Section 21 of the Indian Penal Code. There is a liability attached to a Home Guard inasmuch as he shall be bound to serve in any unit of the Home Guards to which for the time being he may be attached subject to the rules that may be made in this behalf. The Home Guards shall be liable to serve when called for in a prescribed manner for duty in any part of the State. They may also be required to render service outside the State, but they will not be required to do so unless they have given their consent in the prescribed manner for such service. The Commandant General or any officer prescribed in this behalf shall have the authority to discharge or suspend any member of the Home Guards in accordance with the rules made in this behalf. A Home Guard may also resign from the force after giving one month's notice delivered to such officer as may be prescribed. There are certain penalties also provided under the Adhiniyam for a Home Guard who fails to report himself when called out for duty under Section 8 of the Adhiniyam, or without sufficient excuse neglects or refuses to obey any lawful order or direction of his superior officer or other competent authority or fails to discharge his function as a member of Home Guards while on duty, or deserts his post, or is guilty of cowardice or offers any unwarranted personal violence to any person in his custody.

12. The first question to be determined is as to whether respondent no. 1 was a Home Guard employed under the Adhiniyam. But before deciding this point we have to look into the provisions of a certain Scheme also which was in existence for the creation of Home Guards even before the Adhiniyam under an executive order of the Government.

13. Certified copies of a number of orders of the Government have been filed in the case to indicate as to what the Scheme of the Home Guards was and what were their duties and functions and the remunerations, if any, that were payable to them. The earliest letter in that

connection is dated the 28th of February, 1963 (Exhibit A-4). It is a letter addressed by the Director of Civil Defence and Additional Secretary to the Government of Uttar Pradesh, Confidential (CD) Department to all the District Magistrates of Uttar Pradesh, which states that a scheme for Home Guards, which was shortly to be introduced, envisages the appointment in each Battalion of a number of superior officers who will be paid some remuneration, in the shape of an honorarium, to compensate them for their travelling and other expenses, and among the scales prescribed is to be found an honorarium of Rs. 50 per mensem for an adjutant. It then provides as to how the selection for these posts will be made by the State, i. e., it shall be made by a Board specially constituted for the purpose. The letter also describes the number of Battalions sanctioned for the various districts. The qualifications of the various officers also have been mentioned, the posts of the various officers being confined to Ex-Army or Ex-Police Officers or to members of University or Degree College staff with a background of military training and prepared to work on a part-time basis. The letter dated March 22, 1963 (Exhibit A-3) described the outlines of the Scheme for Home Guards on the basis of a proposal of the Government of India. The purposes of the force have been described to be more or less in the same manner in which they have been described in the Adhiniyam and the details need not be repeated. The liability for service also is similar. The various officers in the Organisation also have been described and one of the officers described is an adjutant attached to each Battalion. Physical standards, character and preference in enrolment also have been mentioned in the Scheme. The limitation as to service also has been described, the minimum period being three years with one month's notice on either side. The Commandant General may allow a member to withdraw otherwise also on compassionate grounds. The emoluments of the officers have also been described. For an adjutant Rs. 50 per mensem has been described as Instructor's allowance. Various other allowances have been described, but they seem to be applicable to the Home Guards as such and not to the officers. Training allowances at the rate of Rs. 2 per head per diem inclusive of expenditure on contingencies has been allowed when members of Home Guards are called up for collective training in camps at various levels. A parade allowance has been described as being 50 P. per head for each parade attended. The duty allowance also has been described under the rules when members are called up for duty outside their localities but within the State including costs of trans-

port etc. which will not exceed Rs. 2 per diem per head. For duty outside the State it is prescribed that members will be paid a suitable duty allowance depending on the nature of the task assigned and the area in which it is to be performed. An idea is given in this letter about the training also that the Home Guards have to undergo. The types of arms to be provided to the Home Guards also are described. By a letter dated the 6th of December, 1963 (Exhibit A-6) sanction has been conveyed of the Government to the grant of an outfit allowance at the rate of Rs. 100 only initially to various officers. In another letter dated the 24th of February, 1964 (Exhibit A-7) it has been pointed out that the provisions of Civil Service Regulations will not apply to the case of pensioners for the purposes of adjustment of pay and pension of re-employed pensioners if they happen to be appointed as Home Guards and it is stated that the pensioners will get such honoraria and allowances as may be prescribed for various ranks in the Home Guards Organisation. On the 9th of March, 1964, there was issued another letter (Exhibit A-8) which, among other things, says that the Instructor's allowance sanctioned in the earlier letter dated the 23rd of May, 1963 (Exhibit A-5) which describes the allowance for an Adjutant at Rs. 50 per mensem, may be treated as an honorarium and that G. O. has been modified to that extent. In that G. O. the allowance was described as Instructor's allowance.

14. We find on record in connection with the appointment of respondent no. 1 as Adjutant, a copy of his application (Exhibit 6) addressed by him to the Deputy Controller, Civil Defence, Lucknow, the application dated the 21st of June, 1963 having been made prior to the coming into force of the Adhiniyam which was assented to by the Governor on the 30th of December, 1963 and which was published in the U. P. Gazette (Extraordinary) dated the 31st of December 1963. There was a recommendation on this application of the District Magistrate (Exhibit 8). The appointment order passed by the Commandant General (Exhibit 4) is dated the 11th of November, 1963. All these relate to the period prior to the coming into force of the Adhiniyam. The appointment order provides that the appointee namely, respondent No. 1, would be entitled to Instructor's allowance at the rate of Rs. 50/- per mensem. The printed copy of this order is Exhibit 5. There does not appear to be any other application on behalf of respondent No. 1 on record or any other order as to his appointment. It thus appears that no application was made by respondent No. 1 after the coming into force of the Adhi-

nyam nor any appointment made. The Adhiniyam does not provide that the appointment made prior to its coming into force would terminate or it would be treated as having been made under the Adhiniyam. In fact no rules have yet been framed by the Government under Section 15 of the Adhiniyam.

15. Section 24 of the U. P. General Clauses Act provides that where any enactment is repealed and re-enacted by an Uttar Pradesh Act with or without modification, then, unless it is otherwise expressly provided, any appointment, notification, order, scheme, rule, form or by-law, made or issued under the repealed enactment shall, so far as it is not inconsistent with the provisions re-enacted, continue in force, and be deemed to have been made or issued under the provisions so re-enacted, unless, and until it is superseded by any appointment, notification, order, scheme, rule, form or by-law made or issued under the provisions so re-enacted.

16. This provision of law will not apply to the case because the Scheme that was enforced prior to the coming into force of the Adhiniyam was under an executive order and not under an enactment which may have been repealed or re-enacted. It cannot, therefore, be said under this provision that the scheme under which the appointment of respondent no. 1 was made will be deemed to have been made under the rule-making power under Section 15 of the Adhiniyam or the appointment, of respondent no. 1 should be deemed to have been made under the provisions of the Adhiniyam. The rules under the Scheme made by an executive order have not the force of law as they are not statutory rules but are rules made by an executive authority. The principle embodied in Section 24 cannot be made applicable to such a case for what was done under a prior law only has to be deemed to have been done under a law which repeals or re-enacts it. The scheme having been made under an executive order cannot be said to have been made under any law or a law which may have been repealed or re-enacted by the Adhiniyam. Respondent no. 1, therefore, cannot be said to have been appointed as an Adjutant under the Adhiniyam. He is, however, an Adjutant under the Home Guards Organisation in accordance with the Scheme, referred to above. That scheme does not seem to have been put in abeyance on account of the Adhiniyam and is still continuing, for respondent no. 1 continued to hold the office under the scheme even after the coming into force of the Adhiniyam which office he has resigned, his resignation being accepted as from the 31st of March, 1967, as appears from an entry in the Comman-

ders' Namawali Pustika, Second Battalion, Home Guards, Lucknow (Exhibit 9 at P. 7).

17. It must, therefore, be held that respondent no. 1 is not an Adjutant under the Home Guards Adhiniyam, 1963. The question, therefore, whether he holds an office of profit by virtue of his being an Adjutant under that Adhiniyam does not arise.

18. The question, however, still remains to be determined as to whether he held an office of profit on the relevant date, it being not disputed that he was an Adjutant under the Home Guards Organisation under the Scheme both on the date of nomination and on the date of election.

19. Article 191 of the Constitution in so far as it is relevant provides that a person shall be disqualified for being chosen as, and for being, a member of the Legislative Assembly of a State if he holds any office of profit under the Government of India or the Government of any State specified in the First Schedule, other than an office declared by the Legislature of the State by law not to disqualify its holder.

20. The question to be determined is as to whether by virtue of his being an Adjutant under the Home Guards Organisation under a Scheme promulgated through an executive order, referred to above, respondent no. 1 held an office of profit under the Government of Uttar Pradesh, it being left to be determined later as to whether if he did hold an office of profit, has that office been declared by the Legislature of the Uttar Pradesh by law as not disqualifying him from being chosen as, and for being, a member of the Legislative Assembly. It is not disputed on behalf of respondent no. 1 that he holds an office. What is to be seen is as to whether he holds an office under the Government of Uttar Pradesh and whether it is an office of profit.

21. A number of authorities were cited at the Bar to show as to what is an office of profit and the circumstances under which an office can be said as being held under a Government. The cases which have been cited in this connection have either been decided by some Election Tribunals or by some High Court or by the Supreme Court. The Election Tribunals, as they stood constituted prior to the recent amendment of the Representation of the People Act, were subordinate authorities and were under the superintendence of the various High Courts under Article 227 of the Constitution. The orders by them were amenable to the jurisdiction of the various High Courts under Article 226 of the Constitution. The opinions expressed in the decisions of such Tribunals, though

they may be of some persuasive value, will not be of that force which may be attached to a judgment of a High Court much less will they be of binding authority as would be the opinions of the Supreme Court. I, therefore, do not propose in the first instance to refer to the judgments of those Election Tribunals. I shall confine myself only to the law laid down by the High Courts as also by the Supreme Court. It may be necessary to refer to the decisions of the Election Tribunals also in case the point is found as having not been covered by the decisions of the High Courts or the Supreme Court.

22. Let me now take up such cases one by one.

23. The earliest case cited before me is that of Ravanna Subanna v. G. S. Kageerappa, AIR 1954 SC 653. It is pointed out in that case that the meaning of the expression seems to be that an office must be held under Government to which any pay, salary, emoluments or allowance is attached. The word "Profit" connotes the idea of pecuniary gain. If there is really a gain, its quantum or amount would not be material, but the amount of money receivable by a person in connection with the office he holds may be material in deciding whether the office really carries any profit. The office in that case was that of the Chairman of Gubbi Taluk Development Committee. The Chairman was entitled to a fee of Rs. 6 for each sitting he attended. It was pointed out that the fee of Rs. 6 which the non-official Chairman was entitled to draw for each sitting of the committee, he attended, was not meant to be a payment by way of remuneration or profit, but it was given to him as a consolidated fee for the out-of-pocket expenses which he had to incur for attending the meetings of the committee and the Supreme Court thought that it was not the intention of the Government which created these Taluk Development Committees which were to be manned exclusively by non-officials, that the office of the Chairman or of the members should carry any profit or remuneration. What has, therefore, been laid down in this case is that an office in order to be an office of profit must, besides being held under Government, also carry pay, salary, emoluments or allowance attached to it. The term "profit" connotes the idea of pecuniary gain and if there is really a gain, its quantum or amount would not be material. In the circumstances of that case a fee of Rs. 6 for each sitting of a certain committee was held only to be a fee for out-of-pocket expenses and not profit.

24. The next case is that of Dr. Deorao Laxman Anande v. Keshav Laxman Borkar, AIR 1958 Bom 314 decided by the

Bombay High Court. The expression "office of profit" under the Government was analysed in that case as connoting of three things, namely, (1) that the person held an office, (2) that it was an office of profit and (3) that it was an office under the Government of India or the State Government. An office of profit, according to the view expressed in that case, means an office capable of yielding a profit or from which man might reasonably be expected to make a profit and, as has been laid down in Ravanna's case, AIR 1954 SC 653 (supra), the amount of such profit was immaterial.

25. The principal tests for deciding whether an office is under the Government, as pointed out in that case, are (1) what authority has the power to make an appointment to the office concerned, (2) what authority can take disciplinary action and remove or dismiss the holder of the office and (3) by whom and from what source is his remuneration paid. The learned Judges, however, proceeded to remark that of these the first two are more important than the third one.

26. The question was whether an Insurance Medical Practitioner functioning under the Employees' State Insurance Act, 1948, was a holder of an office and it was pointed out that the fact that he was allowed private practice would not alter the character of his appointment. Various sections of the Act were taken into consideration and it was held that the Insurance Medical Practitioner held a post or an office under the Government of Bombay.

27. Next we come to another case of the Supreme Court, namely, Abdul Shakur v. Rikhab Chand, AIR 1958 SC 52. There it was pointed out that the power of the Government to appoint a person to an office of profit or to continue him in that office or revoke his appointment at their discretion and payment from out of Government revenues are important factors in determining whether that person is holding an office of profit under the Government though payment from a source other than Government revenue is not always a decisive factor. In that case the person whose election was challenged was appointed by the Committee of the Durgah Endowment constituted under the Durgah Khwaja Sahib Act (Act XXXVI of 1955). No doubt, although the Committee or the members of the Committee were removable by the Government of India, the appointment of the Mohatmim (manager) of Madarsa Durgah Khwaja Sahib Akbari, who was appointed by that Committee, could not be said to be an appointment by the Government of India nor was he removable by the Government of India nor was the pay-

ment made to him out of the revenue of the Government of India. In such circumstances, the mohatmim was held not to hold an office of profit under the Government. The test laid down, however, was the same as in the earlier two cases, namely, the power of the Government to appoint a person to an office of profit or to revoke his appointment at their discretion and payment from out of the Government revenues, though the source of payment was held not to be always a decisive factor.

28. The matter came up before a Bench of the Rajasthan High Court in Hoti Lal v. Raj Bahadur, AIR 1959 Raj 227. In that case the question was whether the office of an Oaths Commissioner in Rajasthan is an office of profit under the Government of Rajasthan. It was pointed out therein that the fact that there is no fixed pay for the office is immaterial. So long as profit arises by fees or by commission to the holder of an office, the office will be an office of profit. The appointment in that case was to be made by the Judicial Department of the Government and it was pointed out that the words "Government of India or the Government of any State" must be interpreted in their widest import and would thus include Judicial Office or office under the Judicial Department as the office under the Government of India or the Government of any State. It was also remarked that even an office held under the Legislature, as for example, the Secretary to a legislature or clerks working in the office of a legislature would also be holding office of profit under the Government of India or the Government of a State. The word "Government" used in Article 102 must be read widely to include all the three functions of Government, namely, executive, legislative, judicial and an office of profit held under any of the three branches of Government would be an office under the Government of India or the Government of a State. That judgment was delivered for the Bench by Wanchoo, C. J. who is now the Chief Justice of India.

29. We next come to the case of Cheddu Singh v. Monohar Singh, AIR 1964 All 179 decided by a Bench of this Court. There it was held that a branch Post-master is an officer in the employment of the Central Government. He is not a Government contractor, nor is he a civil servant nor can it be said that he is holding a civil post within the meaning of Art. 311 of the Constitution. He could also not be said to be a Government Servant, but he did hold an office of profit under the Central Government. The duties assigned to him may be fewer than the duties that are assigned to a post-master or a sub-post-master because it is a branch post-office, but whatever duties

are assigned to him are exactly the same as are assigned to any post-master or sub-post-master and are to be performed by him in the same way as by a post-master or sub-post-master. The quantum of emoluments that he receives is immaterial; it is enough that he receives emoluments by way of profit. What is laid down in this case is that in order that a person may be held to be holding an office of profit under the Central Government he must be shown in the first place to hold an office. Then it should be shown that he holds an office from which he earns profit. The quantum of the emoluments that he may be receiving was immaterial. The branch post-master did work under the Government of India and he held an office of profit.

30. Next we come to a case, namely, *Panna Lal v. Har Narain*, 1964 All LJ 902 also of our High Court but decided by a Single Judge, on which strong reliance has been placed on behalf of respondent no. 1. It was a case of a person who was an officer in the N. C. C. Junior Division. The question was whether it was an office of profit. Rule 35 of the National Cadet Corps Rules, 1948 provided that every officer commissioned in the National Cadet Corps and posted to a unit of the Junior Division shall be entitled 'for period of actual' attendance (the underlining (herein ') is mine) at authorised course of instruction in Army schools, and with Army units, including intervening Sundays and holidays to such pay as is specified in Schedule II. It further provided that every officer commissioned in the National Cadet Corps and posted to a unit of the Junior Division shall be entitled to receive at the end of the training year, an honorarium as specified in Schedule II, on condition that he has attended the annual training camp of his unit in such a training year. As to the emoluments provided under rule 36, it is stated that every officer of the Senior and Junior Division posted or appointed to a unit or part thereof shall be entitled to such allowances as are specified in Schedule II. The learned Judge who decided that case pointed out that from these rules read with Schedule II it appeared that a Junior Division Officer was entitled firstly to pay (ranging between Rs. 130 and Rs. 290 per month) for periods of actual attendance at authorised courses of instruction in Army schools and with Army units, secondly to an honorarium (ranging between Rs. 90 and Rs. 250) at the end of the training year if he has attended the annual training camp in such year and thirdly to an allowance (Rs. 5 per day) for every day of actual attendance at the annual training camp, provided he lives, messes and

sleeps in camp. Analysing the nature of these payments it was urged in that case that the payments received by such an officer are not by way of remuneration or profit but are mere allowances granted to him in order to compensate him to cover his expenses while he is attending the Army courses or the annual training camp. The fact that these payments are conditional on attendance at the courses or the camp shows that they are not on a par with an ordinary salary and cannot be treated as plain remuneration for services rendered by the officer. It was urged in the case that he may perform all the duties assigned to him as Cadet Corps Officer and still will not be entitled to draw his honorarium, or daily allowance if he fails to attend the annual training camp and the monthly pay he will get only when he attends Army courses, i. e., for receiving instruction, not for performing duties or rendering services. The learned Judge accepted this contention pointing out that the distinction drawn appeared to be valid and the amounts to which the petitioner in that case was entitled under Rules 35 and 36 could not be equated with remuneration or profit, since they were not paid in return for services rendered. The pay drawn under Rule 35(2) is for receiving instruction and is more analogous to the stipend paid to a scholarship holder than to the salary paid to an employee. The honorarium and allowance drawn under Rules 35(3) and 36(1), which are given for attending training camp, are presumably meant to compensate and cover expenses incurred by the officer in that connection. This case does not define as to what is profit but decides that in the case there was no question of any profit or remuneration as the payment that was made was not made for services rendered but was made for receiving instruction and for attending training camp, the former being by way of stipend rather than salary and the latter by way of compensation to cover the expenses incurred.

31. We then come to a case of the Calcutta High Court, namely *G. Basu v. San-kari Prosad Ghosal*, (1963) 67 Cal WN 558. It lays down that when the powers of appointment and dismissal are vested in different authorities and the remuneration is paid by another, the office should be deemed to be held under all of them, if a wide connotation and construction be preferable as it should be under Article 102(1)(a) of the Constitution and like provisions.

32. It may here be pointed out that Article 102(1)(a) relates to members of the Central Legislature and is parallel to Article 191(1)(a) and whatever interpretation is put to one is equally applicable to the other. Similarly, the provisions of section 5-A of the U. P. Panchayat Raj

in that, process was issued against them, they were harassed, they were required to attend and did, in fact, attend the Court on several occasions, they were defended and had incurred expenses, and in fact damage can be said to have been done to them by reason of this prosecution. Secondly, it ended in their favour. It is, therefore, contended that in so far as the malice and want of reasonable and probable cause are concerned, there is no proof at all. At any rate, the inference is drawn from certain facts though the said elements are not established. It may be mentioned that the question which the Courts below were called upon to determine was whether the defendant honestly believed the case which he laid before the Magistrate and whether he acted with ill-will, hatred or spite.

7. The two other ingredients, viz., "want of reasonable and probable cause" and "malice" are not susceptible of precise definition, in that during the course of several centuries, they have been expressed in different language by different Judges in England, which has exported its law of Tort to this country. Winfield in his book on Tort (7th Edn. page 710) said that "there does not appear to be any distinction between 'reasonable' and 'probable'". The conjunction of these adjectives is a heritage from the redundancies in which the old pleaders delighted, and although it has been said that reasonable cause is such as would operate on the mind of a discreet man while probable cause is such as would operate in the mind of a reasonable man, this does not help us much, for it is difficult to picture a reasonable man who is not discreet. It is obvious, therefore, that there would be various definitions and indeed there were. Of them, it may be of assistance to cite the one given by Lord Devlin in *Gliniski v. McIver*, (1962) AC 726, 767, where he stated that reasonable and probable cause "means that there must be cause (that is, sufficient grounds...) for thinking that the plaintiff was probably guilty of the crime imputed". This is merely to say that the prosecutor has to make out a *prima facie* case fit to be tried, not that it should succeed nor that he should have belief in the probability of conviction. Dixon, J., in *Commonwealth Life Assurance Society Ltd. v. Brain*, (1935) CLR 343, 382, was of the view that the prosecutor must believe that "the probability of the accused's guilt is such that upon general grounds of justice a charge against him is warranted". Or, as posed by Cave, J., to the Jury in *Abrath v. North Eastern Railway Co.*, (1883) 11 QBD 79: "Did (the defendants) honestly believe the case which they laid before the Magistrate"? In our opinion, it may be simpler to state that the answer to the question "did the prosecutor believe in the admittedly known facts when he launched the prosecution, so that he could be said to have reasonable and probable cause for so doing?" would furnish a workable test.

8. In so far as malice is concerned, it has been equally difficult to find a uniformly general definition of it. It has been variously described. As Winfield stated (Winfield on Tort, 7th Edn. page 714): "Perhaps we are nearer the mark if we suggest that malice exists unless the predominant wish of the accuser is to vindicate the law... And it has long been law that malice and lack of reasonable and probable cause must be separately proved. Want of reasonable and probable cause may be evidence of malice in cases where it is such that the jury may come to the conclusion that there was no honest belief in the accusation made. If there was such an honest belief, the plaintiff must establish malice by some independent evidence, for malicious motives may co-exist with a genuine belief in the guilt of the accused. If want of reasonable and probable cause is not proved by the plaintiff, the defect is not supplied by evidence of malice". Again to cite Lord Devlin in *McIver's case*, 1962 AC 726: "Malice, it is agreed, covers not only spite and ill-will but also any motive other than a desire to bring a criminal to justice".

9. The ordinary meaning of malice cannot be determined by any subjective standard. It denotes spite or hatred against an individual. But it is often difficult to infer this spite or hatred from the conduct of a person. A Bench of the Calcutta High Court in *Bharat Commerce and Industries Ltd. v. Surendranath Shukla*, AIR 1966 Cal 388, after referring to what has been stated by Clarke and Lindsell and Professor Winfield in their respective books on the Law of Tort observed at pages 391-392:—

"Thus, in order to give an objective meaning to the term 'malice', it should be found out whether the accuser has commenced prosecution for vindication of justice, e. g., for redress of a public wrong. If he is actuated by these considerations, he cannot be said to have any malice. But if his object to prosecute is to be vindictive or to malign him before the public or is guided by purely personal considerations he should be held to have malice in the matter".

In our view, it is difficult to envisage a person actuated by such purely public spirit and thus subject himself to the inconvenience and expense in launching a criminal prosecution. It would not be untrue to postulate some element of personal interest or dislike for the person against whom the prosecution is launched, which however would not amount to malice, though when it reaches the stage of ill-will, hatred, vindictiveness or cussedness, it can be said to be actuated by malice.

10. Before we consider the second question namely whether the findings regarding malice and want of reasonable and probable cause are findings of fact or whether these are findings which can be canvassed in second appeal, it is necessary to examine what the evidence is upon which the Courts below have acted and whether that evi-

dence is sufficient to establish malice and whether it was only an inference drawn by the Courts from certain facts. In this case, there is ample evidence for the Court to come to the conclusion that not only was the defendant actuated by malice in filing the complaint but also there was no reasonable and probable cause for him to proceed with the prosecution. The 1st plaintiff, the defendant, and his two brothers were members of the joint family and though the agency which they obtained from Charminar Cigarette Factory was in the name of the 1st plaintiff, it was treated as a joint family asset and, as the Courts below pointed out, on the day when the fracas is said to have taken place between Krishna Murty and others in the shop the defendants claimed that they were in charge of that shop to the exclusion of the plaintiff and the members of his family while the plaintiff and his sons contend that they were in possession. In these circumstances, it is not difficult to presume that the altercation related to taking of possession of the shop by the plaintiffs from the defendants or vice versa. Both sides suffered injuries. It is not denied that Krishna Murty had multiple injuries as also the two brothers of the 1st defendant namely, Gopal Rao and Venkataratnam. The evidence further shows that Krishna Murty was in an unconscious state and morphia was administered to him at about 4 a.m. and thereafter the assertion that he had absconded, is something which is difficult to comprehend. Prior to this, there is evidence to show that he must have jumped into a canal as his body was seen floating. In these circumstances, the 1st defendant's categorical assertion in the complaint that the 1st respondent, Krishna Murty was absconding in order to escape the prosecution and punishment for stabbing Gopal Rao and Venkataratnam, and that the other plaintiffs fully know the whereabouts of the 1st respondent, Krishna Murty, and are giving him food and shelter, would show that he could not have believed in the statements made by him. These averments, in our view, were made recklessly without regard to the truth and with an ulterior objective namely to bind over the plaintiff-respondents so that they may not attempt to take possession. This is further fortified by the subsequent allegations in the petition that the plaintiff-respondents in this case and Krishna Murty were determined to do away with the 1st defendant and his injured brothers, that in fact their main object is to kill the defendant and to get at the management of the business for the benefit of the 1st respondent exclusively and that the respondents were also openly saying so. He has also stated that the 1st respondent was not to be seen outside and that he learnt that the 1st respondent with the support and help of the other respondents is trying to do bodily harm to him. Thus, according to him, all the respondents have conspired against the defendants and his brothers, Gopala Rao and

Venkataratnam and the defendant is very much afraid of bodily harm at the hands of the respondents.

11. These allegations, as pointed out by the trial Judge as well as the appellate Judge, are totally unfounded. The appellant examined himself as D. W. 1 and produced two others, a betel-leaf shop owner who was examined as D. W. 2, and a fountain pen shop owner who was examined as D. W. 3. The shops of these witnesses were situated near the Charminar Agency shop. D. W. 2 deposed that on the third day following the incident he had found some of the plaintiffs and others gathering at the Charminar Agency Shop in the evening and stating that the same fate which had befallen Krishna Murty should overtake defendant also, and that the defendant was present at that time. D. W. 3 says that he saw a crowd gathering at the agency shop and that some of the plaintiffs were in the crowd. He further stated that some of the plaintiffs stated that it would have been better if the defendant had received injuries, but that the defendant was not present then. From the depositions of the witnesses examined above it is clear that they were speaking of incidents which occurred on two different occasions. D. W. 2 says that the defendant was present at the time when the plaintiffs were saying that the same fate which had befallen Krishna Murty should overtake the defendant also. This shows that he was not present on the second occasion spoken to by D. W. 3. It is apparent from the evidence of this witness that while the plaintiffs and others were present, the witness does not say that the plaintiffs made a threat. The threat also was not in respect of causing any death but only that the injury that the brother of the defendant had received would befall the defendant-appellant. D. W. 3 also says that some of the plaintiffs who were in the crowd said that it would have been better if the defendant had received injuries. Notwithstanding this the allegations in the petition are that the plaintiffs wanted to kill the defendant-appellant to get at the management of the business for the benefit of the plaintiffs. The trial Court as well as the appellate Court had considered the evidence of the plaintiffs and believed their evidence, particularly of those plaintiffs, who were not present at the time of the altercation, and who were living away from Vijayawada, and who had come there only on hearing of the disappearance of Krishna Murty. This evidence not only establish motive but also that there was absolutely no reasonable or probable cause for taking proceedings against them. None of the witnesses, either D. W. 2 or D. W. 3 mentioned that these persons had said anything to justify the prosecution. In view of the fact that both the Courts below have given a definite finding on the evidence before them, no question of any inference would arise and in these circumstances, the

second question that has been posed before us need not be gone into.

12. This second appeal is accordingly dismissed with costs.
DGB/D.V.C. Appeal dismissed.

AIR 1969 ANDHRA PRADESH 35
(V 56 C 15)

P. JAGANMOHAN REDDY, C. J.
AND KUPPUSWAMI, J.

G. Venkatratnam and others, Petitioners v. The Principal, Osmania Medical College, Hyderabad and others, Respondents.

Writ Petns. Nos. 2523, 2528, 2572, 2573, 2580, 2597, 2601, 2611, 2612, 2620 and 2621 of 1967, D/- 20-11-1967.

(A) Constitution of India, Art. 14 — Rules for selection of candidates for admission to integrated M. B. B. S. Course in Medical Colleges in Telangana appended to G. O. Ms. 1135 Health dated 16-6-66 — Rule 6 (a) (ii) not invalid.

There is a rational basis for providing a small percentage of seats for the class of candidates referred to in R. 6(a)(ii) being sons and daughters of non-official residents of Hyderabad City from and after 1-11-1956. The rule is not invalid.

(Para 6)

(B) Constitution of India, Art. 14 — Rules for selection of candidates for admission to integrated M.B.B.S. Course in Medical Colleges in Telangana appended to G. O. Ms. 1135 Health dated 16-6-66 — Rule 6(a)(i) and corresponding portion of R. 17(viii) invalid — Unrestricted reservation of seats for sons and daughters of Government Officers serving in Hyderabad and Secunderabad discriminatory and invalid — Proviso under R. 6 (a)(ii) does not govern R. 6(a)(i).

Under Rule 6(a)(i) there is no limitation at all on the number of candidates belonging to that category being admitted in Medical Colleges in Telangana area. It makes an exception in the case of sons and daughters of Government Officers belonging to the Andhra Region and working in the twin cities of Hyderabad and Secunderabad without any justifiable basis. While in Rule 6 (a) (ii) only 5% of total seats are reserved for sons and daughters of non-officials who have moved in Hyderabad City on or after 1-11-1956, there is no such limitation under R. 6 (a) (i). That rule and Rule 17 (viii) in so far as it relates to candidates referred to in former rule are discriminatory and invalid. 1966-1 Andh WR 294, Ref. (Paras 7, 8 & 9)

Cases Referred: Chronological Paras
(1966) 1966-1 Andh WR 294, Sukha-
dev v. Govt. of Andhra Pradesh 12

Y. Sivarama Sastry and P. Balakrishna Rao, for Petitioners in W. P. Nos. 2523, 2528, 2572, 2573, 2597 and 2601 of 1967, A. S. Prakasam, for Petitioner in W. P. No. 2580 of 1967; S. Sriramireddy, for Petitioner in W. P. Nos. 2611 and 2612 of 1967; S. S. R. Sastry, for Petitioner in W. P. No. 2621 of 1967; Govt. Pleader, for Respondents (in all the Petns.)

KUPPUSWAMI, J.:— In this batch of eleven Writ Petitions a common question is involved namely, the validity of Rule 6 (a) (i) and (ii) and Rule 17 (viii) of the Rules for the Selection of Candidates for admission to the Integrated M.B.B.S., Course in the Medical Colleges in Telangana area, appended to G. O. Ms 1135 Health dated 16-6-1966.

2. Sri Y. Sivarama Sastry, addressed the main argument in W. P. No. 2523 of 67 and the Advocate appearing for the Petitioners in the other Writ Petitions adopted his arguments. It is, therefore, sufficient to deal with the submissions made by Sri Sivarama Sastry in Writ Petition No. 2523 of 67.

3. The Petitioner in this Writ Petition passed his Higher Secondary (Multi-purpose) Certificate Examination held in the month of March, 1967, in the First Class, securing 223.5 marks in the optional subjects, thus getting an average of 74.5%. He sought admission to the Osmania Medical College at Hyderabad. His father is a Chartered Accountant, residing at Secunderabad since 1944 and the petitioner was born and bred up at Secunderabad. He sought admission in Region I of the Telangana area comprising the cities of Hyderabad and Secunderabad and he was selected from the General pool from that Region. He, however received a Memorandum dated 6-10-1967 directing him to report to the Principal, Medical College, Guntur. By that Memorandum 16 candidates including the petitioner who were selected from Region I under various categories for admission to the Integrated M. B. B. S., Course for the year 1967-68 were informed that they have been allotted to Andhra Area for their admission in one of the Medical Colleges in that area. The said candidates were instructed to report to the Principal, Guntur Medical College, Guntur, who is the authority-in-charge of Admissions in Andhra Area, on or before 13-10-1967 failing which their provisional admission would be cancelled. This Memorandum was apparently issued in pursuance of the G. O. Ms. 1135 Health dated 16-6-1966. Under that G. O., the Government directed that the rules specified in the Annexure to the order shall be followed in respect of admission of Students to the Integrated M. B. B. S., Course in the Medical Colleges in the Telangana area from the academic year 1966-67. The rules for the selection of

candidates annexed to the G. O. state that the number of seats available for admission of candidates to the M.B.B.S. Course in the two Government Medical Colleges in the Telangana area shall be 150 for Osmania Medical College and 120 for Gandhi Medical College. There are certain rules for reservation of seats for candidates from outside the State of Andhra Pradesh, for those who have distinguished in Sports etc., for scheduled castes and scheduled tribes and for the women candidates. After providing for such reservation Rule 6 of the Rules which relates to the Regional Distribution of seats states as follows:—

"REGIONAL DISTRIBUTION OF SEATS:

6(a) For the purpose of Selection, the seats available for admission in the Telangana area of the State after deducting the reservation specified in Rule (2) (a), shall be allotted to the candidates belonging to that area only:—

(i) Provided that the sons and daughters of Officers of Government belonging to the Andhra Region and working in the twin cities may be admitted to the M. B. B. S., Course,

(ii) Provided that the sons and daughters of non-officials who have moved into Hyderabad city on or after 1-11-1956, and are bona fide permanent residents thereof may be admitted to the M.B.B.S., course. Such admissions should not in any case exceed 5% of the total seats available for Region I.

(ii) Provided further that the sons and daughters of non-officials seeking admission under this rule should have had their schooling at the Secondary stage and P. U. C., or its equivalent or H. S. C. (Multi-purpose) examinations in the Telangana region of the Andhra Pradesh State.

Note (i):— The children of the Andhra officials and non-officials referred to in sub-clauses (i) and (ii) above should get selection on merit from their respective regions in the Andhra area.

Note (ii):— All such candidates of Telangana area from Region I who, but for these outside admissions falling under sub-clauses (i) and (ii) above would have secured admissions in the Colleges concerned shall, without any further procedure of selection be entitled to secure admission in the corresponding colleges in the Andhra region and preferably in the districts adjacent to Telangana.

(b) The Telangana area shall be divided into two regions as indicated below and the seats available for the area, after deducting the reservations specified in Rule 2 (a), shall be distributed among the two regions in a manner that 70% of the seats shall be filled from the candidates from Region II, and 30% from Region I.

Region I: Comprising the jurisdiction of the Municipal Corporation of Hyderabad (which includes also Secunderabad).

Region II: Comprising Telangana area excluding the jurisdiction of the Municipal Corporation of Hyderabad (which includes also Secunderabad).

(c) If in any region in the Telangana area, there is deficiency in the number of candidates admitted against the reserved quota for that region in favour of a particular category the candidate from the General Category in that region shall be considered for admission."

4. The other rule relevant for the purpose of this Writ Petition is Rule 17 (viii). Rule 17 (viii) is headed 'PROCEDURE FOR SELECTION'. It is in the following terms.

"Applications from children of Government servants from Andhra area working in the capital and applications from children of non-officials who have moved from Andhra area to Hyderabad city on or after 1-11-1956 and are bona fide permanent residents thereof, will be included in the list of candidates of the respective regions in the Andhra area in the categories to which they belong. They will be considered for selection along with other candidates of the respective region in the Andhra area, in the respective categories, on the basis of their marks. After their selection in Andhra area, they shall be admitted in one of the Medical Colleges in Hyderabad City.

Only Telangana male candidates other than children of officials of Telangana working at Hyderabad city of Region I, occupying the last places in the respective categories, equal to the number of children of Government servants and non-officials from the Andhra area will be allotted to the Medical Colleges in Andhra area, preferably in the colleges adjacent to the Districts to which they belong."

5. It is seen that the general scheme of Rule 6 is that the seats available for admission in Telangana area, after deducting the reservations specified in Rule 2(a) that is, for the candidates selected by the Government of India, from outside the State of Andhra Pradesh shall be allotted to the candidates belonging to that area only, but exception is made by the first two provisos contained in Rule 6 (a) (i) and 6 (a) (ii) in the case of sons and daughters of officers of Government belonging to the Andhra Region and working in the twin cities and the sons and daughters of non-officials who have moved into Hyderabad City on or after 1-11-1956 and are bona fide permanent residents thereof. These have to apply for selection in the Andhra area to which they belong along with the other candidates of the respective regions in the Andhra area. After their selection in the Andhra area, they shall be admitted

in one of the Medical Colleges in Hyderabad city. In order to give place to such candidates, Telangana male candidates, other than children of officials of Telangana working at Hyderabad city of Region I, occupying the last places in the respective categories equal to the number of candidates referred to in the two provisos to Rule 6 will be allotted to the Medical Colleges in the Andhra area, preferably in the Colleges adjacent to the Districts to which they belong. It is in pursuance of this scheme contained in Rules 6 and 17 (viii) that the petitioner and fifteen others were allotted to the Andhra area and were directed to report themselves to the Principal, Guntur Medical College, Guntur. The Petitioner challenges Rule 6 (a) (i) and 6 (a) (ii) as discriminatory and invalid. Though, reference is made in the affidavit in support of the Writ Petition to Rule 6 (a) (i) and 6 (a) (ii) as being discriminatory and void, the main attack is on Rule 6 (a) (i). The affidavit itself states that under Rule 6 (a) (ii) there is at least a limitation of 5% of the total seats available for Region I, whereas under Rule 6 (a) (i) there is no such limitation whatsoever. The said proviso i.e., Rule 6 (a) (i) according to the Petitioner confers unbridled and arbitrary discretion which is likely to be misused by the authorities concerned and that there was no rationale behind the said provisions seeking to provide for the sons and daughters of Government Servants belonging to the Andhra region and working in the twin cities of Hyderabad and Secunderabad. Those applicants would be enabled to get admission in Region I without going through the process of contest and taking their own chance in regard to the percentage of marks that they have got to get. It is also stated in the affidavit that even in the Telangana area a discrimination is sought to be made between Region I and Region II and provision is sought to be made for candidates only from Region I instead of Region II.

6. In our view the contention that Rule 6 (a) (ii) is invalid is not justified. Under Rule 6 (a) (ii) a provision is made for the sons and daughters of non-officials who have moved into Hyderabad City on or after 1-11-1956 and are bona fide permanent residents thereof for admission to the M. B. B. S., Course in the Telangana area, though the candidates do not belong to that area. Such admissions, according to Rule 6 (a) (ii) should not exceed 5% of the total seats available. This proviso enabling the persons of the category mentioned therein to get admissions in respect of a small percentage namely 5% was apparently intended to provide for the persons who have lived for a considerable time in the Hyderabad City ever since the formation of the State

of Andhra Pradesh, but who have not still qualified to get a nativity certificate which requires residence for a period of fifteen years have not elapsed still, as they have been in the twin cities for nearly eleven years, some provision should be made for them to be admitted into colleges in Telangana area. Hence, we are of opinion that there is a rational basis for providing for a small percentage of seats for the class of candidates referred to in Rule 6 (a) (ii) and there is no substance in the contention that the proviso contained in Rule 6 (a) (ii) is invalid.

7. As stated earlier the real attack is on Rule 6 (a) (i). It is to be noticed that under this sub-clause there is no limitation at all on the number of candidates belonging to that category being admitted in the Telangana area. As long as the candidates are the sons and daughters of officers belonging to Andhra region and working in the twin cities and they are selected in the Andhra area, all of them shall be admitted in one of the Medical Colleges in Hyderabad City. The result of such admission is to displace an equal number of Telangana male candidates from the Colleges in Telangana area who will be allotted to the Medical Colleges in Andhra area. The G. O. does not disclose any basis for enabling the sons and daughters of officers of the Government belonging to the Andhra Region who have been selected for the colleges in the Andhra area to obtain admission in the Medical Colleges in the twin cities without any limitation whatsoever displacing by such admission the candidates who have been selected for admission into those colleges. The counter-affidavit filed by the Director of Medical and Health Services also does not disclose any basis for such rule. Beyond merely asserting in paragraph 4 that the rule is neither discriminatory nor unreasonable, no facts and circumstances are mentioned in the counter-affidavit to justify Rule 6 (a) (i) making an exception in the case of sons and daughters of Government Officers belonging to the Andhra Region and working in the twin cities without any limitation whatsoever. Whereas a limit is imposed in case of non-officials under Rule 6 (a) (ii) by stating that the admission under that sub-clause should not exceed 5% of the total seats available for Region I, no such limitation is imposed in case of persons under Rule 6 (a) (i). In the absence of the G. O. and the counter-affidavit disclosing any justifiable basis for such discrimination in favour of the children of Government Officers falling under Rule 6 (a) (i) the Government Pleader had practically to concede that the rule cannot be justified. We are also unable to find any justifiable basis for the discrimi-

mination. It is to be suggested that the reason is that the children of the Government officers should be enabled as far as possible to study in the cities where their parents are working. It is to be observed that the Government officers may at any moment be transferred from the twin cities conceivably soon after the admission of the candidate. The rule cannot, therefore, be justified on that basis. If it is economic considerations that have led to the introduction of this rule, the same consideration would equally apply to the candidates from Telangana area who are displaced by the admission of candidates referred to in Rule 6 (a) (i) and who are compelled to read in a place different from that to which they belonged. The same consideration will equally apply to the non-officials referred to in Rule 6 (a) (ii) and there is no reason why the admissions in respect of children of non-officials referred to in Rule 6 (a) (ii) should be limited to 5% whereas no limitation should be imposed on the admission of candidates referred to in Rule 6 (a) (i).

8. It may again be pointed out that the rule is not in favour of children of Government servants as a class but only of a selected few in that class namely children of officers of that class unless of course officers include all Government servants. There are a very large number of Government servants who are not liable to be transferred such as those who are serving in the Secretariat or Directorates — who at any rate like the non-officials may be continuously residing in Region I from 1-11-1956 and who satisfy the qualifications in Rule 6 (a) (ii). We could have understood a provision being made for children of that class and included in Rule 6 (a) (ii) on the basis that they are in the progress and almost nearing completion of getting the qualification for obtaining nativity of the Telangana region and in particular region I.

9. We are therefore, of the opinion that Rule 6 (a) (i) and Rule 17 (viii) in so far as the latter deals with the candidates referred to in Rule 6 (a) (i) and directs allotment of equal number of Telangana candidates to the Medical Colleges in Andhra area are discriminatory and invalid.

10. The learned Government Pleader argued that the sentence occurring in Rule 6 (a) (ii), namely "such admissions should not in any case exceed 5% of the total seats available for Region I" should be so interpreted as to mean that admissions in each case coming under Rule 6 (a) (i) and 6 (a) (ii) should not exceed 5% of the total seats. So read, he submitted, the admissions under Rule 6 (a) (i) may also be limited to 5% of the total seats available for Re-

gion I and if so limited the proviso contained in Rule 6 (a) (i) would not be unreasonable or discriminatory. We are unable to find any justification for construing the last sentence referred to above in Rule 6 (a) (ii) in the manner suggested by the learned Government Pleader. That sentence occurs in Rule 6 (a) (ii) only and refers only to the proviso contained under Rule 6 (a) (i). That expression in any case, means in any event and it cannot by any stretch of imagination be construed as 'in each of the cases referred to in Rule 6 (a) (i) and Rule 6 (a) (ii)'. The very fact that more than 5% were selected for admission under Rule 6 (a) (i) shows that the Government never understood the limitation referred to in Rule 6 (a) (ii) as being applicable to Rule 6 (a) (i). We have, therefore, to proceed on the footing that Rule 6 (a) (i) does not impose any limitation to the number of admissions. In the absence of such limitation as stated already we have no option but to come to the conclusion that the said proviso is discriminatory and invalid.

11. Mr. Sivarama Sastry also contended that the applications by sons and daughters of the Government servants referred to in rule 6 (a) (i) are only to the Colleges in Andhra area, and the rules in question which are for selection of candidates for admission to the colleges in the Telangana area cannot make a provision for candidates for selection in the Colleges in the Andhra area to be admitted in the Colleges in Telangana area. It is no doubt, true that the rules relate to admission to Colleges in the Telangana area, but there is nothing to prevent the Government from making rules for the transfer of persons admitted in Colleges in Andhra area to the Telangana area and in lieu thereof for allotting the candidates selected in Telangana area to Andhra area.

12. I Sukhadev v. Government of Andhra Pradesh, 1966-1 Andh WR 294. Justice Jaganmohan Reddy (as he then was) after considering Rule 6 (a) of the Rules as it then stood, stated that the rule appears to be somewhat unhappily drafted because it postulates a number of seats to be reserved for Telangana candidates equal to the number of Andhra candidates who are selected to the M. B. B. S., Course to the institution in Hyderabad city without making evident how selection of the Andhra candidates in the institutions in Hyderabad city are to be made. It was ultimately held that the exchange of the Andhra students vis-a-vis the Telangana students is on the basis of selection in their respective areas and consequently if any seats have been kept vacant in the Andhra area without selecting the Andhra candidates that

would not be in consonance with the spirit and intention of the rule.

13. Apparently the present rule has been re-drafted to bring it in line with the decision in that case. Though it may be pointed out, the rule still remains unhappily drafted, now as express provision is made as to the mode of selection of the candidates referred to in Rule 6 (a) (i) in Andhra area and the transfer of those to the Telangana area, and an equal number of the candidates being allotted to Andhra area, we do not find any substance in the above contention urged by Sri Sivarama Sastry.

14. Sri Sivarama Sastry also contended that the impugned rule 17 (viii) is discriminatory inasmuch as only Telangana male candidates are to be allotted to replace the sons and daughters of the Government officers transferred under Rule 6 (a) (i) whereas female candidates are left untouched. The result of Rule 17 (viii) is that the candidates are forced to live away from their parents in cities which are new to them. In those circumstances we see nothing objectionable in confining the allotment only to the male candidates without putting female candidates to such inconvenience and hardship. The rule cannot, therefore, be attacked as discriminatory on this ground.

15. While this is so we would like to make an observation on one aspect of the matter, namely that while candidates who are transferred from Andhra area to Region I come of their volition and due to better convenience which they have in the city, the candidates from Region I who are transferred to Andhra area go there unwillingly and have to incur expenditure which they, due to their economic conditions, may be unable to afford. This is a matter which the Government, in making the rule, should consider and in some way come to their aid such as for instance giving the candidate free admission to the hostel or other financial assistance.

16. Sri Sivarama Sastry also raised a further contention that a discrimination is sought to be made between Region I and Region II, as provision is made for candidates falling under Rule 6 (a) (i) by displacing candidates only from Region I instead of from Region II also. This contention is, according to us, devoid of any substance. If Rule 6 (a) (i) is valid and the candidates referred to in Rule 6 (a) (i) have to be accommodated in the colleges in the twin cities, it is but natural and just that the candidates to replace them should be out of candidates in Region I, to which the twin cities belong.

17. As we are, however, holding that Rule 6 (a) (i) and the corresponding portion of Rule 17 (viii) are invalid, for

other reasons as set out earlier in this judgment the Memorandum No. 5765/B2/67 dated 6-10-1967 is directed to be given effect to, to this extent viz., that only such number of candidates out of the petitioners herein equal to the number of candidates admitted under Rule 6 (a) (ii) will be allotted to Andhra. The memorandum in so far as it affects Rule 6 (a) (i) and the corresponding provision in Rule 17 (viii) is quashed and effect cannot be given to it. The petitioners will have their costs. Advocate's fee Rs. 50/- in each petition.
SAP/D.V.C. Petitions allowed.

AIR 1969 ANDHRA PRADESH 39

(V 56 C 16)

SESHACHALAPATI, J.

K. Dasaradharami Reddy, Petitioner v. Union of India and others, Respondents.

Writ Petn. No. 1655 of 1966, D/- 19-10-1967.

(A) Mineral Concession Rules (1961), Rr. 54 and 37, Explanation 1 (A) — Application for transfer of mining lease filed on 24-7-1965 — No order passed by State Government within 9 months — Application must be deemed to have been refused — Revision filed before Central Government under R. 54 after 23-4-1966 i.e., lapse of 9 months from the date of original application is competent.

(Paras 5, 6)

(B) Constitution of India, Art. 226 — Dismissal of writ — Temporary injunction for facilitating institution of suit cannot be issued.

When a Court declines to decide a writ petition filed under Article 226 of the Constitution, it cannot for the purpose of facilitating the institution of a suit, issue directions in the nature of temporary injunctions. AIR 1952 SC 12, Foll.

(Para 10)

Cases Referred: Chronological Paras (1952) AIR 1952 SC 12 (V 39) = 1952

SCR 28, State of Orissa v. Madan

Gopal

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P. Krishna Reddy, for Petitioner; K. Ramachandra Rao, Central Govt. Standing Counsel, (for No. 1), G. V. L. Narasimharao, (for Nos. 2 and 3) and M. V. Ramachandra Reddy for P. Babulreddy and M. N. Rao, (for No. 4), for Respondents.

ORDER:— This is a petition under Article 226 of the Constitution of India for the issue of a writ of mandamus directing the State Government not to give effect to the G. O. Ms. No. 1042 dated 23-9-1966 recognising the transfer of the mining lease and to direct the transfer of the lease in favour of the petitioner.

LK/HL/E7/67

2. The facts relevant for the disposal of this petition may be stated briefly. The 4th respondent in this petition, Sri T. Chenchaiyah Naidu, was granted a mining lease for excavating mica in an extent of about 83-69 acres in S. No. 227 etc., of Turimula Village Rapur Taliuk Nellore District for a period of 20 years by the State Government by an order dated 12-1-1962. On 16-4-1963, Chenchaiyah Naidu entered into an agreement with the petitioner for sub-leasing the lease for a period of 5 years on an annual rent of Rs. 5,000/-. It is alleged in the present petition that the 4th respondent, Chenchaiyah Naidu, was trying to resile from his agreement with the petitioner and took some more money from one Sri Venugopala Raju and transferred his lease in favour of the said Venugopala Raju. On 24-7-1965 the 4th respondent Chenchaiyah Naidu filed a petition before the State Government to permit him to transfer the mining lease in favour of Venugopala Raju. It is alleged in the petition that the petitioner filed a petition before the State Government making allegations against Venugopala Raju and adducing reasons why the transfer in his favour should not be recognised. That petition would appear to have been under enquiry by the State Government to his application for transfer dated 24-7-1965, the 4th respondent Chenchaiyah Naidu, filed a revision under Rule 54 of the Mineral Concession Rules, 1960. The Central Government called for comments from the State Government and by an order dated 13-9-1966 directed the State Government to consider the petition filed by the 4th respondent for the transfer of the lease and passed final orders thereon at an early date. In conformity with the directions of the Central Government, the State Government considered the application of the 4th respondent for the transfer of the mining lease and granted in and by G. O. Ms. No. 1042 dated 23-9-1966 permission to the 4th respondent to transfer the lease in favour of Venugopala Raju for the unexpired portion of the lease period subject to the condition, that the transferor should execute the transfer deed within a period of 90 days from the date of the issue of the order dated 23-9-1966.

3. In this writ petition the legality of the order of the Central Government remitting the case for disposal at an early date and the order of the Government of Andhra Pradesh granting permission of the transfer are challenged as being illegal and inoperative.

4. Mr. Krishna Reddy the learned Counsel for the petitioner has contended that inasmuch as admittedly the State Government had not passed an order on the application of the 4th respondent dated 24-7-1965 seeking permission for

the transfer, the 4th respondent should not have filed a revision petition under Rule 54 of the Mineral Concession Rules and that therefore the order passed by the Central Government on 13-9-1966 is illegal and without jurisdiction. It is further argued that G. O. Ms. No. 1042 dated 23-9-1966 passed by the State Government is also afflicted with legal infirmity.

5. As to the first objection raised by the learned Counsel I am of the opinion, that there is no substance in the contention. Rule 37 of the Mineral Concession Rules which is the relevant provision is as follows:—

"37. Transfer of lease;— (1) The lease shall not without the previous consent in writing of the State Government, which in the case of a mining lease in respect of any mineral as specified in the First Schedule to the Act shall not be given except after previous approval of the Central Government.

(a) assign, sublet, mortgage, or in any other manner transfer the mining lease, or any right, title or interest therein, or

(b) enter into or make any arrangement, contract or understanding whereby the lessee will or may be directly or indirectly financed to a substantial extent by, or under which the lessee's operation or undertakings will or may be substantially controlled by, any person or body of persons other than the lessee.

1 (A) An application for transfer of mining lease shall be disposed of by the State Government within nine months from the date of its receipt, and if it is not disposed of within that period, it shall be deemed to have been refused." The other portion of Rule 37 of the above Rules are not relevant for the purpose. The explanation 1 (A) has been introduced by an amendment, which came into effect on 6-5-1963. The question is whether the present case falls within the scope and ambit of that explanation. It may be remembered that the application for the transfer of the mining lease filed by the 4th respondent Chenchaiyah Naidu, was made on 24-7-1965. The period of nine months referred to in Explanation 1 (A) to Rule 37 of the Rules would expire on 23-4-1966. It is common ground that no order was passed by the State Government on the application of the 4th respondent dated 24-7-1965. But by reason of the provision contained in explanation 1(A) to Rule 37 of the Mineral Concession Rules, I am of the opinion that the application must be deemed to have been refused on the expiry of nine months from the date of the application, that is on 23-4-1966. That being so, the 4th respondent was at liberty to file a revision before the Central Government under Rule 54 of the Mineral Concession Rules.

6. Mr. Krishna Reddy next contended that in explanation 1 (A) to Rule 37 there is no reference to any 'order' as in Explanation to Rule 54 of the Mineral Concession Rules. In my view there is no substance in this contention. The deeming provision contained in Rule 54 means and can only mean that after the expiry of the nine months from the date of the application and if no orders are passed before them, the application should be deemed to have been refused. In other words, it should be understood that there is an order refusing the application. That being so, I hold that the revision filed under Rule 54 of the Mineral Concession Rules is competent and accordingly the directions given by the Central Government in and by their order dated 23-9-1966 are also in order and well within the jurisdiction of the Central Government. It therefore follows that the disposal given by the State Government to the application of the 4th respondent Chenchiah Naidu in and by their order in G. O. Ms. No. 1042 dated 23-9-1966 is also well within the authority and jurisdiction of the State Government.

7. In the affidavit filed in support of the present petition it is alleged that no notice was given to the petitioner either by the State Government or the Central Government before passing orders. In the counter affidavit, filed on behalf of the Central Government it is stated that the petitioner's name was not mentioned in the application filed by the 4th respondent and that therefore there was no question of the Central Government calling for comments from him or otherwise giving him an opportunity. Similarly in the case of the State Government it was not necessary at that stage for them to hear the petitioner for the reason that they could dispose of the petition for transfer on the material available to them.

8. In the writ petition some allegations are made as to how Sri Venugopala Raju was disqualified to get the transfer. In the counter affidavit filed by the State Government, those allegations are denied. It is not necessary for me to go into that question in this writ petition, as the main objection is as to the legality of the order passed by the Central Government and that of the State Government in pursuance thereto.

9. Mr. Krishna Reddy has drawn my attention to the allegation expressly made in the writ petition that the petitioner was not informed of the result of the petition filed by him on 19-10-1965. In the counter affidavit filed by the State Government it had been stated expressly that there was an enquiry by the Special Deputy Collector, Gudur and that he had also submitted a report dated 28-1-

1966. It is also stated that the Special Deputy Collector, Gudur had given several notices to the writ petitioner to appear before him for the enquiry and that at no time he turned up even though the witnesses cited by him were examined by the Special Deputy Collector. In these circumstances I think the grievance that he was not communicated with the orders of the enquiry is imaginary.

10. Lastly Mt. Krishna Reddy contended that he may file a suit for the vindication of his legal rights and that in order to aid him, this Court might interdict the implementation of G. O. Ms. No. 1042 dated 23-9-1966. There is a decisive authority against this Court making any such order. In *State of Orissa v. Madan Gopal*, AIR 1952 SC 12 it has been held that when a Court declines to decide a writ petition filed under Article 226 of the Constitution of India, it cannot for the purpose of facilitating the institution of a suit, issue directions in the nature of a temporary injunction.

11. There are no merits in this petition. It is accordingly dismissed with costs. Advocate's fee Rs. 100/- one set. MVJ/D.V.C. Petition dismissed.

AIR 1969 ANDHRA PRADESH 41 (V 56 C 17)

ANANTHANARAYANA AYYAR, J.

The Public Prosecutor, Appellant v. Mohammed Ali, Accused-Respondent.

Criminal Appeal No. 213 of 1965, D/-30-6-1967, from order of 2nd Addl. Dist. Munsif Magistrate, Vijayawada, in C. C. No. 766 of 1963.

(A) Criminal P. C. (1898), S. 195(1)(a) — "Public servant concerned" — Superintendent in charge of Central Telegraph Office — Whoever happens to occupy that post at the time of filing complaint is the public servant concerned and can file complaint for offences under Ss. 182, 417 and 471, Penal Code — (Penal Code (1860), Ss. 182, 417 and 471) — (Words and Phrases — "Public servant concerned"). AIR 1962 SC 1206, Rel. on.

(Para 10)

(B) Criminal P. C. (1898), Ss. 200 (aa), 251 (b) and 251A — Complaint filed by Superintendent Central Telegraph Office in his official capacity — He is public servant and need not be examined on oath before taking case on file — His successors examined as witnesses in case — It cannot be said that there was no evidence connected with complaint — Proceedings having been initiated by some one other than Police Officer proper procedure for trial was under S. 251 (b) and not under S. 251A — Fact that Police had made investigation was not of any im-

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portance and could not affect validity of proceedings even if Police had investigated without proper authority under S. 155 (2). AIR 1964 SC 28, Rel. on.

(Para 13)

(C) Criminal P. C. (1898), Ss. 156 and 537 (2) — Defect in initiation of complaint — Curability.

Section 156 empowers an officer in charge of a Police Station to investigate a cognizable case without the order of a Magistrate and delimits his power to the investigation of such cases within a certain local jurisdiction. It is the violation of this provision that is cured under sub-section (2) of S. 537. Under the explanation to S. 537, in determining whether any error, omission or irregularity in any proceedings under the Code has occasioned a failure of justice, the Court shall have regard to the fact whether the objection could and should have been raised at an earlier stage in the proceedings. AIR 1955 SC 196, Rel. on.

(Para 16)

Cases Referred: Chronological Paras

(1964) AIR 1964 SC 28 (V 51)=

1964 (1) Cri LJ 11, Munnalal v.

State of Uttar Pradesh 18

(1962) AIR 1962 SC 1206 (V 49)=

1962 (2) Cri LJ 286, Daulat Ram

v. State of Punjab 10

(1955) AIR 1955 SC 196 (V 42)=

1955 Cri LJ 526, Rishbud v. State

of Delhi 16, 17

P. Sitarama Raju on behalf of Addl. Public Prosecutor, for Appellant; A. Rama Rao and K. Nagaraja Rao, for Respondent (Accused).

JUDGMENT:— The learned Public Prosecutor has filed this appeal against the judgment of the Second Additional District Munsif Magistrate, Vijayawada, acquitting the sole accused altogether.

2. The relevant facts are as follows.

3. The Superintendent-in-charge, Central Telegraph Office, Vijayawada, filed a complaint on 13-11-1963, in the Court of the Judicial First Class Magistrate, Vijayawada, in which he stated as follows:—

"Complaint filed under Section 195 (1) (a), Criminal Procedure Code for offences under Sections 182, 417 and 471, I. P. C.

The Superintendent-in-charge, Central Telegraph Office, Vijayawada, sent a requisition to the Sub-Regional Employment Officer, Vijayawada, on 9-7-1962 requesting him to send candidates for appointment as telegraph peons.....

SD/- Complainant,
Superintendent-in-charge,
C. T. O., Vijayawada"

4. The learned Magistrate, Sri G. Pulliah, took it on file, making an endorsement as follows:—

"Taken on file on 13-11-63 under Sections 417 and 471, Indian Penal Code. Issue summons to the accused."

5. The prosecution examined seven witnesses. Of these, H. A. D. Monte (P. W. 1) was the Superintendent, C. T. O., Vijayawada, who called for applications in July 1963 and before whom the accused is said to have produced transfer certificate (Ex. P. 2) with endorsement (Ex. P. 3) which is said to be the subject-matter of the charges. He deposed that he filed them in the office. Subsequently, one V. Sambandham became the Superintendent in the same office, in place of P. W. 1. He gave a complaint to the police, complaining of the offence. The Inspector of Police (P. W. 7) registered the crime under Section 465 read with Section 471, Indian Penal Code in R. C. 27/63. He deposed as follows:—

"I obtained the orders from IV City Magistrate, Hyderabad on 7-8-63 to investigate into the case under Section 155 (2) Cr. P. C. I submitted my report to S. I., S. P. F. Hyderabad....."

Subsequently, on 13-11-1963 the Superintendent-in-charge of C. T. O., viz., V. Sambandham who had succeeded P. W. 1 (H. A. D. Monte) signed in complaint and filed it in Court. The learned Magistrate, who took the case on file examined the witnesses, P. Ws. 1 to 7. He questioned the accused on 22-1-1964 putting one single long question mentioning various items of evidence against him and the accused gave a single answer 'I did not commit the offence.' He examined P. Ws. 2 to 7 from 19-2-64 to 26-3-64. The learned Magistrate questioned the accused in detail and on 2-5-1964 he framed charges against him under Sections 182 and 471, I. P. C. The accused pleaded "not guilty" and stated that he had no defence witnesses. Finally, the learned Magistrate delivered the Judgment on 30-6-1964.

6. In the judgment, he framed four points for consideration as follows:—

(1) Whether this Court can take cognizance of this case?

(2) Whether the Police can investigate into a non-cognizable case without the orders of Magistrate?

(3) Whether the prosecution made out their case under Sections 182 and 471, I. P. C.?

(4) To what relief?

7. On point No. 1 the learned Magistrate held as follows:—

".....The charge sheet in this case was filed under Sections 182, 417 and 471, I. P. C. P. Ws. 1 and 2 are the concerned officers who should have filed the complaint in this case. Neither of them nor their superior filed the complaint in this case. One V. Sambandham is said to have filed the complaint in this case. He is not examined as witness for the prosecution. There is no explanation as to why P. Ws. 1 and 2 who were the concerned officers or their superiors have

not filed this complaint. There is no evidence connecting the alleged complaint with the proceedings of this case. Section 195, Cr. P. C. is mandatory provision which directs that Courts shall take cognizance of the offences under Sections 172 to 188, I. P. C. only on the complaint of the public servant concerned or some other public servant to whom they are subordinates. There is no such complaint in this case as directed in Section 195 (1), Cr. P. C."

On point No. 2, the learned Magistrate held as follows:—

"The offence under Section 182 is a summons case which means a non-cognizable case as quoted above. Section 155(2), Cr. P. C. bars the Police to investigate into a non-cognizable offence without the orders of the competent Magistrate. No such orders of the Magistrate have been filed and marked in this case. P. W. 7 is the Inspector of Police. He deposed that he obtained orders from the IV City Magistrate, Hyderabad on 7-8-1963 to investigate this case under Section 155 (2), Cr. P. C. No such orders have been filed in this case. Hence Section 155 (2), Cr. P. C. is a bar for the police to investigate into this case. I, therefore, find that the police shall not investigate into this case."

He held on Points Nos. 3 and 4 as follows:—

"Point No. 3:— In the light of the findings on points 1 and 2, there is no need to discuss and give a finding on this point.

Point No. 4:— In the result, the accused is acquitted under Section 258 (1), Cr. P. C."

Point No. 1:—

8. The case of the prosecution was that the accused committed the offence with which P. W. 1 was concerned in his official capacity as Superintendent of C. T. O., Vijayawada, and not in his personal capacity as an individual.

9. If P. W. 1 had continued to be in office at the time of filing the complaint, and if he had filed the complaint, that complaint would have been in his official capacity as Superintendent and not in his individual capacity as Sri H. A. D'Monte. The public servant concerned under Section 195 (1) (a), Cr. P. C. so far as this case is concerned was the Superintendent, C. T. O., Vijayawada, in his official capacity and not Sri H. A. D'Monte (P. W. 1) in his individual capacity.

10. The learned Magistrate has relied on the decision of the Supreme Court in Daulat Ram v. State of Punjab, AIR 1962 SC 1206. The learned Counsel for the accused in this Court also has sought to rely on that decision. In that case, one Daulat Ram, a patwari, was charg-

ed for the offence under Section 182, I. P. C. for having given false complaint to the Tahsildar, his superior officer at Pathankot. Their Lordships observed in the Judgment as follows:— (at p. 1207)

"..... The public servant who was moved by the appellant was undoubtedly the Tahsildar The question is therefore whether under the provisions of Section 195, it was not incumbent on the Tahsildar to present a complaint in writing against the appellant and not leave the Court to be moved by the police by putting in a charge-sheet It was therefore incumbent, if the prosecution was to be launched, that the complaint in writing should be made by Tahsildar as the public servant concerned in this case. On the other hand what we find is that a complaint by the Tahsildar was not filed at all, but a charge-sheet was put in by the station house officer."

Therefore, their Lordships referred to the public servant concerned as the Tahsildar and never referred to his name or to him in his personal capacity as a private individual. That decision is a direct authority to show that, in this case, the public servant concerned for the purpose of Section 195 (1) (a), Cr. P. C. was the Superintendent-in-charge of the C. T. O., Vijayawada. Whoever happened to occupy that post at the time of filing the complaint was the public servant concerned and could file the complaint. The post of C. T. O. was held at various times by persons as follows:—

P. W. 2, M. J. Venkatesan—from 1-5-62 to 31-8-62.

P. W. 1, H. A. D'monte—July 1963.

Complainant V. Sambandham—Date of complaint (13-11-1963) and of filing of complaint.

The passage relied upon by the learned Magistrate in the Judgment of the Supreme Court in Daulat Ram's case (Supra) is as follows:—

"The words of the Section (195 of the Code of Criminal Procedure) namely, that the complaint has to be in writing by the public servant concerned and that no Court shall take cognizance except on such a complaint clearly shows that in every instance the Court must be moved by the appropriate public servant. The words 'no Court shall take cognizance' have been interpreted on more than one occasion and they show that there is an absolute bar against the Court taking seisin of the case except in the manner provided by the section This passage does not give any support to the view of the learned Magistrate. It has to be observed that the learned Magistrate himself had taken the case on file. The finding of the learned Magistrate on Point No. 1 is wrong.

11. Point No. 2:—

P. W. 7 deposed that he had obtained

orders from the IVth City Magistrate, Hyderabad, for prosecution (vide portion extracted by me already from the judgment of the lower Court). This statement was not challenged up to cross-examination by the accused; nor any question was put by the learned Magistrate to P. W. 7 in the matter. If the learned Magistrate doubted the truth of the statement of P. W. 7, he could have put a question to him and if the learned Magistrate felt that a copy of that order should be filed in the Court, he could have called for such an order being filed or insisted on its being filed. If a valid order really had been passed under Sec. 155 (2), Cr. P. C., the investigation would have been competent and valid, whether a copy of that order was filed in the Court or not. So, the action of the learned Magistrate in his finding on Point No. 2 is not justified and is untenable.

12. When the learned Magistrate came to the conclusion on Points Nos. 1 and 2, the course adopted by him viz., acquittal of the accused was not correct or proper.

13. In the present case, the proceedings were not initiated by the charge-sheet filed by the Police but the Superintendent, C. T. O. who filed the complaint. As the complainant is a public servant, under the proviso (aa) to Section 200 Cr. P. C. there was no need for the complainant being examined on oath before taking the case on file. The learned Magistrate himself acted rightly on that basis by taking the case on file without examining the complainant. Sri V. Sambandham signed the complaint and filed it in Court as he was then holding the office of C. T. O. Each of Sri M. J. Venkatesan (P. W. 2) and H. A. D'monte (P. W. 1) deposed as witness because he knew certain relevant facts as one who had occupied the office at certain relevant times. Therefore, the observation of the learned Magistrate 'there is no evidence connecting the alleged complaint with proceedings of this case' has no significance. His observation that there was no explanation as to why P. Ws. 1 and 2 have not filed the complaint is based on a presumption which is wrong. There was no need for P. W. 1 or P. W. 2 to file the complaint. The proceedings were initiated by a complaint by some one other than police officer and not by a charge-sheet filed by a police officer. The learned Magistrate himself accordingly followed the procedure which was not under Section 251-A but under Section 251 (b), Cr. P. C. In the circumstances, the fact that Police (P. W. 7) had made investigation was not of any importance and could not affect the validity of proceedings even if the Police (P. W. 7) had investigated without proper authority by

way of order under Section 155 (2), Cr. P. C.

14. The findings on Point Nos. 1 and 2 by the learned Magistrate only related to defects by way of improper initiation, the complaint being filed by one who was not public servant under Section 195 (1) (a), Cr. P. C. and improper investigation, and as such the learned Magistrate ought not to have acquitted the accused on those findings alone without going into merits of the case.

15. Section 156, Cr. P. C., runs as follows:—

"(1) Any officer in-charge of a Police Station may without the order of a Magistrate, investigate any cognizable case which a Court having jurisdiction over the local area within the limits of such station would have power to inquire into or try under the provisions of Chapter XV relating to the place of inquiry or trial.

(2) No proceeding of a police officer in any such case shall at any stage be called in question on the ground that the case was one which such officer was not empowered under this section to investigate."

16. In *Rishbud v. State of Delhi*, AIR 1955 SC 196, their Lordships of the Supreme Court have stated that sub-section 156, Cr. P. C. was a provision empowering an officer in charge of a Police Station to investigate a cognizable case without the order of a Magistrate and delimiting his power to the investigation of such cases within a certain local jurisdiction and that it was the violation of this provision that was cured under sub-section (2). Under the explanation to Section 537, Cr. P. C. in determining whether any error, omission or irregularity in any proceedings under this Code has occasioned a failure of justice, the Court shall have regard to the fact whether the objection could and should have been raised at an earlier stage in the proceedings. From the record, it does not appear that an objection was taken by anybody up to the time of the judgment on the ground, which is concerned in Point No. 1 or Point No. 2. The judgment also does not state that such an objection was taken any time before the judgment was delivered.

17. In AIR 1955 SC 196 (Supra.) it was observed by the Supreme Court as follows: (at pp. 203-204)

"A defect or illegality in investigation, however serious had no direct bearing on the competence or the procedure relating to cognizance of trial. No doubt a police report which results from an investigation is provided in Section 190, Cr. P. C. as the material on which cognizance is taken. But it cannot be maintained that a valid and legal police report is the

foundation of the jurisdiction of the Court to take cognizance."

The present case was taken on file on the basis of a complaint by the Superintendent-in-charge, C. T. O., and not on a police charge-sheet.

18. In *Munnalal v. State of Uttar Pradesh*, AIR 1964 SC 28, the above passage in Rishbud's case was extracted with approval and the following observation was made (at pp. 31-32).

"In view of this decision, even if there was irregularity in the investigation and Section 5-A was not complied with in substance, the trials cannot be held to be illegal unless it is shown that miscarriage of justice has been caused on account of the illegal investigation. Learned Counsel for the appellant has been unable to show us how there was any miscarriage of justice in these cases at all due to the irregular investigation..... In the present cases no objection was taken at the trial when it began and it was allowed to come to end. The appellant therefore cannot say that the trial was vitiated unless he can show that any prejudice was caused to him on account of the illegal or irregular investigation. We have already remarked that no such thing has been shown in this case; nor was it possible to show any such thing in view of the alternative defence taken by the appellant....." In the present case, there is no basis for holding that the trial which was held on a complaint by the Superintendent-in-charge C. T. O., (not a Police Officer) was in any way vitiated by the investigation of the Circle Inspector (P. W. 7) even if his investigation has not been authorised by an order of the competent Magistrate under Sec. 155 (2), Cr. P. C.

19. The findings of the learned Magistrate on Point Nos. 1 and 2 are, therefore, not tenable. Consequently, the judgment of acquittal which is based purely on the findings of the learned Magistrate on Point Nos. 1 and 2 is not tenable. In the light of the findings which I have given in this appeal on Point Nos. 1 and 2, Point Nos. 3 and 4 will have to be decided after going through the evidence. The learned Magistrate has not done that. Therefore, the proper course to be adopted by me now is to direct the learned Magistrate to give findings on Point Nos. 3 and 4 in the light of the findings which I have given on Point Nos. 1 and 2.

20. In the result, I allow this appeal, set aside the judgment of acquittal and direct the learned Magistrate to dispose of the case on merits after giving findings on Point Nos. 3 and 4.

HGP/D.V.C.

Appeal allowed.

AIR 1969 ANDHRA PRADESH 45
(V 56 C 18)

GOPALRAO EKBOTE, J.

Konakanchi Nagayya, Appellant v. Kondramutla Hanumiah and others, Respondents.

Second Appeal No. 212 of 1963, D/- 10-3-1967, against decree of Sub. J., Narsaraopet, in A. S. No. 89 of 1959.

Civil P. C. (1908), S. 105 (2) and O. 41, R. 23 — Scope and applicability — Principle that the appellate Court must take into account any changes in the law since the decision in appeal is given, is subject to the finality attached to the order of remand.

Section 105 (2), C. P. C. provides that if the party aggrieved by an order of remand from which an appeal lies does not appeal therefrom he cannot subsequently question the correctness of the order of remand. In a case where the appeal is actually filed and disposed of, that decision would be final and the point decided therein cannot be reconsidered either by the Trial Court to which the case goes back or by any other Court of appeal at a subsequent stage.

(Para 7)

Even apart from Section 105 (2), C. P. C., an order of remand under O. 41, R. 23 C. P. C. as regards the Court passing the order is conclusive on all points decided thereby and those points cannot be reopened in that Court either before the same Judge or his successor in appeal from the decision of the Lower Court on remand.

(Para 7)

The proposition of law that hearing of an appeal is a re-hearing and therefore in moulding the relief to be granted the Appellate Court is entitled to take into account facts and events which have come into existence after the decree appealed against and that the latest changes can also be taken into account since the decision in the appeal is given, is subject to the finality attached to the remand order under S. 105 (2) and O. 41, R. 23. When the order passed under O. 41, R. 23, C. P. C. has become final either because it was upheld by the High Court or because it operated as *res judicata*, that finality does not come to an end and it is not permissible for the High Court to ignore the decision already given by it and reconsider the matter in the light of a subsequent decision. The fact that a Bench decision relied upon by the Court of remand has been subsequently overruled by a Full Bench decision, held, could not be considered since the order of remand had become final by reason that the appeal against the order of remand had been heard and dismissed. AIR 1960 SC 941, Dist. (Paras 9 & 11)

Cases Referred: Chronological Paras
 (1963) AIR 1963 SC 358 (V 50)=
 1963-2 SCR 707, Mohanlal v. Tri-
 bhovan 9
 (1960) AIR 1960 SC 941 (V 47)=
 (1960) 3 SCR 590, Satvadhyan v.
 Smt. Deorajin Debi 8, 10
 (1959) AIR 1959 Andh Pra 523
 (V 46)=1959-2 Andh WR 79 (FB),
 Gurunadham v. Venkata Rao 6
 (1958) 1958-1 Andh WR 85, Dak-
 shinamurthi v. Sitharamayya 4
 (1941) AIR 1941 FC 5 (V 28)=
 1940 FCR 84, Lachmeshwar v.
 Keshwar Lal 9
 G. Venkatarama Sastri, for Appellant;
 B. Krishna Bhagavan (for No. 1) and
 P. V. R. Sharma (for No. 3), for Respon-
 dents

JUDGMENT:— The 1st defendant is the appellant. The respondents-plaintiffs filed a suit for possession of Item 1 with which I am concerned, from defendants 1 and 2, who are father and son. In the alternative they sought partition with a request that Item 1 should be allotted to the 1st defendant so that the plaintiffs may get the same. It was alleged that the 1st defendant sold under Exhibit A-3 dated 12-10-1943 the first item to his second wife. This sale deed was execut-
 ed with a view that the wife should come and stay with the 1st defendant. Since she did not come, the 1st defendant instituted O. S. No. 36 of 1947 for restitution of conjugal rights on 24-1-1947, Exhibit B-2.

On 11-4-1947 under Exhibit A-1, Chandramma, the second wife of the 1st defendant, sold to the plaintiffs Item 1 of course pending the suit O. S. 36 of 1947. The plaintiffs who had thus purchased Item 1 gave notice to the 1st defendant on 14-7-1947, Exhibit B-1. The 1st defendant gave reply that the sale-deed was void. Subsequently O. S. No. 36 of 1947 was decreed on 25-11-1947, Exhibit B-4 is the judgment.

2. The plaintiffs instituted the suit, O. S. No. 341 of 1951 before the District Munsif's Court, Narasaraopet for possession as against the 1st defendant only. In view of some formal defect the suit was withdrawn with permission to file a fresh suit. That is how the present suit O. S. 11 of 1956 was filed on 21-10-1955 for possession on the basis of the sale-deed executed by the second wife of the 1st defendant.

3. The defence was that an alienee, from an alienee would not be entitled to any equity. I am not concerned with the other defences raised.

4. On 2-11-1957 the suit was dismissed. Appeal Suit No. 34 of 1956 was filed before the Sub-Court. The Sub-Court allowed the appeal on 11-2-1959 and held that an alienee from an alienee is entitled

to the equity. The appellate Court relied upon a Bench decision of this Court in *Dakshinamurthi v. Sitharamayya*, 1958-1 Andh WR 85. Against that remand order, the 1st defendant preferred a C. M. A. to this Court. It was how-
 ever dismissed on 7-4-1961.

5. Before the C. M. A. was actually disposed of, the suit after remand was decreed by the Trial Court on 24-4-1959. According to that decree, the first item was allotted to the 1st defendant so that it might finally go to the plaintiff. The 1st defendant filed A. S. 89 of 1959. The appeal was dismissed and the Trial Court's decree was confirmed. It is this concurrent view that is now challenged in this Second Appeal.

6. The only contention raised by Mr. G. Venkatarama Sastry, the learned Counsel for the appellant, is that the Bench decision in *Dakshinamurthi v. Sitharamayya* (supra) has been overruled by a Full Bench decision of this Court in *Gurunadham v. Venkata Rao*, 1959-2 Andh WR 79=(AIR 1959 Andh Pra 523) (FB). I should therefore follow the Full Bench decision and hold that an alienee from and an alienee is not entitled to an equity. I do not think I can give effect to this argument. The remand order dated 11-2-1959 in which the Bench decision was followed became final. It was confirmed by this Court on 7-4-1961. By that date, the Full Bench decision was already reported. The appellant in that case obviously did not bring to the notice of this Court the Full Bench decision with the consequence that this Court also while confirming the order of remand passed by the Sub-Court virtually followed the Bench decision. The short question therefore is whether I can consider the question which has become final because of the order of remand confirmed by this Court. I do not think I can consider that question afresh merely because the original suit has come in second appeal and the lis is pending.

7. Section 105 (2), C. P. C. provides that if the party aggrieved by an order of remand from which an appeal lies does not appeal therefrom he cannot subsequently question the correctness of the order of remand. In a case where the appeal is actually filed and disposed of, that decision would be final and the point decided therein cannot be re-considered either by the Trial Court to which the case goes back or by any other Court of appeal at a subsequent stage. Even apart from Section 105 (2), C. P. C., an order of remand under Order 41, Rule 23, C. P. C. as regards the Court passing the order is conclusive on all points decided thereby and those points cannot be re-opened in that Court either before the same Judge or his successor in appeal.

from the decision of the Lower Court on remand. I have already stated that the order of remand came up for consideration to this Court and it was upheld. I cannot therefore go into the question which was decided by this Court in the previous C. M. A.

8. I am fortified in my view by the following decision of the Supreme Court. In *Satyadhyan v. Smt. Deorajin Debi*, AIR 1960 SC 941, their Lordships held:

"The principle of *res judicata* applies also as between two stages in the same litigation to this extent that a Court, whether the Trial Court or a higher Court having at an earlier stage decided a matter in one way will not allow the parties to re-agitate the matter again at a subsequent stage of the same proceedings."

9. It was, however, argued by Sri G. Venkatarama Sastry, the learned Counsel for the appellant, that since the Division Bench decision has been overruled by a Full Bench decision, I am bound to take notice of the change in law and mould the relief accordingly. In support of this contention, he relied upon the following two decisions: *Lachmeshwar v. Keshwar Lal*, AIR 1941 FC 5 and *Mohanlal v. Tribhovan*, AIR 1963 SC 358. There can be no quarrel in so far as the proposition of law that the hearing of an appeal is in the nature of re-hearing and therefore in moulding the relief to be granted in a case on appeal the Appellate Court is entitled to take into account facts and events which have come into existence after the decree appealed against and that the Appellate Court is competent to take into account latest changes since the decision in appeal was given. The previous Bench decision interpreting the law in a particular way has been overruled by the Full Bench.

This proposition, however, is subject to the finality attached to the remand order. Then the order passed under Order XLI Rule 23 C. P. C. has become final either because it was upheld by this Court or because it operates as *res judicata* merely because the Bench decision has been subsequently overruled that finality does not come to an end and it is not permissible for this Court to ignore the decision already given by this Court and reconsider the matter in the light of the Full Bench decision.

10. It was then contended that the remand order is an interlocutory order and therefore in an appeal against the final decree I can go into the said question. Reliance was placed in this connection on AIR 1960 SC 941. The following observation, however, would repel the contention:

"But an interlocutory order which had not been appealed from either because no appeal lay or even though an appeal

lay an appeal was not taken can be challenged in an appeal from the final decree or order. A special provision is made in Section 105 (2), Civil P. C. as regards order of remand. But even under Section 105 (2) the correctness of an order of remand can be challenged in appeal from the final decision provided the order of remand is not appealable."

11. It will thus be clear that it is only in a case where the remand order is not appealable that the Appellate Court hearing the appeal from the final decree can consider the correctness of the order of remand. This is not a case of that type. The remand order passed was certainly appealable and an appeal was filed and considered by this Court. I find therefore no difficulty in rejecting this contention.

12. The second appeal fails and is dismissed with costs. No leave.

TVN/D.V.C.

Appeal dismissed.

AIR 1969 ANDHRA PRADESH 47
(V 56 C 19)

P. JAGANMOHAN REDDY, C. J.
AND VENKATESAM, J.

Kruthiventi Kutumba Rao, Petitioner
v. Muthi Venkata Subba Rao and others,
Respondents.

Contempt Case No. 12 of 1967, D/- 18-7-1967.

(A) Contempt of Courts Act (1952), S. 3 — Civil P. C. (1908), O. 39, R. 7 — Account books required as piece of evidence by plaintiff to obtain order of permanent injunction — Court issuing order under O. 39, R. 7 — Parties to the suit and who have notice of same will be liable for contempt of disobedience or for obstructing execution of the order — Whether order is valid or irregular unless it is vacated, it has got to be obeyed — Constitution of India, Art. 215: AIR 1958 Punj 180 and AIR 1951 Pat 266, Rel. on. (Para 16)

(B) Civil P. C. (1908), O. 39, Rr. 7 and 6 (2) — Scope — Account books required as piece of evidence by plaintiff for establishing his allegations to obtain order of permanent injunction — R. 7 confers ample powers on Court to seize them — Provisions of R. 7 and R. 6 (2), are wide enough to authorise any party, to suit to apply for and obtain orders to seize account books and to have them into Court as piece of evidence if plaintiff or defendant cares to rely on them: AIR 1961 SC 218, Rel. on. (Paras 14, 16) Cases Referred: Chronological Paras (1961) AIR 1961 SC 218 (V 48) = 1961 (1) Cri LJ 322, Padam Sen v. State of U. P. 115 (1958) AIR 1958 Punj 180 (V 45) = 1958 Cri LJ 685, Narain Singh v. Hardayal Singh 116

(1951) AIR 1951 Pat 266 (V 38)=

Subodh Gopal v. Dalmia Jain & Co., Ltd.

17

N. Rajeswara Rao and K. B. R. Krishnamurthy, for Petitioner; P. Rama Rao (for Nos. 1 to 3) and Public Prosecutor (for Nos. 4 to 6), for Respondents.

JAGANMOHAN REDDY, C. J.:— This is a petition to commit Respondents Nos. 1 to 6 for contempt for violating the orders of the District Munsif, Vijayawada, by obstructing the Advocate Commissioner, Sri P. V. Rama Sarma while performing the duties directed in the warrant issued to him in I. A. No. 179/67 in O. S. No. 78/67, that is for seizing the account books and papers (Items 1 to 19) mentioned in the petition and to file the same in the Court.

2. The petitioner is a founder-member of Sri Velidendra Hanumantharaya Grandhalayam, Gandhinagar, Vijayawada, which was founded in the year 1934 in memory of the late Mr. Velidendra Hanumantha Rao. He is also the Secretary for a long time and the Joint Secretary of the Executive Committee of the Library. In 1944 the library was registered as No. 2/44 under the Societies Registration Act, and he is one of the persons who had subscribed to the Memorandum of Association. In 1964, during the General Body Meeting the strength of the Executive was increased by providing for one President, three Vice-Presidents, one General Secretary, three Assistant Secretaries, one Treasurer and 16 members, in total not exceeding 25. The present Executive Committee of the Library is elected on 9-2-64. The term of office of the Committee was two years, and one Pothina Gurunatha Banerji was elected as the General Secretary. The Petitioner filed O. S. No. 78/67 on the file of the District Munsif, Vijayawada for a permanent injunction restraining the Secretary from functioning as Secretary of the Executive Committee alleging that the Secretary mismanaged the affairs of the library. It is stated in the plaint that he did not keep the accounts properly and failed to convene the General Body Meeting for electing the New Executive for the last one year and that the library funds running into several thousands of rupees were misappropriated and mismanaged. The petitioner filed I. A. No. 179/67 for appointing an advocate as a commissioner to make an inventory of the Account Books, Bank Books, Cheque Books, Minute Books and all other records of the library and file them in the Court. On this I. A., a warrant dated 4-3-67 was issued to seize Items 1 to 19 mentioned in the petition and file them in Court with an inventory.

On 5-3-67 a Commissioner was appointed who with the help of Respondents Nos. 4 and 5, the Head Constable and

Police Constable respectively of Law and Order, V Town Police Station, Vijayawada, went to the library at 3-15 p.m. Along with the Commissioner, the petitioner and his advocates, Sri S. Rama Krishna and Sri P. L. Narayana, entered the office room of the library. Respondent No. 1 is the Librarian, Respondent No. 2 the Treasurer, and Respondent No. 3 the Secretary of the Building Construction Committee of the Library. The Advocate Commissioner in his report has stated that accompanied by the petitioner and his advocate, Sri P. L. Narayana, he went to Law and Order No. 5 Town Police Station, Vijayawada at about 2-30 p.m., and produced the letter for help. Taking the assistance of Respondents Nos. 4 and 5, he proceeded to the library along with them and the plaintiff's counsel, Sri P. L. Narayana, and reached there at about 3-15 p.m. They went to the 2nd Floor where the office room is situated. In the office room of the Grandhalayam, the 1st respondent was found sitting in a chair before the desk. The Commissioner had shown the warrant to him and asked about the respondent. Then the 1st respondent called one Bujeti Jagannadha Rao and pretended to make enquiries about the respondent and ultimately he told the Commissioner that the respondent was not available. Thereupon the Commissioner drafted a notice intimating his intention to proceed with the commission work and asked him to co-operate and take the notice. The 1st respondent took the notice and endorsed the same and thereafter he asked the Commissioner to wait for some time so that he may contact the President of the Grandhalayam, V. Jagan Mohan Rao and the Treasurer by name P. Kesava Rao the 2nd respondent on phone. After he returned from the telephone, he produced some account books, and receipt books relating to the present period which were readily available on the table itself. He said that some account books were in the iron safe but the keys of the iron safe were with the treasurer, the 2nd respondent.

3. The Commissioner prepared an inventory list in respect of the books produced before him. In the meantime, the 2nd respondent came there. He raised objections and disputed the powers of the Commissioner. The Commissioner asked him to open the locks of the Iron Safe as the keys were with him, but the 2nd respondent refused to do so. The Commissioner told him that he was going to take steps for breaking open the locks of the Iron Safe in connection with executing the warrant. After this, he sent for a lock repairer. After the lock repairer by name Shaik Rahim Tallab came, the Secretary of the Building Construction Committee of the Grandhala-

yam and some of his men also came there. In the presence of the Head Constable, Constable, Petitioner and his advocates, Sri S. Rama Krishna and Sri P. L. Narayana who were with the Commissioner, as well as the Mediators Sri A. Sri Rama Murty, Sri C. L. Mrutyunjaya, Sri M. V. Subba Rao, and Kesava Rao, the Commissioner directed the lock repairer to open the lock of the iron safe. After the lock repairer opened the door of the iron safe, some account books, printed receipt books etc., were found in the iron safe and the Commissioner prepared inventory of the same. On all the documents inventoried and listed by him, the Commissioner put his signature and numbered the same. After preparing the inventory list, he gave a copy to the clerk, the 1st respondent and told him that he was going to take the documents with him. But the 2nd and 3rd respondents advised the Commissioner not to take the list and they did not allow him to take the inventoried documents. The police constables refused to give help and assistance and they left the place saying that the Circle Inspector of Police, Sri Sirgaraju Respondent No. 6 asked them to go away.

Thereafter, according to the Commissioner, he sought help from the Police Control Room when a few of them came. Then also Respondents Nos. 1, 2 and 3 and their men obstructed him from executing the warrant and prevented him from getting the inventoried documents which were bundled and placed on the table. As he found much pressure by the persons gathered there who were restraining him to execute the warrant, the Commissioner had telephoned to the Assistant Superintendent of Police, Vijayawada Town seeking proper police assistance but he could not contact him as it was reported that he was not at home. In the mean time, the Circle Inspector, the 6th respondent came there and stationed in front of the Grandhalayam in a Jeep Car, and instructed the police that have come from the Police Control Room to leave the place. As there was no help from the police and there was great pressure and force from the said persons obstructing and preventing the execution of the warrant, he could not get the documents listed and inventoried by him and the same were left in the Grandhalayam Office Room under the control of the aforesaid people, namely Respondents Nos. 1 to 3 and their men. The Commissioner took the signatures of the mediators who were present throughout the proceedings, on the inventory list and on other proceedings; after that they left the place at about 6-30 p.m.

4. In front of the Grandhalayam, the 6th respondent, who was there in a Jeep Car, called him. The Commissioner ex-

plained to him the situation and asked him for sufficient help and assistance. Without caring for his words, he threatened the Commissioner saying that he would prosecute him for calling help and assistance from the Police Control Room. As he had no police aid to get the books, and the 6th respondent threatened him to prosecute and refused to give help and protection, he had to leave the place. Respondents Nos. 1 to 3 threatened him to leave the inventory list as well as the Commission warrant at the Grandhalayam Office but, however, the Commissioner says he was able to come out only with inventory list.

5. Then he went to the Assistant Superintendent of Police, Vijayawada Town and waited at his residence till about 12-30 in the night to report the matter to him. As soon as he came, he gave a report about the situation and sought his help and protection. He asked the Commissioner to ring him up at 10.45 a.m., the next morning. Accordingly he went to see him but could not get him as he had just left his house. Again he tried to contact him at 12-40 noon but he did not return home by then. Then the Commissioner prepared inventory list as per the warrant and could not get the documents inventoried and file them as he was prevented by force as stated earlier. On 7-3-67 the Court gave a further order directing him to take sufficient police assistance from the Assistant Superintendent of Police, Vijayawada, under a letter of requisition issued by the Court in connection with the execution of the Commission Warrant. The Commissioner served the notice on the Petitioner's advocate, Sri Rama Krishna, stating that he would proceed to execute the warrant between 3 p.m. and 6 p.m. on 8-3-67. After obtaining the said letter of requisition at about 4 p.m. on 7-3-67, the petitioner attempted many times to contact the A. S. P., but could not get him till 12-30 noon on 8-3-67. At about 12-30 on 8-3-67, he went to the A. S. P.'s bungalow, met him and gave the envelope containing the letter of requisition to him. Thereupon the A. S. P. directed the Sub-Inspector of Police, Law & Order, No. V Police Station to give sufficient help by endorsing the direction of the letter given by the Court itself and asked him to show the same to the said Sub-Inspector of Police. Accompanied by the petitioner and his advocate, Sri P. L. Narayana, the Commissioner went to the Law & Order No. V Police Station and produced the letter for help at about 4-15 p.m. Thereupon, A. S. I. Law & Order, No. V. Town Police Station, P. Cs. 1481, 1758 and 572 were deputed to help him in executing the warrant.

6. Accompanied by the Police, the petitioner and his advocate, the Commis-

sioner went to the Grandhalayam at about 4-35 p.m., and reached the 2nd floor where the office room is situated and where he had, on 5-3-67, under forcible circumstances, left the documents inventoried by him. But he found that the doors of the office room were closed and locked with a Godrej Lock. Then he called the watchman and made inquiries as to with whom the keys of the lock are kept. The watchman told him that the keys of the office room were with the clerk, the 1st respondent and that he did not know about his whereabouts. Then the advocate for the petitioner, Sri P. L. Narayana requested the Commissioner by way of a memo to break open the lock and enter the office room and execute the warrant or to put a seal until further directions by the Court. But as the commission warrant did not provide for breaking open the locks of the rooms of premises or to seal the same, and the express authorisation given was only to break open the locks of the shelves, almyrahs etc., the Commissioner told him that he could not concede to his request. As the office room was found locked and the person with whom the keys were available had not been forthcoming, the Commissioner was prevented from executing the warrant and ultimately he left the place at about 5 p.m.

7. On 27-3-67, the Commissioner filed another report which was re-issued to him with directions, on 17-3-67 at about 12 noon, and this time it was to break open the lock of the room. He went to the premises on 19-3-67 along with the petitioner and his advocate, Sri P. L. Narayana and three police constables, he reached the place at about 9-20 a.m. There he found that the doors of the office room were open and the 1st respondent, the clerk was present. The Commissioner showed the Commission warrant to him and tendered notice. He had seen the warrant and received notice. The Commissioner asked him to produce the documents inventoried by him on 5-3-67 and other account books etc., but they were not produced. When he asked the clerk, the 1st respondent to open the iron safe and show him whether there are any inventoried documents in it, he opened it but none of the documents inventoried by him or any other account books were found therein. The 1st respondent told them that on 6-3-67 at about 9 a.m. the petitioner and his sons went to the Grandhalayam and asked him to give the documents inventoried by the Commissioner. Thereupon he gave the said documents to the petitioners on 6-3-67 and they have taken them away. Thus the 1st respondent said that the documents inventoried by the Commissioner were not available in the Grandha-

layam. Therefore, the Commissioner left the office at about 9-45 a.m.

8. The petitioner alleged that Respondents Nos. 1 to 3 obstructed the Commissioner from seizing account books etc., as per the orders of the Court and produce them before the Court, with help of the mob that gathered there and with the active assistance of Respondents Nos. 4 to 6 who colluded with Respondents Nos. 1 to 3. Later, Respondents Nos. 1 to 3 removed the books from the Office of the Library and secreted them. The 6th respondent, the Town Circle Inspector who has a duty to carry out the orders of the Court and to uphold the dignity of the Court, instead of helping the Commissioner to do his duty aided respondents 1 to 3 who are very influential people by asking Respondents 4 and 5, the Head Constable and Police Constable respectively to leave the office of the library thus putting the Commissioner at the mercy of Respondents 1 to 3 and also threatening the Commissioner that he would be prosecuted. Virtually the Circle Inspector i.e., the 6th respondent, hand-in-glove with Respondents 1 to 3 caused the disappearance of the books etc. which were inventoried.

9. We will examine the defence of Respondents' Nos. 1 to 3 on the one hand and Respondents Nos. 4 to 6 on the other as their combined acts have to be looked into in order to ascertain what was their conduct and whether they amount to contempt of the orders of the Court. Respondent No. 1 denying the allegations of the petitioner says that he gave full co-operation to the Commissioner throughout and, therefore, he is not liable to contempt. While not denying the details given in the report of the Commissioner, he says that when he telephoned and enquired about the Secretary in the presence of the Commissioner on 5-3-67, he was informed that he went to Hyderabad and, therefore, he immediately informed the same to the Commissioner. The allegation that he pretended to make inquiries as mentioned in the interim report of the Commissioner is denied by him. He has stated that the Commissioner served notice on him stating that he would take steps to execute the warrant entrusted to him. He received the notice and told the Commissioner that he was only the clerk in the office and so he sought his permission to inform the purpose of his coming etc., to the President and the Treasurer as the Secretary was out of station. Then he informed them on telephone and produced the books relating to the present period as they were then readily available on the table itself. He informed the Commissioner that the remaining account books asked for were in the iron safe

and the keys of the iron safe were with the Treasurer Sri P. Kesava Rao, the 2nd respondent. Some time later, the Treasurer, the 2nd respondent came there when the Commissioner asked him to open the locks of the iron safe. The Treasurer informed the Commissioner that the keys of the safe were with the Secretary and further asked the Commissioner as to how he was empowered to seize the account books. The Commissioner showed him the warrant and on a perusal of the same, the 2nd respondent stated that there was absolutely no mention of Sri Velidandla Hanumantharaya Grandhalayam or the seizure of account books of the Grandhalayam but, however, he assured the Commissioner that he would co-operate with him.

It is not denied that the Commissioner got the lock of the iron safe broken open. He took out from it the account books and the printed receipt books in the immediate presence of the Treasurer, the 2nd respondent and the Secretary of the Building Construction Committee, the 3rd respondent, who happened to come by that time. Subsequent to the seizure of the documents, the Commissioner prepared an inventory and put his signature on all the documents and numbered the same. He has stated that the allegation that Respondents Nos. 2 and 3 advised him not to take the list and did not allow the Commissioner to take the inventoried documents is not correct. After preparation of the inventory and affixture of the signatures, Respondent No. 2 made a request to the Commissioner that the documents might be kept in iron safe under the seal of the Commissioner and also the protection of the police, if necessary, till the arrival of the President and Secretary when the Commissioner might take the same as required. But the allegation that they obstructed the Commissioner from executing the warrant, according to him, is not correct. Even after the police from the Control Room came at the instance of the plaintiff's counsel, a request was made by the 2nd respondent once again to keep the books etc. in the Grandhalayam premises till the President and Secretary came. He has stated that the Respondents never obstructed the Commissioner from executing the warrant but on the other hand, they gave him their utmost co-operation. Again he has stated that what they requested him was to see that the documents were retained in the office till the President or Secretary came out, nothing more. They never indulged in threats or obstruction, and on the other hand, they appealed to the Commissioner to keep them under the seals of the Commissioner and protection of the police if necessary. It was also contended by the 1st respondent that the appointment of the Commissioner

for the seizure of the account books was null and void and, therefore, the alleged obstruction, even if it is assumed to be true to any extent, does not tantamount to contempt of Court. Further, the Court issuing the commission did not order notice to the defendant in the suit in the course of passing the order of appointment of the Commissioner, and since such order violates the mandatory provisions of Order 26, Rule 18 Civil Procedure Code, it is submitted that it is null and void and obstruction to the Commissioner would not amount to contempt and that the report of the Commissioner made under such circumstances cannot be considered as piece of evidence or acted upon as desired by the petitioner.

10. Respondents Nos. 2 and 3 also support these statements and took similar objections. It will be seen from these three affidavits that while Respondents 1 to 3 deny that they caused any obstruction, none-the-less they cannot hide the fact which is asserted by the Commissioner in his report as also by the petitioner in his affidavit that the books and documents along with the inventories were asked to be left in the office premises and were not allowed to be taken. It appears to us that the alleged requests of the respondents that the documents etc., be left there till the arrival of the President etc., are misnomers, and they amount to acts of obstruction. There is no reason for the Commissioner and much less the petitioner to falsely state that the Commissioner was prevented from taking the books. If they were only requests, the Commissioner would have expressed his regret and inability to comply with their requests, and he would have complied with the directions of the Court which appointed him as the Commissioner. The very object of asking for police assistance and taking them there was to see that no one caused a breach of the peace when the Commissioner executes the orders of the Court. But unfortunately in this case, in spite of the fact that the Commissioner applied to the police for help, and it was granted by the Court that help was not forthcoming.

11. No doubt, Respondents Nos. 4 and 5 give a different version. According to them, they were asked to take custody of the books but as they had no authority to take the books into their custody, the 4th respondent sent the 5th respondent to the police station to take instructions from the A. S. I. He went and returned saying that the Circle Inspector who was present had stated that they had no authority to take custody of the books. Then the 4th respondent himself went to the police station and the Circle Inspector told him the same thing. The Circle Inspector, Respondent No. 6, did not ask them to come away from the Grandhala-

yam but instructed them to stay there till the Commissioner finished his work and to see nothing untoward happened.

12. The 6th respondent denied that he was in collusion with the other respondents and stated that the 5th respondent came and said that the Advocate Commissioner prepared an inventory of the books and he was insisting that the police should take custody of the books and wanted to know if he could do so. On looking into the letter of requisition, he told him that the police were not authorised to do so and if they did, they would be exceeding their powers. Then the 5th respondent went away. The 4th respondent also came and inquired about the same and he has instructed him in the same way. After completing his work, the 6th respondent went to the spot where he found the van of the Police Control Room. Thereupon he stopped and asked the Control Room party why they were there. The Head Constable who was in-charge of the party replied that they had come in response to a telephone call that a gallata was going on at the Grandhalayam and that when they came, they found that there was no gallata and that it was a false call. A gentleman who came from Grandhalayam stated that he made that telephone call. Thereupon the 6th respondent advised him that it was not proper to make false calls to the Control Room and that persons giving false complaints are liable to be prosecuted. That gentleman did not say anything. Thereafter the 6th respondent immediately left the place in Jeep for the Office. He says it is not correct to say that he threatened the gentleman with prosecution. He also says he did not speak to him harshly and what he told him was merely in the nature of an advice.

13. The affidavits of other persons also were adduced in support of the contention that what the Commissioner asked for was not police assistance to take the books but to keep the books in the police custody. They further stated that the Head Constable and the Police Constable after their return submitted a report to him stating that the Commissioner told them that if they were not prepared to take charge of the books, he did not require a bandobust and they may go away. The Head Constable also made an entry in the General Diary to that effect. The affidavit of Mustafa shows that he was in-charge of the Police Station on 5-3-67 and that at about 6-30 p.m., a telephone message was received from Hanumantharaya Grandhalayam that a gallata was going on there. Immediately, he went there with the Police Control Room party and did not find any gallata there. He questioned the persons present there,

where and what the gallata was and some of them replied that there was no gallata. Then he went down-stairs. Even the General Diary shows that the Advocate Commissioner had telephoned at 6-30 p.m. saying that a gallata was going on at the said library. In response to this, a party left at 6-45 p.m., but found no gallata at the spot and therefore they returned to the Control Room. In the affidavits of A. Y. S. S. P. Sarma and B. V. Rama Rao also it is stated that there was no gallata. The former says that when he went there he found that the almirah had been broken open and some books were bundled up, and one of the lawyers asked the police personnel present there to take charge of the books. The Head Constable told him that he cannot take charge of the books but that he would give the necessary assistance to the lawyer and stay there till the work was completed.

Even the statement taken from the petitioner by S. V. Narasimhulu, Deputy Superintendent of Police, Vijayawada shows that the Commissioner and the 6th respondent were having hot discussion. Even from this statement, from what the 6th respondent stated namely that the Commissioner kept quiet when he was told that he was liable to be prosecuted it would appear that the 6th respondent was trying to hide what actually took place between them. We have no hesitation in holding that the statements made by Respondents Nos. 4 to 6 and others which are adduced in support of them to buttress the version given, and to justify their inaction are all stereotyped. It appears incredible as to why when the Commissioner accompanied by the petitioner and the lawyers had gone there with the purpose of executing the warrant and bringing the books, they would leave the books and come away nor is it clear why they would ask the police to take custody of the books unless they were apprehending danger of the books being forcibly removed from the premises by Respondents 1 to 3 and their supporters. The whole truth has not been stated by the respondents and it is regrettable that the police who were sent there to help the Officer of the Court, have not rendered the necessary assistance, resulting in the disappearance of the account books etc. We do not say that they have obstructed him but they were positively unhelpful. The affidavit of the petitioner is corroborated by the report of the Commissioner and it shows that Respondents 1 to 3 obstructed the Commissioner while executing the warrant under the direct orders of the Court. Not only that, even the books were spirited away and the allegation that the petitioner and his people took them away is an utter falsehood. Notwithstanding

the fact that the 2nd respondent is said to have had the keys though when he came on the scene he said they were with some one else, the Commissioner had to get the safe and locker broken open and recover the books.

14. The contention raised by Respondents 1 to 3 that the Court which issued the warrant had no jurisdiction to do so and that the same is null and void; as such, there is no contempt of the order of the Court has also no validity. Order 39, Rule 7, C. P. C., empowers the Court on the application of any party to a suit, and on such terms as it thinks fit, to make an order for detention, preservation or inspection of any property which is the subject-matter of such suit, or as to which any question may arise therein or for all or any of the purposes aforesaid authorize any person to enter upon or into any land or building in the possession of any other party to such suit; or for all or any of the purposes aforesaid authorize any samples to be taken, or any observation to be made or experiment to be tried, which may seem necessary or expedient for the purpose of obtaining full information or evidence. Sub-rule (2) of Rule 6 also says that the provisions as to execution of process shall apply mutatis mutandis to persons authorised to enter under this rule. These provisions are wide enough to authorize any of the parties to a suit to apply for and obtain orders to seize the account books and to have them into Court as a piece of evidence if the plaintiff or the defendant cares to rely on them.

15. In this case, the plaintiff made an application in the suit for a permanent injunction restraining the defendant from functioning as Secretary of the Executive Committee alleging that that Secretary mismanaged the affairs of the Library, and the library funds running into several thousands of rupees were misappropriated and mismanaged. In order to establish this, account books were necessary and on the application of the plaintiff's petition, (sic) the Court had jurisdiction to issue the impugned order, Sri Rama Rao appearing for Respondents Nos. 1 to 3 cites Padam Sen v. State of U. P., AIR 1961 SC 218 in support of his contention that there was no power in the Court to issue an order of the nature of which contempt is said to have been committed. In that case, Their Lordships of the Supreme Court were considering the case of a person who is alleged to have obstructed the Commissioner in the execution of his duties. In a suit filed for recovery of money on the basis of promissory notes executed by defendants in his favour, the defendant applied to have the plaintiffs account books brought into Court on the apprehension that the

plaintiff would tamper with the books and might fabricate them. The Additional Munsif issued a warrant to seize the said books of account, and bring them into Court. The Commissioner accordingly seized the books and brought them to Ghaziabad. The appellants were convicted by the Special Judge under Section 165-A, I. P. C. for having offered bribe to the Commissioner for being allowed an opportunity to tamper with those books of account, and their conviction was upheld by the High Court. But their Lordships of the Supreme Court observed that the defendants had no rights to these account books. They could not lay any claim to them. They applied for the seizure for these books because they apprehended that the plaintiff might make such entries in those books which could go against the case they were setting up in Court. They rejected the contention that such an order could be passed by a Court under several provisions namely Section 75 or Section 151 or Order 26, Rules 38 and 39. Raghubar Dayal, J., observed at p. 220 as follows:—

"Rule 7 of Order XXXIX empowers the Court, on the application of any party to a suit, to make an order for the detention, preservation or inspection of any property which is the subject-matter of such suit or as to which any question may arise therein. The account books of the plaintiffs were not 'property' which were the subject-matter of the suit nor such that about them a question could arise in the suit. The account books could, at best, have been a piece of evidence, if the plaintiff or the defendant had cared to rely on them. We therefore hold that the Additional Munsif had no power under the Code to appoint the Commissioner for seizing the plaintiff's books of account."

16. In this case, certainly, as observed by Their Lordships of the Supreme Court, the account books were required as a piece of evidence by the plaintiff who cares to rely on them for establishing the allegations made by him in order to obtain an order of permanent injunction; as such Order 39 Rule 7 confers ample powers on this Court to seize them. A large number of cases have been cited for the proposition that where an order of the Court is without jurisdiction, no contempt can be said to have been committed. But inasmuch as we have found that the Court has jurisdiction to issue the order, it is not necessary to consider that line of cases. So long as there is an order by the Court which requires compliance not only, parties but even third parties who are not parties to the suit and who have notice of the same will be liable for contempt for the disobedience of such orders or

for obstructing the execution of the same. Whether the order is valid or irregular unless it is vacated. It has got to be obeyed. Oswald in his book "Contempt of Court" (3rd Edition) at page 107 says:

"An order irregularly obtained cannot be treated as a nullity, but must be implicitly obeyed, until by a proper application it is discharged, and the case is the same where the order is alleged to have been improvidently made."

In *Narain Singh v. S. Haridayal Singh*, AIR 1958 Punj 180, it has been held that so long as the injunction order has not been vacated or modified by the Court granting it, or has not been reversed on appeal, no matter how unreasonable and unjust the injunction may be, the order must be obeyed. Violation of the order of injunction cannot be executed on the ground that though the Court acted within its jurisdiction, the order that it passed, was erroneous. The Court, in contempt proceedings will not inquire into the merits of the case in which the injunction was issued.

17. In *Subodh Gopal v. Dalmia Jain & Co. Ltd.*, AIR 1951 Pat 266 it has been held that right or wrong, the injunction order binds him, and he disregards it at his peril.

18. It appears to us from what we have stated above that respondents 1 to 3 have committed gross contempt not only in not obeying the orders of the Court but in obstructing the execution thereof by the Commissioner appointed by it. Their further action in spiriting away the books nullifies and reduces the process of the Court to mere nothing. This aggravates the contempt. While we cannot say with the same certainty that respondents 4 to 6 in any way obstructed or committed contempt of the orders of the Court, nonetheless, being the minions of law and order, their services were requisitioned and their assistance was sought in furtherance of the execution of the orders of the Court, but they stood by, without rendering much help and later they invented a theory that the Commissioner had asked them to take the books into their custody, which under the requisition they were not asked to do. We cannot accept the statement that there was no galata at all and that no threat or obstruction was caused in the execution of the commission. It is certain that the Commissioner was not permitted to take the books. Respondents 4 and 5 did nothing and respondent No. 6 who came on the scene rendered no assistance. It is unthinkable that the Commissioner would not have reported the matter to the 6th respondent nor would he have falsely blamed his conduct. However, in the case of respondents 4, 5 and 6, we drop the proceed-

ings against them with the observation that we cannot look askance at their unhelpful and negative attitude in not assisting the execution of the orders of the Court by the Commissioner. Where the police are required to render assistance in executing the orders of Court, they must diligently and actively assist, — nay it is one of their duties which they can neglect to perform only at the risk and peril of exposing themselves to censure and punishment. In so far as respondents 1 to 3 are concerned, their acts are contumacious and they have caused obstruction to the execution of the orders of the Court.

19. We accordingly convict Respondents Nos. 1 to 3 for contempt of Court. The conduct of these respondents is derogatory to the dignity and authority of law and stultifies the process through which Courts of Law in this country must administer justice. The impunity with which respondents 1 to 3 not only disobeyed, obstructed and secreted the documents but subsequently tried to justify it as if the orders were issued without jurisdiction, adds to the aggravation of the offence. They have not also tendered any apology. We accordingly sentence each of respondents 1 to 3 to two months simple imprisonment with the direction that they may be detained in District Prison, Secunderabad.

LGC/D.V.C.

Order accordingly.

AIR 1969 ANDHRA PRADESH 54

(V 56 C 20)

GOPALRAO EKBOTE, J.

In re Masqi Bitchanna and others, Petitioners.

Criminal Revn. Cases Nos. 500 and 922 and Criminal Revn. Petns. Nos. 460 and 817 of 1964, D/- 13-9-1966, from order of Chief City Magistrate-cum-Addl. S. J., Hyderabad, D/- 13-7-1964.

Criminal P. C. (1898), S. 517 — Penal Code (1860), S. 420 — Offence under S. 420 in respect of lorry — Ownership of lorry in dispute — Held, Court could direct parties to get dispute solved by Civil Court — Same could not be decided by Criminal Court. (Para 2)

Shankar Rao Bilolikar, for Petitioners in Cri R C No. 500 of 1964 and for Respondents Nos. 1 and 2 in Cri. R. C. No. 922 of 1964 Abdul Khair Siddiqui, for Petitioners in Cri R C No. 922 of 1964, 1st Addl Public Prosecutor, for the State in both the cases.

ORDER:— These two revision petitions arise out of an order passed by the learned Chief City Magistrate-cum-Additional Sessions Judge, Hyderabad, dated 13-7-

LJ/KK/D/501/66

1964 whereby he directed the parties to approach the Civil Court in order to get the title to the lorry settled. What happened was that the Police of Afzalgunj registered a case under Section 420 I. P. C. on 8-1-1963. That was in pursuance of a complaint filed by one of the petitioners complaining against one Chandrasekhar, who is his sister's husband's brother. It was contended that the lorry was purchased by the 2nd petitioner bearing registration No. APF 2171 on hire purchase basis from the 1st petitioner in 1960. That was a Ford 1944 model and was equipped with a diesel engine. When the said vehicle was in possession of one mechanic at Afzalgunj for repairs, Chandrasekhar the 1st accused, by falsely representing that the vehicle was to be taken back to the 2nd petitioner took possession of the vehicle from the mechanic and then subsequently sold it to some person at Kosgi. Upon this complaint, the Police seized the vehicle from a rice mill of which one Bhadrappa was the owner. At the time when the lorry was seized it did not have any number plate. The complainant's contention was that the original chasis had been replaced by that of another vehicle bearing registration No. MSP 129. The Police, after due investigation, charge-sheeted Chandrasekhar and the first petitioner for the offence of cheating. The 1st petitioner was charged with abetment of the offence. After a proper trial, both the accused were acquitted. The Trial Court in its judgment directed the vehicle seized to be given to P. W. 4 who had laid claim to the lorry. P. W. 4 was the petitioner before me in Cri. R. C. No. 922 of 1964 and he died during the pendency of the petition and his legal representative has been brought on record. The accused filed an application under Section 520 Cr. P. C. before the Chief City Magistrate, Hyderabad complaining that the order of the Trial Court directing delivery of the lorry to P. W. 4 is bad in law. The learned Chief City Magistrate directed that the lorry should be retained in the Criminal Court until such time as either of the claimants establishes his title to the lorry in a competent Civil Court. It is this view that is now challenged both by the heir of P. W. 4 and the accused in these two revision petitions.

2. Now, under Section 520, any Court of Appeal, confirmation, reference or revision may direct any order under Section 517, Section 518, or Section 519, passed by a Court subordinate thereto to be stayed, pending consideration by the former Court, and may modify, alter or annul such order and make any further orders that may be just. Both the complainant as well as the accused claim the lorry. The lorry was seized from the

possession of one Bhadrappa, the owner of the rice mill at Kosgi. He has no interest in the lorry. He has not approached the Court and asked for the delivery of the lorry. In view of the rival claims made by the accused as well as the complainant, in the circumstances of the case, I think the learned Chief City Magistrate was right in directing the parties to approach the Civil Court and get the dispute settled. It is not a case in which the Criminal Court can go into these disputes and decide. In any case, such a decision would have been subject to the decision of the Civil Court. It is true that the lorry will have to be retained in that Court's custody till such time as the dispute is decided. But the parties, or any one of them who approach the Civil Court can get necessary directions of the Civil Court if the property has to be preserved. I do not therefore think that the order of the Court below suffers from any infirmity and it calls for interference at the hands of this Court.

3. The revision petitions therefore are dismissed,

AKJ/D.V.C.

Revision dismissed.

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(V 56 C 21)

FULL BENCH

P. JAGANMOHAN REDDY, C. J.,
SESHACHALAPATHI AND
CHINNAPPA REDDY, JJ.

R. D. Suryanarayana Rao, Cross-objector v. The Revenue Divisional Officer, Land Acquisition Officer, Guntur, Respondent.

Memorandum of Cross-objections, S. R. No. 33447 of 1966 in Appeal No. 78 of 1965, D/- 6-9-1967.

(A) Court Fees and Suits Valuation — Andhra Pradesh Court Fees and Suits Valuation Act (1956), Ss. 48 and 49 — No Court fee payable on cross-objection for interest claimed under S. 34 of Land Acquisition Act (1894) — AIR 1964 Andh Pra 216, Overruled.

No duty is cast on the Court under S. 23 or 26 of the Land Acquisition Act, determining the compensation to award interest on that amount. However, a statutory liability is imposed on the Collector under S. 34 to pay the amount awarded with interest thereon from the time of taking possession until such time as it shall have been paid or deposited. No court-fee need, therefore, be paid on a cross-objection claiming merely such interest. AIR 1964 Andh Pra 216, Overruled, AIR 1928 PC 287 and AIR

AL/AL/A71/68

1961 SC 908 and AIR 1963 SC 1171 and AIR 1965 Guj 212, Ref. (Paras 3, 6 & 8)

(B) Land Acquisition Act (1891), Ss. 23, 26 and 34 — Andhra Pradesh Court Fees and Suits Valuation Act (1956), S. 48 — Civil P. C. (1908), S. 2 (2) and (9) — Interest is not part of compensation.

Interest claimable under S. 34 of Land Acquisition Act is not part of compensation under S. 23 or award under S. 26 (1) deemed to be a decree under sub-section (2) within the meaning of clauses (2) and (9) of S. 2, Civil P. C. or under S. 48 of the Andhra Pradesh Court Fees and Suits Valuation Act. (Paras 5 & 6)

(C) Precedent — Observations.

A precedent is authority for what is actually decided in the case and not for other observations. (Para 7)

Cases Referred: Chronological Paras

(1965) AIR 1965 Guj 212 (V 52)=

ILR (1964) Guj 975, Anandilal v.

Addl. Spl. Land Acquisition Officer 6

(1964) AIR 1964 Andh Pra 216 (V 51)

=1964-1 Andh WR 185, Dodla

Mallalah v. State of Andhra Pradesh 2, 3, 7

(1963) AIR 1963 SC 1171 (V 50)=

(1963) Supp (2) SCR 971, National

Insurance Co Ltd. v. Life Insurance

Corporation of India 6

(1961) AIR 1961 SC 908 (V 48)=

(1961) 3 SCR 676, Satinder Singh

v. Umrao Singh 4, 6

(1930) AIR 1930 Mad 45 (V 17)=

ILR 53 Mad 48, Brahmanandam v.

Secy. of State 3

(1928) AIR 1928 PC 287 (V 15)=

1928 AC 492, Ingle Wood Pulp

and Paper Co. Ltd. v. New Brunswick

Electric Power Commission 4

(1912) 39 Ind App 197=ILR 40 Cal

21, Rangoon Botatoung Co. Ltd.

v. Collector Rangoon 3

(1901) 1901 AC 495=70 LJ PC 76,

Quinn v. Leatham 7

(1898) 1898 AC 1=67 LJQB 119,

Allen v. Flood 7

A. V. Krishna Rao and G. Nageswara

Rao, for Cross-Objector; 2nd Govt. Plea-

der, for Respondent.

P. JAGANMOHAN REDDY, C. J.:-

The question before this Full Bench

is whether the office is right in

demanding Court-fee on the interest

payable under Section 28 of the Land

Acquisition Act on compensation payable

for the compulsory acquisition of land

under the said Act.

2. The Government filed an appeal

against compensation awarded to the

respondents at the rate of Rs. 6/- per

sq. yd. by the Subordinate Judge, Gun-

tur, on 20-7-1964 in O. P. No. 61/62. In

that appeal, the respondents preferred

cross-objections claiming enhanced com-

penensation of Rs. 4,779.38 ps. together with

15% solatium. Interest on the enhanced

amount was also claimed, but Court-fee

on the amount of compensation and solatium alone was paid. The High Court office relying on an observation by a Division Bench of this Court consisting of Satyanarayana Raju, J., (as he then was) and Venkatesam, J., in *Dodla Mallalah v. State of Andhra Pradesh*, 1964-1 Andh WR 185=(AIR 1964 Andh Pra 216) called upon the Cross-objector to include interest also in his valuation and pay Court-fee thereon, if he was not relinquishing his claim to it. The Cross-objector pointed out that since the Government had taken possession of the acquired land on 11-1-1960, the Government was bound to pay the statutory interest from the date of possession till the date of actual payment and therefore interest need not be separately valued for purposes of Court-fee. As the office did not accept this contention, the matter was posted for orders of Court and it came up before Venkatesam, J. It may be pointed out that the learned Judge who delivered the judgment in *Dodla Mallalah's* case 1964-1 Andh WR 185=(AIR 1964 Andh Pra 216) on behalf of the Bench must have felt that the matter required further consideration and therefore directed it to be posted before a Bench as that decision "was sought to be distinguished". The Bench consisting of Basl Reddi and Chandrasekhara Sastry, JJ., after noting the contentions of the learned advocate for the Cross-objector Sri A. V. Krishna Rao, that the observations in *Dodla Mallalah's* case were obiter and even if they are not treated as obiter, that decision requires reconsideration in so far as it relates to the payment of Court-fee on interest, observed that these contentions were not without force and merit consideration by a Full Bench.

3. It may be mentioned that in *Dodla Mallalah's* case, 1964-1 Andh WR 185=(AIR 1964 Andh Pra 216) the question that had to be considered was whether Court-fee under the Andhra Pradesh Court-fees and Suits Valuation Act was payable under Section 48 or Section 49. It was contended by Sri Sankarasastri before that Bench that it was Section 49 that would apply to appeals from decrees awarding compensation under the Land Acquisition Act and since Court-fee payable under Section 49 is the same as that payable in the lower Court, Court-fee of Rs. 2/- paid in appeal was sufficient. Venkatesam, J., after holding that Section 48 of the Act which expressly deals with appeals claiming enhanced compensation governs the case, but not Section 49, observed at page 192 as follows:

"The appellants also claim 15 per cent statutory solatium besides the compensation amount. It was laid down in *Brahmanandam v. Secy. of State*, ILR 53 Mad 48=(AIR 1930 Mad 45), that where a person being dissatisfied with the amount

It is this passage that is characterised by the learned counsel for the appellant as obiter and as a precedent sub silenti, that is, a decision where a point has neither been raised, nor argued and consequently not binding, or at any rate not warranted on a reading of the relevant provisions of the Court-fees Act and the Land Acquisition Act. It is not denied that Section 48 of the Court-fees Act applies, but unlike in explanation (iii) to Section 49, there is no provision in Section 48 that the interest accrued during the pendency of the suit till the date of the decree shall be made part of the subject matter of appeal. It is, however, urged by the learned Government Pleader that under the provisions of the Land Acquisition Act, solatium and interest form part of the compensation upon which Court-fee is payable under Section 48 which requires that Court-fee payable on the memorandum of appeal against an order relating to compensation under any Act for the time being in force for the acquisition of property for public purposes shall be computed on the difference between the amount awarded and the amount claimed by the appellant. It may be noted, firstly, that the section applies to memoranda of appeals against orders relating to compensation under any Act, not necessarily, confined to the Land Acquisition Act; secondly, that the appeal is against an order relating to compensation and, thirdly, Court-fee is payable on the difference between the amount awarded and the amount claimed by the appellant. The question naturally arises as to what is meant by an order relating to compensation. Whatever may be the meaning of the word "compensation" for purposes of other Acts, what we have to consider is what does compensation include for purposes of the Land Acquisition Act and what is it that is awarded thereunder, the difference between which and the amount claimed will be the subject-matter of the appeal on which Court-fee is to be paid. It may be mentioned that as a consequence of the decision of their Lordships of the Privy Council in Rangoon Botatoung Co. Ltd. v. The Collector, Rangoon, 39 Ind App 197 (PC) that inasmuch as a decree relating to awards made under the Land

It will be observed that compensation to be awarded for the land acquired under the Act is the market value of the land together with damages or expenses or the loss of profits occasioned by the acquisition of the said land or property. The compensation as computed under Section 23 (1) is the amount which has to be set out in the award passed under Section 26 (1) and it is that award which is deemed to be a decree under sub-section (2) of Section 26. It may be pertinent to notice that neither solatium under sub-section (2) of Section 23, nor

interest under Section 34 forms part of the award. Though in respect of solatium, the Court is enjoined in every case to award a sum of 15% on the market value of the subject-matter in consideration of the compulsory nature of the acquisition, there is no such duty on the Court to award interest on that amount, but a statutory liability is imposed on the Collector to pay the amount awarded with interest thereon from the time of taking possession until such time as it shall have been paid or deposited. We are not here concerned with the question whether solatium is part of compensation within the meaning of Section 48 of the Court-fees Act, because that question is neither argued, nor pressed upon us inasmuch as Court-fee has already been paid thereon. The only question is whether the order "relating to compensation" under the Act includes interest.

4. Mr. Krishna Rao, learned Counsel for the cross-objector, contends that compensation does not include interest as under Section 23 (1) which deals with the determination of compensation, there is no mention made for the inclusion of interest. In any case, he submits that interest is not compensation in the sense that it is the value of the land, but is a statutory liability for deprivation of possession and the consequent loss of profits or the yield therefrom. Interest is, therefore, independent of compensation. Their Lordships of the Privy Council in *Inglewood Pulp & Paper Co., Ltd. v. New Brunswick Electric Power Commission*, 1928 AC 492=(AIR 1928 PC 287), observed that "the right to receive interest takes the place of the right to retain possession and is within the rule." *Gajendragadkar, J.*, (as he then was) in *Satinder Singh v. Umrao Singh*, AIR 1961 SC 908 further reinforced these observations at pages 916-17 when he said, "It would thus be noticed that the claim for interest proceeds on the assumption that when the owner of immovable property loses possession of it he is entitled to claim interest in place of right to retain possession."

5. The Government Pleader, on the other hand, says that the use of the word "order" and not "award" read with the words "relating to" would not necessarily confine compensation to that which is to be computed under Section 23 (1) and awarded under Section 26, but would also include the order relating to interest which is given under Section 34.

6. It appears to us whether solatium is part of compensation or not — a matter upon which we do not wish to express our views in this reference — interest certainly is not. A reference to Section 11 of the Land Acquisition Act would show that the Collector has to

enquire about the value of the land and the respective interests of the persons claiming compensation and that he has to make an award under his own hand, among other things about the compensation which, in his opinion, is to be allowed and in determining the amount of compensation, the Collector shall be guided by the provisions contained in section 23 and ignore the matters to be included under Section 24. As already stated compensation can only be computed in the manner laid down in Section 23 (1) which does not include interest either under Section 34 or on the excess amount awarded by the Court over that awarded by the Collector under Section 28. If interest is not part of compensation under the provisions of the Land Acquisition Act, reference to an order relating to it, cannot in any manner affect the content of the word. The order referred to in Section 48 of the Court Fees Act is the order against which an appeal is being filed and such an order in respect of compensation awarded under the Land Acquisition Act is a decree within the meaning of Clause (2) of Section 2 of the Code of Civil Procedure. This view of ours is fortified by a close reading of Section 48 of the Court Fees Act, in that, the order against which an appeal is filed relates to compensation awarded and the amount of compensation claimed, so that by reference in so far as the Land Acquisition Act is concerned, the meaning to be given to the word "award" is the same as contained in Section 26 of the Act. It may further be stated that where costs are sought to be included in the award Section 27 clearly provides for it and in the same manner if it was the intention of the Legislature to include interest also in the award, it could have said so; but it did not. On the other hand, where interest is sought to be included as part of the subject-matter of appeal, it has been specifically stated so, as in the case of explanation (iii) to Section 40 of the Court-fees Act. In a recent case, a Bench of the Gujarat High Court in *Anandilal v. Addl. Spl. Land Acquisition Officer*, AIR 1965 Guj 212 arrived at a similar conclusion on analogous provisions of Section 7 (1) of the Bombay Court-fees Act which like Section 48 of the Andhra Pradesh Court-fees Act also provided that the amount of fee payable under the Act on the memorandum of appeal against an order relating to compensation under any Act for the time being in force for the acquisition of land for public purposes shall be computed according to the difference between the amount awarded and the amount claimed by the appellant. *Bhagwati, J.*, after referring to the case of AIR 1961 SC 908 (*supra*) and the case of *National*

Insurance Co. v. Life Insurance Corporation, AIR 1963 SC 1171 said:

"..... It is now well settled that the right to receive interest is in substitution of the right to retain possession of the land and when a claim for payment of interest is made by a person whose immovable property has been acquired compulsorily, he does not make a claim for damages properly or technically so called but he bases his claim on the general rule that if he is deprived of his land, he should be put in possession of the compensation immediately; if not, in lieu of possession taken by compulsory acquisition interest should be paid to him on the amount of compensation." Continuing further Bhagwati, J., observed:

"..... Moreover the scheme of the Land Acquisition Act, 1894, itself shows that interest is treated as distinct from compensation for the purposes of that Act. Interest cannot, therefore, be regarded as forming part of compensation and the expressions "amount awarded" and "amount claimed" cannot on a true construction include the amount of interest claimed by the appellant in the memorandum of appeal. The claim for interest on the additional compensation claimed in the memorandum of appeal would stand or fall with the decision of the main claim and being merely an adjunct of the main claim, no Court-fee would be payable on it."

7. In our view, the observations of the Bench in Dodla Mallaiah's case 1964-1 Andh WR 185=(AIR 1964 Andh Pra 216) that if the appellants are claiming interest, they are bound to pay court-fee thereon do not appear to have been made after a consideration of the relevant provisions relating to interest and the meaning of the word "compensation" under the Land Acquisition Act. In fact, as we have already seen, the question of payment of Court-fees on interest did not arise in that case. A precedent is authority for what it actually decides in the case. Lord Halsbury observed over half a century ago in *Quinn v. Leatham*, 1901 AC 495 dealing with the case of *Allen v. Flood*, 1898 AC 1:

"I wish to make, and one is to repeat what I have very often said before, that every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. The other is that a case is only an authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem

to follow logically from it. Such a mode of reasoning assumes that the law is necessarily a logical code, whereas every lawyer must acknowledge that the law is not always logical at all."

8. In this view of the matter, we hold that interest is not included in compensation and no Court-fee need be paid on it. The office is directed to register the cross-objections without requiring payment of Court-fee on the interest claim. SAP/D.V.C. Answered accordingly.

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SESHACHALAPATHI, J.

Ciriviseti Sastrulu and others, Petitioners v. Government of Andhra Pradesh and others, Respondents.

Writ Petns. Nos. 1546, 1547, 1624, 1646, 1742, 1743, 1784, 1785 and 1893 of 1964 and 236, 67, 78 and 331 of 1965, D/- 4-11-1967.

(A) Constitution of India Article 226 — Essential Commodities Act (1955), Section 7 — Andhra Pradesh Rice Procurement (Levy) Order (1964), Cl. 3 — Writ of prohibition — When issues — Notice by Grain Purchasing Officer to licensed rice miller to sell rice — Miller defaulting to sell — Miller prosecuted for default — Pleas e.g., non-liability to sell, because of alleged defects in requisitioning or omission to name the person to whom rice was to be delivered, could be raised and tried at trial — Writ Petition not maintainable on such grounds.

The writ of prohibition will be directed to inferior Court forbidding it to continue proceedings which are in excess of its jurisdiction or manifestly in contravention of the laws of the land. Where the defect of the jurisdiction of the inferior Court is apparent, a writ of prohibition is normally issued as a matter of right. The defect of jurisdiction must be either a wrong assumption of jurisdiction or a palpable excess in the exercise of that jurisdiction. Where the Grain Purchase Officer gave notice to a licensed rice miller to sell rice to the former, specified quantity of rice within a notified date, and the miller did not deliver it in accordance with that notice, the miller's pleas, e.g., non-liability to sell, omission to name the person to whom the rice was to be delivered, or other alleged defects in the notice, could be raised by him and adjudicated upon by the Trial Court, which has jurisdiction to try them. High Court will not grant a writ petition in such circumstances to prohibit the Trial Court from proceeding with the trial. (Para 7)

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(B) Andhra Pradesh Rice Procurement (Levy) Order (1964), Clause 3 — Miller obtaining licence after Order was rescinded — Failure to comply with notice under Order — Effect — Writ of prohibition lies — (Constitution of India — Art. 226.)

When a rice miller was granted a licence on 2-9-64 and commenced rice-milling on 14-9-64, after the Andhra Pradesh Rice Procurement (Levy) Order was rescinded, he could not be said to be guilty of contravention of that order, if he fails to deliver rice in compliance with the Grain Purchasing Officer's notice. Writ of prohibition will issue to the Magistrate not to proceed with the prosecution. (Para 9)

D. Narasraju, G. Kameswarrao, T. Dasartha Ramayya, A. Subbarao and Y. Suryanarayana, for Petitioners (in all the Petns.); Second Govt. Pleader, for Respondents (in all the Petns.)

ORDER:— These Writ Petitions are filed under Article 226 of the Constitution of India, seeking the issue of writs of prohibition restraining the respondents from taking action in pursuance of notices issued to the petitioners under the provisions of the Andhra Pradesh Rice Procurement (Levy) Order, 1964 and declaring that the prosecutions launched under Section 7 of the Essential Commodities Act of 1955 are illegal.

2. Though the writ petitions have been filed by different parties or individuals, represented by different Counsel, they arise from the same or similar facts. The main argument was addressed by the learned Counsel, Mr. D. Narasa Raju, in W. P. No. 1546 of 1964 and the decision in that Writ Petition will govern the other Writ Petitions except W. P. No. 1785 of 1964, which will be dealt with separately.

3. W. P. No. 1546 of 1964: The petitioners are rice millers in Krishna district. In exercise of the delegated powers under Section 5 of the Essential Commodities Act (Central Act X of 1955), the State of Andhra Pradesh issued on 31st July, 1959 an order called the Andhra Pradesh Rice Procurement (Levy) Order, 1959 under which the dealers and millers were required to sell to the State Govt. on a requisition served on them by the requisitioning authority, 40% of the quantity of rice held in stock by the dealers or the millers as the case may be at the controlled price. This order came into operation in December, 1963. The said order was rescinded by G. O. Ms. No. 507, Food and Agriculture, dated 4th March, 1964 and a fresh order called the Andhra Pradesh Rice Procurement (Levy) Order, 1964 came into force. Under the provisions of this order, every licensed dealer or miller was required to sell to

the Purchase Officer at the controlled price, 25% of rice of the total quantity of rice produced or manufactured by him in his rice mill every day and it was made obligatory on the part of the licensee to deliver to the Purchase Officer or such other persons authorised in that behalf by the Purchase Officer, the required quantity of rice for sale. The Andhra Pradesh Rice Procurement (Levy) Order of 1964 was rescinded by G. O. Ms. No. 1748 dated 1-7-1964. The said G. O. contained a provision that the rescission shall not affect the previous operation of the order or the rights and liabilities acquired or incurred thereunder. On 12-7-1964, the Grain Purchasing Officer, Vijayawada, issued a notice, which was received by the petitioners on 28-7-1964. The terms of the notice, as extracted in the affidavit filed in support of the writ petition, are as follows:

"You are hereby required to sell to the undersigned at the controlled prices 137-56 tons of rice, which you were under obligation to deliver under Clause 3 of the Andhra Pradesh Rice Procurement (Levy) Order, 1964, prior to 1-7-1964, before 29-7-1964 failing which you are hereby informed that necessary legal action (Civil and Criminal) will be taken against you. The stocks can be delivered at the Central Storage Godown, Masulipatnam Port."

Obviously, the terms of this notice were not complied with and complaints were lodged in the Court of the District Munsif-Magistrate, Avanigadda (C. C. Nos. 37, 38, 39, 40, 51, 54 and 55 of 1964) under Section 7 of the Essential Commodities Act. In the other writ petitions also similar notices were issued to the petitioners and, for non-compliance with the terms thereof complaints were lodged in the Courts of Munsif-Magistrates having appropriate jurisdiction.

4. In these writ petitions, the main relief asked for is a direction in the nature of a writ of prohibition against the continuance of the prosecution for non-compliance with the terms of the notices issued to the petitioners.

5. Mr. Narasa Raju, the learned Counsel for the petitioners, has raised several contentions before me. It is argued, that the terms of the order casting liability on the dealers or the millers as the case may be to deliver and sell to the concerned authorities are vague and not capable of compliance without a proper requisition. To appreciate this argument, it is necessary to refer to sub-clause (4) of Clause 3 of the Andhra Pradesh Rice Procurement (Levy) Order, 1964, which reads as follows:

"The rice required to be sold to the Purchase Officer by the licensed miller or the licensed dealer under sub-clause

(1) or sub-clause (2), as the case may be, or by the person referred to in sub-clause (3) and liable to sell rice under that sub-clause, shall be delivered to the Purchase Officer or to such other person as may be authorised in this behalf by the Purchase Officer, subject to such general and special instructions with regard to exemption of any miller or dealer or any other person from levy under this order, etc., as may be issued by State Government or the Commissioner of Civil Supplies, Hyderabad, from time to time."

It is argued that this sub-clause would show that the obligation of the licensed miller or the dealer is to deliver to the Purchase Officer or such other person as may be authorised in that behalf by the Purchase Officer. That postulates, it is contended, that there should be a definite requisition as to whether the stock should be delivered to the Purchase Officer or to such other person as may be authorised in that behalf by the Purchase Officer. On that premises, it is contended that, without a requisition, there is no obligation to deliver and that failure, in those circumstances on the part of the licensed miller or dealer cannot be visited with penal consequences. It is further contended that, under Section 35 of the Sale of Goods Act, there should be a specific direction to the seller in respect of the delivery and that sub-clause (4) of Clause 3 of the Andhra Pradesh Rice Procurement (Levy) Order, 1964 should be read in harmony with the provisions of the Sale of Goods Act. It is, therefore, contended that, where there is no requisition by the buyer as to the person to whom the stock should be delivered, the prosecutions launched for non-compliance with the provisions of that Order are incompetent and illegal and should be interdicted by this Court.

6. On the contrary, the learned Government Pleader contended that there is no ambiguity in the provisions of the Andhra Pradesh Rice Procurement (Levy) Order, 1964; that the "Purchase Officer" is clearly defined in Clause 2 (e) of the Order and that the liability is clearly cast upon the miller or the dealer as the case may be to sell to the Purchase Officer. It is also contended that the Order clearly fixes the liability for sale, the quantity to be sold, the price at which it should be sold and to the person or authority to whom the stock should be delivered. It is also contended that, even though the Andhra Pradesh Rice Procurement (Levy) Order, 1964 was rescinded on 1-7-1964, the liabilities incurred under the said order are expressly saved; that, for non-compliance with the terms of the notice calling for delivery, the prosecutions have been legitimately launched and that the petitioners are not

entitled to invoke the jurisdiction of this Court under Article 226 of the Constitution of India.

7. It is well settled that the writ of prohibition will be directed to an inferior Court forbidding it to continue proceedings which are in excess of its jurisdiction or manifestly in contravention of the laws of the land. Where the defect of the jurisdiction of the inferior Court is apparent, a writ of prohibition is normally issued as a matter of right. The defect of jurisdiction must be either a wrong assumption of jurisdiction or a palpable excess in exercise of that jurisdiction. The contentions of Mr. Narasa Raju, to my mind, do not touch the question of jurisdiction. It cannot be said that the Courts in which the complaints have now been lodged have assumed jurisdiction which, in law, they do not possess or have exceeded their jurisdiction so as to be interdicted by a writ of prohibition from this Court. The various contentions raised by Mr. Narasa Raju as to the ambiguity of the provisions of the Andhra Pradesh Rice Procurement (Levy) Order, 1964, are designed to show that the petitioners could not comply with the provisions of that Order and hence penal consequences should not be vested on them. These are contentions which the petitioners can well raise before the Court in which the complaints are now lodged.

8. In that view, I do not propose to express any opinion on the validity of the contentions of Mr. Narasa Raju or those of the Government Pleader. I am of the view that this is not a case in which a writ of prohibition should issue from this Court. The writ petition is dismissed with costs. This decision will govern the other writ petitions except W. P. 1785 of 64 and they are accordingly dismissed with costs. Advocate's fee Rs. 50/- in each of the writ petitions.

9. W. P. No. 1785 of 1964: The circumstances for the filing of this writ petition may be briefly stated: On 27-7-1964, the Grain Purchasing Officer filed a complaint in C. C. No. 85 of 1964 on the file of the District Munsif-Magistrate, Nuzvid, against the petitioner for failure to deliver certain stocks of rice to the Government as required under Clause 3 (1) (b) of the Andhra Pradesh Rice Procurement (Levy) Order, 1964. The notice was given to the petitioner on the footing that he is a licensed miller. It is alleged by the petitioner that the licence under Section 6 of the Rice Milling Industry (Regulation) Act, 1958 was granted to him on 2-9-1964 and that he actually commenced the rice-milling business on 14-9-1964 and that he also obtained the electric connection on 14-9-1964. It is, therefore, alleged that he was not a

licensed miller within the meaning of the provisions of the Andhra Pradesh Rice Procurement (Levy) Order, 1964 and that, inasmuch as, by the time he started business as a rice miller, the Andhra Pradesh Rice Procurement (Levy) Order, 1964 had been rescinded, he cannot be penalised and no prosecution would lie against him. No counter-affidavit has been filed by the Government. I have therefore, to proceed on the basis that the facts alleged by the petitioner are not challenged. That being so, it cannot be said that the petitioner is a person who is liable to be proceeded against in a Criminal Court for non-compliance with the requirements of an order which had ceased to be in force prior to the commencement of his business as a licensed miller. The prosecution seems to be obviously illegal and a writ of prohibition will issue to the District Munsiff-Magistrate, Nuzvid, not to proceed further with the prosecution in C. C. No. 85 of 1964 on his file.

10. The writ petition is allowed with costs. Advocate's fee Rs 50/-.

SAP/D.V.C. Order accordingly.

AIR 1969 ANDHRA PRADESH 62 (V 56 C 23)

P. JAGANMOHAN REDDY, C. J.
AND CHINNAPPA REDDY, J.

Kuppu Damayanthi, Appellant v. C. Rama Rao, Respondent.

A. A. O. No. 453 of 1965, D/- 27-9-1967, from order of Dist. J., Visakhapatnam, D/- 5-2-1965.

(A) Special Marriage Act (1954), Ss. 24 and 34 (1) (c) — Delay in filing petition for declaring marriage null and void — Failure of spouse to induce other spouse for divorce — No explanation for delay — Individual cannot challenge validity of marriage when they like.

Under Section 34 (1) (c) it is only when the Court is satisfied that there has been no unnecessary or improper delay that relief under Section 24 could be granted but not otherwise.

A delay of seven years in filing a petition for declaring a marriage null and void by the husband on the ground that he was trying for a peaceful divorce implies a recognition by the parties of the existence and validity of the marriage, for there can be no dissolution of marriage which is not valid. Failure of a spouse to induce other spouse to agree to a divorce is not explanatory of the delay in suing. It may be said that there should be no rigid insistence on the maintenance of a union which has utterly broken down but at the same time Court

cannot ignore the status conferred by marriage and the consequences that flow from it particularly after years of cohabitation. The consequences with regard to the children of the marriage are so serious and far-reaching that it will be unjust and improper to give to individuals the choice of challenging of a marriage when they like. (1955) 2 All ER 110, (1863) 164 ER 1302, Foll.

(Paras 1 and 2)

(B) Special Marriage Act (1872), Ss. 2, 17 — Contravention of S. 2, Cl. (3) — Marriage not void but voidable — Court has large discretion in such matters under S. 17 — (Divorce Act (1869) S. 10).

It is not correct to say that a contravention of Clause (3) of S. 2 of the Special Marriage Act (1872), renders a marriage void, it can only be voidable. It is also not correct to say that the Court has no discretion in the matter except to declare the marriage a nullity. That the Court has a large discretion in such matters is recognised by S. 17 of the Act which states that such marriages which contravene S. 2 of the Act may be declared null or dissolved. The word "may" appearing in S. 17 governs all that follows namely, the grounds mentioned in the Indian Divorce Act (1869) and contraventions of the conditions prescribed in Clauses 1 to 4 of the Special Marriage Act (1872). 1 PD 405, (1955) 2 All ER 110, Followed. (1830) 162 ER 1165, Dist.

(Para 7)

(C) Special Marriage Act (1954), S. 34 (1) (c) — Provision has nothing to do with rights of party — Prescribes only manner in which Court's discretion is to be exercised.

That the legislature is competent to prescribe periods of limitation for causes for which there were no periods of limitation earlier cannot be disputed. Therefore when the Special Marriage Act (1872) was repealed and the Special Marriage Act (1954) was brought into force, instead of prescribing any absolute period of limitation within which actions for declarations of nullity of marriage could be brought, the Court is given discretion to consider the question of delay with reference to the facts and circumstances of each case. Surely that cannot be held to have the effect of abridging or curtailing any right to remedy which a person possessed under the Act of 1872.

Further, the provisions contained in S. 34 (1) (c) of the Act of 1954 has nothing to do with the right of the party. It prescribes the manner in which the discretion which the matrimonial Court always possessed should be exercised. The remedy of a party to seek a declaration of nullity of a marriage is still available to him. That right has not been abridged or curtailed in any manner. 1901

P 193, Foll AIR 1916 Mad 607 and AIR 1938 Mad 688 and AIR 1957 SC 540 and AIR 1953 SC 221, Dist. (Para 9)

Cases Referred: Chronological Paras

(1967) AIR 1967 SC 1318 (V 54)=	
(1967) 2 SCR 318, Syed Yousuf Yar Khan v. Syed Muhammad Yar Khan	9
(1957) AIR 1957 SC 540 (V 44)=	
1957 SCR 488, Garikapati v. Subbiah Choudhry	12
(1955) 1955-2 All ER 110=1955-1 WLR 480, Llewellyn v. Llewellyn	2, 7
(1953) AIR 1953 SC 221 (V 40)=	
(1953) 4 STC 114, Hoosain Kasam Dada v. State of Madhya Pradesh	12
(1938) AIR 1938 Mad 688 (V 25)=	
1938-2 Mad LJ 44, Girdharilal Son and Co. v. Kappini Gounder	12
(1916) AIR 1916 Mad 607 (V 3)=	
ILR 38 Mad 101, Ramakrishna Chetty v. Subraya Iyer	12
(1901) 1901 P 193=70 LJP 44, Johnson v. Johnson	7
(1863) 164 ER 1302=3 Sw. & Tr. 330, Boulting v. Boulting	2
(1830) 162 ER 1165=3 Hagg Ecc 301, Dunis v. Donovan	8
1 PD 405, Wikins v. Reynolds	7

Y. Suryanarayana, for Appellant; M. Jagannadha Rao, for Respondent.

CHINNAPPA REDDY, J.:— The appellant (wife) and the respondent (husband) were married under the Special Marriage Act, 1872, on 24-2-1953, before the Registrar of Marriages at Visakhapatnam. They appear to have lived together as man and wife for some time prior to the marriage too, and the appellant had admittedly borne the respondent a son before the marriage. The marriage did not meet with the approval of the parents of the respondent. His father never got reconciled to the marriage and made persistent efforts to get the marriage dissolved by trying to induce the appellant to agree to a divorce but his efforts bore no fruit. Whether it was due to the strenuous efforts of the respondent's father to separate husband and wife or due to the alleged waywardness of the parties the marriage itself was not a great success. The appellant and respondent do not appear to have lived together continuously for any considerable length of time at any stage but they undoubtedly lived together off and on at various places periodically. Though the marriage was not a success, the respondent even as late as in February 1958, appeared to have been quite keen that the appellant should come and live with him and that she should resist attempts by his father to induce her to agree to a divorce. This is evident from Ex. B 11 (d), letter written by him to the appellant. Some time between the year 1958 and 1960

there was a definite break between the parties. After the break, renewed and redoubled efforts were made by the respondent's father to induce the appellant to agree to a divorce but again without any result. Finally on 12-6-1960 the respondent filed the petition giving rise to this appeal, under Section 24 of the Special Marriage Act of 1954 for a declaration that the marriage was null and void. He alleged and it is now undisputed, that he was born on 5-10-1932 and therefore below the age of twenty one years on the date of marriage i.e., 24-2-1953. As the consent of his father had not been obtained as required by Section 2 (3) of the Special Marriage Act, 1872, he claimed that the marriage was a nullity. The learned District Judge of Visakhapatnam granted the declaration prayed for but on appeal Chandra Reddy, C. J. and Gopal Rao Ekbote, J., set aside the decree and remanded the petition for fresh disposal as they were of the view that the learned District Judge had not considered the question whether 'there has not been any unnecessary or improper delay in instituting the proceeding'. Under Section 34 (1) (e) of the Special Marriage Act, 1954, it is only where the Court is satisfied that there has been no unnecessary or improper delay that relief under Section 24 could be granted but not otherwise. After remand the learned District Judge holding that there was no unnecessary or improper delay in instituting the proceeding, once more granted the declaration prayed for. The wife has now appealed against the decree of the learned District Judge.

2. The marriage, as we said, was solemnised on 24-2-1953 and the petition for a declaration that the marriage was null and void was filed on 12-6-1960. The explanation offered by the respondent for this long delay, which has been accepted by the learned District Judge is that almost from the date of marriage, he or those interested in him were trying to secure a divorce peacefully' and that he was compelled to file the petition under Section 24 only after those efforts proved fruitless. But, in our opinion, this is no explanation at all. On the contrary, it implies a recognition by the parties of the existence and validity of the marriage, for, there can be no dissolution of a marriage which is not valid. We cannot help that the failure of a spouse to induce the other spouse to agree to a divorce is explanatory of the delay in suing for a declaration that a marriage is null and void. It may be said, as indeed it was said by the learned Counsel for the respondent, that changing social conditions require that there should be no rigid insistence on the maintenance of a union which has

utterly broken down. It may be so but we cannot ignore that status conferred by marriage and the consequences that flow from it, particularly, after years of cohabitation. The consequences, with regard to the children of the marriage, are so serious and far reaching that it will be unjust and improper to give to individuals the choice of challenging the validity of a marriage when they like. As was observed by Hodson L. J. in *Llewellyn v. Llewellyn*, (1955) 2 All ER 110:

"The Court is not to be used as a place to which people can come for redress just when it suits them."

In the same case *Denning, L. J.*, after observing that the petitioner 'cannot play fast and loose with marriage in that way' extracted the following passage from *Boulting v. Boulting*, (1863) 164 ER 1302:

"The Petitioner must feel and suffer under the wrong of which complaint is made, and the Court must be satisfied that the remedy is sought as a genuine relief from the pressure of that grievance. Such is the beaten track of the decisions. It is impossible to tread too faithfully in footsteps so wisely placed."

3. In the present case the grievance of the respondent, in truth, is not that the marriage is invalid, but that it is unhappy, the remedy which he wanted all these years was a dissolution of the marriage and not a declaration that it was null and void. Having failed in his attempts to induce the respondent to agree to a divorce he is now seeking to get rid of an unhappy marriage by labelling it as a void marriage though for seven years he was content to recognise it as a valid marriage. We consider that it would be unfair and inequitable to the wife and the children of the marriage to permit him to do so after a lapse of so many years. We further consider that it is impossible to hold that there has not been any unnecessary or improper delay instituting the proceeding. In fairness to Mr. Ramachandra Reddy, the learned Counsel for the respondent, it must be said that he did not attempt to support the finding of the learned District Judge that there was no unnecessary or improper delay. He urged that under the Special Marriage Act 1872 a marriage was null and void if one of the spouses was below the age of twenty one years and consent of the guardian had not been obtained, that delay or no delay, a party to such a marriage had an unfettered right to obtain a decree declaring a marriage as nullity that the Court had no discretion in the matter and was bound to grant a decree and that although the Special Marriage Act of 1872 was repealed the right to this remedy and such other similar rights were preserved by Section 51 (3) of the

Special Marriage Act of 1954. According to him Section 34 (1) (e) of the Special Marriage Act of 1954 does not apply to marriages solemnized under the Special Marriage Act of 1872 as it will have the effect of curtailing the vested right to the remedy of obtaining a declaration of nullity of marriage.

4. We are unable to accept the argument of Mr. Ramachandra Reddy. In the first place there is no foundation for the assumption that under the Special Marriage Act, 1872 a marriage of the nature described was a nullity and that the Court had no discretion except to declare it so. In the second place we cannot read Section 34 (1) (e) as curtailing any vested right to a remedy.

5. Section 2 of the Special Marriage Act of 1872 in so far as it is relevant runs as follows:—

"Section 2. Marriages may be celebrated under this Act x x x x
x x x x
upon the following conditions:—

(1) neither party must, at the time of the marriage, have a husband or wife living;

(2) the man must have completed his age of eighteen years, and the woman her age of fourteen years according to the Gregorian calendar;

(3) each party must, if he or she has not completed the age of twenty one years, have obtained the consent of his or her father or guardian to the marriage;

(4) the parties must not be related to each other in any degree of consanguinity or affinity which would, according to any law to which either of them is subject, render a marriage between them illegal.

x x x x x
Section 15 declares that a marriage, solemnized under the Act, of a person who is already married is void. Section 17 which is important runs as follows:—

"Section 17. The Indian Divorce Act shall apply to all marriages contracted under this Act, and any such marriage may be declared null or dissolved in the manner therein provided, and for the causes therein mentioned, or on the ground that it contravenes some one or more of the conditions prescribed in Clauses (1), (2), (3) or (4) of Section 2 of this Act" It will be seen that while a marriage solemnized in contravention of Clause (1) of Section 2 is declared void by Section 15, the Act is silent regarding the effect of contraventions of Clauses (2), (3) and (4). Since the Indian Divorce Act is made applicable to all marriages contracted under the Special Marriage Act of 1872 we must look to the provisions of the Indian Divorce Act to find out the effect of contraventions of Clauses (2), (3) and (4). Under Section 19 of the Indian Divorce Act a decree for nullity of marriage may be

obtained on grounds of (1) impotency, (2) consanguinity, (3) lunacy or idiocy (4) bigamy and (5) force or fraud. Contravention of Clause (1) of Section 2 of the Special Marriage Act is the second ground mentioned in Section 19 of the Indian Divorce Act on which a declaration of nullity can be granted. Contraventions of Clauses (2) and (3) are not covered by any of the grounds mentioned in Section 19 of the Indian Divorce Act. Since neither the Special Marriage Act of 1872 nor the Indian Divorce Act has stated the effect of a contravention of Clauses (2) and (3) of Section 2 of the Special Marriage Act, we have to be guided by the principles of English Law because Section 7 of the Indian Divorce Act provides that subject to the provisions contained in the Act, Courts should give relief on principles and rules which are as nearly as may be conformable to the principles and rules on which the Court for Divorce and Matrimonial Causes in England acts and gives relief."

6. The principles on which the English Courts act in such matters are set out in Halsbury's Laws of England (Hailsham's Edition) Volume XVI page 564 as follows:—

"A marriage under age of consent was not absolutely void, but only voidable by either party on the person underage reaching the age of consent. If the girl under twelve, either party might disaffirm the marriage on her attaining that age, and similarly in the case of a boy under fourteen. If at the age of consent the marriage was affirmed by the parties, it became a valid marriage and could not afterwards be questioned by either; and cohabitation after the age of consent was reached amounted to an affirmation of the contract."

7. We must apply these principles as nearly as may be conformable to cases arising under the Special Marriage Act of 1872. The age of consent under the Special Marriage Act is twenty one years. But in the case of a man who has completed the age of eighteen years but not twenty one and in the case of a woman who has completed the age of fourteen years but not twenty one the consent should be that of the father or guardian. In either case that is, where the spouse or spouses are below the ages of eighteen and fourteen respectively or where the spouse or spouses are above that age but below twenty one years and the consent of the parent or guardian has not been obtained, applying the above stated principles of English Law, we must conclude that such a marriage is not void, but only voidable. It is, therefore, not correct to contend that a contravention of Clause (3) of Section 2 of the Special Marriage Act 1872 renders a

marriage void; nor is it correct to say that the Court has no discretion in the matter except to declare the marriage a nullity. That the Court has a large discretion in such matters is recognised by Section 17 of the Act which states that such marriages may be declared null or dissolved. The word 'may' appearing in Section 17 governs all that follows namely, the grounds mentioned in the Indian Divorce Act and contraventions of the conditions prescribed in Clauses (1) (2), (3) or (4) of Section 2 of the Special Marriage Act. The English Courts too have always had wide discretion in cases of dissolution of marriage or declarations of nullity of marriage and delay has always been recognised as one of the grounds on which a decree for dissolution or of nullity of a marriage may be refused. Vide — Johnson v. Johnson, 1901 P. 193; Wilkins v. Reynolds, 1 PD 405; 1955-2 All ER 110 etc. The law as stated in Section 17 of the Special Marriage Act is not different.

8. The learned Counsel for the respondent placed reliance upon the case of Duins v. Donovan, (1830) 162 ER 1165 where Dr. Lushington observed:

"It is true that a very considerable time has elapsed between the period at which this marriage was contracted, and the institution of the present suit; but suits of a similar description have been brought after the lapse of at least as long a period. In Johnston and Johnston, upwards of twenty years had intervened between the solemnization of the marriage and the commencement of proceedings. Considering therefore, that the Court has to pronounce only a declaratory sentence, and to determine whether the law has made this marriage null and void, I think the lapse of time offers no bar to the inquiry."

That was a case where the marriage was solemnized under an Act known by the name of Lord Hardwick's Act which expressly declared all marriages of minors without the consent of guardians absolute nullities. It was not the Law of England previously that such marriages were void; nor was it the Law of England afterwards because that Act was very soon repealed and replaced by a later Act which declared valid marriages of minors solemnized under Lord Hardwick's Act provided the parties lived together as husband and wife till the passing of the later Act or till the death of either of them. In that case soon after the marriage the parties separated and the wife actually contracted a second marriage as if the earlier marriage was no marriage. It was in those circumstances that the observations of Dr. Lushington were made. We do not think that that case has any application here.

9. The next question is whether Clause (e) of sub-section (1) of Section 34 of the Special Marriage Act of 1954 has the effect of abridging or curtailing any right to remedy which the respondent possessed under the Act of 1872. That a Law of Limitation is a law relating to procedure is undoubted. That the legislature is competent to prescribe periods of limitation for causes for which there were no periods of limitation earlier cannot also be disputed, having regard to the recent judgment of the Supreme Court in *Syed Yousuf Yar Khan v. Syed Muhammad Yar Khan*, AIR 1967 SC 1318. It is only in recognition of this principle that whenever a later Act prescribed a shorter period of limitation than an earlier Act care is always taken to provide for what may be termed as 'a period of grace' within which actions likely to be extinguished by reason of the new enactment may be brought. Therefore, when the Special Marriage Act of 1872 was repealed and the Special Marriage Act of 1954 was enacted, a period of limitation could well have been prescribed within which actions for declarations of nullity of marriage could be brought and none could have questioned it. If, instead of prescribing any absolute period of limitation the Court is given the discretion to consider the question of delay with reference to the facts and circumstances of each case surely that cannot be a cause for grievance. Further as contended by Mr. Suryanarayana, learned Counsel for appellant, the provision contained in Section 34 (1) (e) of the Special Marriage Act of 1954 has nothing to do with the right of the party. It concerns the power of the Court. It prescribes the manner in which the discretion which the matrimonial Court always possessed should be exercised. The remedy of a party to seek a declaration of nullity of a marriage is still available to him. That right has not been abridged or curtailed in any manner.

10. Sri Ramachandra Reddy relies on sub-section (3) of Section 51 of the Special Marriage Act, 1954. It will be useful to extract the whole of Section 51 which runs as follows:—

"51. Repeals and savings: (1) The Special Marriage Act (1872) (III of 1872), and any law corresponding to the Special Marriage Act, 1872, in force in any Part B State immediately before the commencement of this Act are hereby repealed.

(2) Notwithstanding such repeal —

(a) all marriages duly solemnized under the Special Marriage Act, 1872 (III of 1872) or any such corresponding law shall be deemed to have been solemnized under this Act.

(b) All suits and proceedings in causes and matters matrimonial which, when

this Act comes into operation, are pending in any Court, shall be dealt with and decided by such Court, so far as may be, as if they had been originally instituted therein under this Act.

(3) The provisions of sub-section (2) shall be without prejudice to the provisions contained in Section 6 of the General Clauses Act 1897 (X of 1897), which shall also apply to the repeal of the corresponding law as if such corresponding law had been an enactment."

11. Clause (a) of sub-section (2) expressly states that all marriages solemnized under the Special Marriage Act of 1872 shall be deemed to have been solemnized under the Act of 1954. It necessarily follows that all actions and appeals must be instituted and decided in accordance with the provisions of the Special Marriage Act of 1954. The provisions of the Act of 1954 are made applicable even to pending proceedings by clause (b) of sub-section (2). Sub-section (3) makes the provision of Section 6 of General Clauses Act applicable.

12. Sub-section (3) of Section 51 of the Special Marriage Act of 1954 read along with Section 6 of the General Clauses Act preserves 'vested rights' e.g., a marriage validly solemnized under the Act of 1872 cannot be declared invalid because it contravenes some provisions of the Act of 1954. To illustrate, a marriage of a girl under the age of twenty one years but above the age of fourteen could be validly solemnized under the Act of 1872 provided the father or guardian consented to it. But under the Act of 1954 such a marriage cannot be solemnized at all. The effect of sub-section (3) of Section 51 of the Act of 1954 is to preserve the validity of such marriages solemnized under the Act of 1954. The learned Counsel for the respondent urges that all rights of action which the parties had under the old Act are also preserved by Section 51 (3). We may at once point out that there is no need to preserve any such rights of action because the Act of 1954 has also made provision for identical remedies. The real question is whether the right of remedy which a party had under the old Act has in any manner been curtailed by Section 34 (1) (e) of the new Act. We are of the definite opinion that it has not been. We have already pointed that neither the prescription of a period of limitation nor the vesting of discretion in the Court can amount to the abridgment of any right of remedy. The learned Counsel referred us to the cases of *Ramakrishna Chetty v. Subbaraya Iyer*, ILR 38 Mad 101=(AIR 1916 Mad 607) and *Girdharilal Son & Co. v. Kappin Gownder*, 1938-2 Mad LJ 44=(AIR 1916 Mad 607) in support of the proposition that a right of action is a vested right,

which proposition we are not inclined to dispute but which will advance the respondent's case no further. The learned Counsel also referred us to Garikapati v. Subbiah Choudhary, AIR 1957 SC 540 and Hoosein Kasam Dada v. State of Madhya Pradesh, 4 STC 114=(AIR 1953 SC 221) both of which are cases of abridgment of vested rights of appeal and are not of any assistance in arriving at a conclusion in the present case.

13. In the light of the foregoing discussion we reverse the finding of the Lower Court and hold that there has been unnecessary or improper delay in instituting the proceeding disentitling the respondent to the decree of nullity of marriage. The decree of the Lower Court is set aside and the appeal is allowed with costs. Advocate's fee is fixed at Rs. 150/-.

14. After the appeal was heard and judgment reserved, the respondent filed a 'Memo' purporting to withdraw his petition for a declaration that the marriage was null and void. We rejected the memo by our order dated 21-9-1967.

DGB/D.V.C.

Appeal allowed.

AIR 1969 ANDHRA PRADESH 67 (V 56 C 24)

SESHACHALAPATHI, J.

K. Panchakshara Reddy, Petitioner v. N. Krishna Reddy, Respondent.

Civil Revn. Petn. No. 377 of 1967, D/- 27-2-1968.

Civil P. C. (1908), O. 5 R. 17 — Service of summons resisted by defendant — Process server driven away by him making service as contemplated by R. 17 impossible — It must be deemed to be sufficient service.

Where a copy of summons was refused by the defendant and his uncle took away the summons from the process server and drove him away, thus rendering it impossible for the process server to affix it to the building in which the defendant resided, O. 5 R. 17 could not be given effect to and the service in such case must be deemed to be sufficient service. AIR 1943 Bom 340, Followed.

(Paras 4, 5)

Cases Referred: Chronological Paras
(1943) AIR 1943 Bom 340 (V 30)=
45 Bom LR 695. M. R. Ved & Co.
v. S. B. Hayeem 5

K. Subramanya Reddy, for Petitioner;
C. Pattabhiramarao, for Respondent.

ORDER:— This Civil Revision Petition is directed against the order of the

DL/EL/B763/68

District Munsif, Puttur in I. A. No. 86 of 1966 filed for setting aside an ex parte decree dated 26-11-1966.

2. The plaintiff instituted a small cause suit No. 190 of 1966 against the petitioner (defendant) for the recovery of a sum of Rs. 319.41 due on certain dealings. The defendant was ex parte and on 26-11-1966 a decree was passed. On 9-12-1966 the present interlocutory application was filed for setting aside the ex parte decree.

3. The main ground alleged in the I. A. is that the defendant was not in the village and that he had gone away to Tirupati. On the contrary, the evidence led by the plaintiff, who opposed the application for setting aside the ex parte decree, was that the petitioner was present in the village when the notice of suit was taken for service but that he refused to receive the summons and that his uncle one Rosi Reddi took away the summons from the process server's hands and drove him away. The process server has spoken these facts. The learned District Munsif believed the version of the plaintiff and refused to set aside the ex parte decree.

4. Before me it is urged by the learned Counsel for the petitioner that in this case the mandatory provision of Order 5 Rule 17 Civil Procedure Code, was not complied with and if the defendant was not available or he had refused to take the summons, the process server should have affixed the summons in the manner prescribed. But this rule cannot be applied to a case where it transpires that the defendant or somebody on his behalf has snatched away the summons.

5. In M. R. Ved & Co. v. S. B. Hayeem, AIR 1943 Bom 340, Chagla, C. J., (as he then was) held that where a copy of the summons has been given to the defendant and he ran away with it, thus rendering it impossible for the serving Officer to affix it to the building in which the defendant resides, Rule 17 of Order V cannot be given effect to and the service in that case must be deemed to be sufficient service. I am in respectful agreement with this decision. The Civil Revision Petition therefore fails and is dismissed with costs.

VGP/D.V.C.

Petition dismissed.

AIR 1969 ANDHRA PRADESH 68

(V 56 C 25)

KUMARAYYA, J.

N. V. L. Narasimha Rao, Petitioner v. Kotha Raghuramayya and others, Respondents.

Appls. Nos. 150 and 155 of 1967 and Election Petn. No. 11 of 1967, D/- 7-8-1967.

(A) Representation of the People Act (1951), Ss. 82 (b) and 123 (1) (B) (a) — Scope and applicability — Mere allegations of corrupt practice are sufficient — Whether corrupt practice was committed by candidate in his own interest or as candidate, is immaterial.

In order to attract S. 82 (b) of the Representation of the People Act, it is essential that there should be allegations of corrupt practice against the candidate in the petition. What is meant thereby is that the allegations must suggest and indicate that the candidate has committed a corrupt practice or is guilty thereof. It is immaterial whether he has done the same in his own interest or as a candidate. Even if it is done as an agent, the case will be covered by the provision: AIR 1958 Mad 171 and AIR 1958 SC 857 and AIR 1965 SC 1243, Foll. (Para 11)

The correctness or otherwise of the said allegations may be subsequently considered. (Para 13)

(B) Representation of the People Act (1951), S. 79 (b) — Candidate — Meaning of — First condition is that person must either be duly nominated or claiming to be duly nominated — Significance of holding out lies in determining starting time of candidature and that only if he satisfies the first condition.

The definition concerns itself not only with the meaning of 'a candidate' but also the time from which a person will be deemed to be a candidate. While the first part of the definition gives the meaning of the term 'candidate', the second part introduces a legal fiction by providing that a person coming within the meaning clause may be regarded as a candidate as from the time with the election in prospect, he began to hold himself out as a prospective candidate. The second clause will not be applicable unless the condition of the first clause is satisfied. To come within the meaning clause, he must be a person who must have been duly nominated as a candidate or at least who claims to have been duly nominated though not actually nominated which may happen in cases where the nomination paper was rejected but the person claims it was wrongly rejected. So then unless a person files his nomination paper in accordance with the law in force, he

cannot possibly be regarded as a candidate. Even if he files his nomination paper but the same is rejected and he acquiesces therein and does not claim to have been duly nominated, he will not be within the meaning of S. 79 (b). Thus he should either be duly nominated or must claim to have been duly nominated in order to come within the definition of candidate. The question of holding out arises only if the above two conditions are satisfied, and even that only for purposes of determining the starting period of his candidature. Though as a matter of fact, he can be a candidate only when duly nominated or an occasion has arisen by reason of which he can claim to have been duly nominated, his candidature may relate back to the time from which he started holding himself out to be a prospective candidate with the election in prospect. Thus the significance of holding out lies in determining the starting time of candidature and that only if he satisfies the condition of the first clause. His holding out may yet be of no avail if that was not done with the election in prospect. The contention, therefore, that unless it is proved that the person concerned has held himself out as a prospective candidate, he cannot be held to be a candidate, even though he might have filed his nomination paper and was validly nominated and his name appeared in the list of validly nominated candidates, cannot be tenable in view of the terms of S. 79 (b). (Para 15)

(C) Representation of the People Act (1951), Ss. 82, 79 (b), 86 and 99 — Expression "other candidates" — Meaning of — It includes all candidates who come within definition of candidate under S. 79 (b) and whose names were not included in list of contesting candidates prepared under S. 38 — Such candidates are necessary parties if there are allegations of corrupt practice against them — If they are not made parties, petition is to be dismissed in limine under S. 86 (1). AIR 1958 All 809 and AIR 1961 Bom 29 and AIR 1964 Punj 209 and AIR 1964 All 340, Rel. on; AIR 1965 SC 1243 and AIR 1964 SC 1366 and AIR 1967 SC 836, Foll. (Paras 16, 20)

(D) Representation of the People Act (1951), Ss. 87, 86 (1) and 82 (b) — Civil P. C. (1908), O. 1, Rr. 10 and 13 — Scope and applicability — Provisions of Civil P. C. apply only when there is no express provision in Act and there is no inconsistency with Act — Consequences of non-compliance with S. 82 (b) are provided in Act — Court cannot invoke power under Order 1 to avoid these consequences — Assuming that defect is removable it should be removed within limitation.

It is not as though the provisions of the Civil Procedure Code are made ap-

plicable without any qualifications. Section 87 of the Representation of the People Act makes the provisions of the Civil Procedure Code available so far as they are not inconsistent with the provisions of the Act.

The provisions of the Civil Procedure Code are made subordinate to the provisions of the Act and can be followed only when there is no express provision in the Act and only to the extent they mean no inconsistency with it. AIR 1954 SC 210, Foll.

It is only when the special law does not prescribe the consequences of non-compliance with certain procedural requirements that the Court has power to exercise its discretion consistent with the principles of justice. If the consequences of non-compliance are provided in special law the Court would not be justified in ignoring the same or in permitting avoidance of the consequences by adopting a procedure which would bring about such a result. In this view of the matter, it is impossible to hold that the petition which ought to be dismissed under the mandatory provisions of S. 86 (1) can at all be kept alive and be proceeded with either by invoking the powers under Order 1, Rule 10, viz., by impleading the necessary party or by permitting the party to delete that portion of the allegations in the petition which necessitate the impleading of a party: AIR 1958 SC 687 and AIR 1958 SC 698 and AIR 1965 SC 1243, Foll.

Even if it is assumed that O. 1, Rule 10, C. P. C. was available to remove the defect in S. 82 (b), unless the defect is removed within the period of limitation, the stable infirmity which would warrant dismissal of the petition under S. 86 (1) would endure. (Para 22)

The plea of waiver under Rule 13 of Order 1, Civil Procedure Code, has to necessarily yield to the mandatory provisions of S. 86 (1) which leave no option to the Court but to dismiss the petition. (Para 23)

Cases Referred: Chronological Paras

- (1967) AIR 1967 SC 836 (V 54)=
 (1967) 1 SCR 342, Har Swarup v. Brij Bhushan Saran 118
 (1965) AIR 1965 SC 1243 (V 52)=
 (1965) 1 SCR 393, Amin Lal v. Hunnamal 11, 18, 22
 (1964) AIR 1964 SC 1366 (V 51)=
 (1964) 5 SCR 12, Mohan Singh v. Bhanwarlal 118
 (1964) AIR 1964 All 340 (V 51)=
 ILR (1963) 2 All 537, Har Sarup v. Brij Bhushan 118
 (1964) AIR 1964 Punj 209 (V 51)=
 66 Pun LR 546, Abhe Singh v. Nihal Singh Ramji Lal 118
 (1961) AIR 1961 Bom 29 (V 48)=
 ILR (1960) Bom 994, Baburao Tatyaji v. Madho Srihari 118

- (1958) AIR 1958 SC 687 (V 45)=
 1958 SCJ 680, Kamaraja Nadar v. Kunju Thevar 22
 (1958) AIR 1958 SC 698 (V 45)=
 1958 SCJ 953, Inamati Mallappa v. Desai Basavaraj Ayyappa 22
 (1958) AIR 1958 SC 857 (V 45)=
 1958 SCJ 1072, S. B. Adityan v. S. Kandaswami 11
 (1958) AIR 1958 All 809 (V 45),
 Chatur Bhuj Chunnilal v. Election Tribunal, Kanpur 118
 (1958) AIR 1958 Mad 171 (V 45)=
 ILR (1958) Mad 279, S. B. Adityan v. Kandaswami 11
 (1954) AIR 1954 SC 210 (V 41)=
 1954 SCR 892, Jagannath v. Jaswant Singh 22

B. Manawala Chowdary, P. Lingayya Chowdary, T. Lakshmaiah and B. Srinivasa Rao, for Applicant in Appln. No. 150/67 and 1st Respondent in Appln. No. 155/67 and Ele. Petn. No. 11 of 1967; M. Bhujanga Rao, for 1st Respondent in Appln. No. 150/67; Applicant in Appln. No. 155/67 and Petitioner in Ele. Petn. No. 11/67 and T. Dhanurbhandu, for 2nd Respondent in Applns. Nos. 150 and 155/67 and Ele. Petn. No. 11/67 and M. Ramaiah, for 3rd Respondent in Applns.

ORDER:— This is yet another case where the Election Petition has to be dismissed in limine under Section 86 (1) of the Representation of the People Act. This time it is a case of non-compliance with the requirement of Section 82 (b) of the Representation of the People Act. The facts bearing on the question are few and may be shortly stated.

2. In the recent general elections for Guntur Parliamentary constituency held on February 21, 1967, six persons were duly nominated as candidates for election. Of these only four, including the petitioner Shri N. V. L. Narasimha Rao and the 1st respondent, Shri Kotha Raghuramayya seem to have contested for the seat. Sri Gullapalli Venkata Punnaiah Sastri who was also a duly nominated candidate did not choose to contest. He withdrew his candidature within the prescribed period. Eventually as a result of poll the 1st respondent was returned from the constituency. His election has now been called in question by the petitioner by means of Election Petition No. 11 of 1967. The grounds on which it is challenged are many. Commission of various corrupt practices by himself, through his agents and other persons have been alleged in the petition. I need not refer to all of them for, at this stage, I am concerned only with the allegations contained in the petition in relation to Gullapalli Venkata Punnaiah Sastri, who is not a party to this proceeding.

3. At page 8 of the annexure to the petition, the petitioner in this behalf stated thus:—

"The first respondent with a view to split the votes among the Brahmins in Guntur Town induced Punnaiah Sastry to stand for this Parliamentary seat, apprehending that all the Brahmins would solidly vote for the petitioner. He was given Rs. 500/- by the first respondent for his deposit. Sri Punnaiah Sastry accepted the offer and filed his nomination. Two days after the nominations were filed, first respondent spent about Rs. 300/- and arranged a tea party in Brodipet and invited the voters of that locality. This function of treating some voters expressed their displeasure at this strategy of the first respondent (sic). Thereupon apprehending some violent reaction, the first respondent induced Punnaiah Sastry to withdraw from the contest offering him a reward of Rs. 500/- which he gave him towards his deposit."

4. Again in his amendment petition which was filed after the issues were framed, he stated thus:—

"An amount of Rs. 1116/- and Rs. 600/- and Rs. 500/- given on different dates to G. V. Punnaiah Sastry by the first respondent were intended to induce him to stand as candidate and withdraw his candidature subsequently for his own purposes. The first respondent used him as well as his agent for procuring votes for his election. First respondent is guilty of corrupt practice under S. 123(1) (A) (a) of the R. P. Act."

Then in para 4 of the annexure to the petition, he stated thus:—

"The first respondent apprehending that his application will be thrown out by the Selection Committee approached Shri G. Punnaiah Sastry, the President of Guntur Town Congress Committee, to recommend him to the said Selection Committee and canvass support for his candidature in consideration whereof he promised a bribe of Rs. 1,116/-. The said Punnaiah Sastry without hastening to act on the mere promise waited till the first respondent issued a cheque for the said amount. He thereupon promised his vote and all kinds of support and sent a glorious report to the President of the A. P. C. C. stating that the 1st respondent alone had every chance of success and the chances of success of Smt. Parvati Devi are few and far between. The first respondent had given him again a cheque of Rs. 600/- and thereby not only procured his vote but also his services in canvassing for votes of others."

Again at page 15 of the annexure Part IV to the petition he stated thus:—

"A car was placed at the disposal of Sri G. Punnaiah Sastry. The first respondent allotted 3 or 4 cars for each

Assembly constituency and each of them was given not less than Rs. 10,000/- for canvassing and procuring votes not only for themselves but also for himself, as his agents."

Then in para 2 of the amendment petition which was allowed to be added at page 7 part 1 para 5 of the annexure to the election petition, he stated thus:—

"All the signatories headed by Sri G. V. Punnaiah Sastry constituted themselves as committee of hosts and issued invitation to felicitate the first respondent, were entrusted with Rs. 50,000/- by the first respondent to be distributed among the scheduled caste voters and Communist voters in Guntur Town including Israilpet, Kankaragusta, Venkataraopet, Romireddihota, Arundalpet, Sangadigupta, Sanjeeva Reddi Nagar, Sajneravah Nagar, Nehrunagar and they procured votes for the respondent by paying them at the rate of Rs 5/- each. The first respondent himself through his agents distributed on the day of Election, Rs. 5/- each to the voters of Bangarala Boodu where Communist voters predominate and procured their votes."

In para 9 of the amendment petition added at the end of para 5 of the main petition, the petitioner referred to the fact that the 1st respondent wilfully suppressed certain items of expenditure including the amount paid to Punnaiah Sastry, viz., Rs. 1,116/- Rs. 600/-, Rs. 500/- and Rs. 4,000/-.

5. The case of the 1st respondent is that the above allegations made in the petition (whether in its original or even amended form) are virtually allegations of bribery against Punnaiah Sastry within the meaning of Section 123 (1) (A) (b) and Sec. 123 (1) (B) (a) and (b) of the Act, and therefore Punnaiah Sastry ought to have been joined as a respondent to the election petition as required under Section 82 (b) of the Act, and that as he was not so joined, the petition is liable to be dismissed in limine under Section 85 (1) of the Act. Of course, such a plea was not taken in the written statement nor at the time when the respondent had opposed the amendment. It was raised at a late stage by way of Application No. 150 of 1967, after the case was set down for trial. In this application a fresh plea of non-compliance with Section 82 (2) has been raised. Of course, there are other pleas also but they are covered by the issues already settled, and the learned Counsel Sri Lakshmaiah confined his argument only to the fresh pleas taken.

6. The election-petitioner in his counter to this application contended that since the respondent never took any objection at any time before the petition was posted for trial, he should be deem-

ed to have waived such an objection if any in view of the provisions of Order I, Rule 13, C. P. C. and his application, therefore, should be dismissed in limine. That apart, the allegation of bribing Punnaiah Sastri and of inducing him to stand as a candidate and later to withdraw his candidature are not interdependent offences. They are two distinct offences for which two distinct issues have been framed. As in the main petition the offence of bribing Punnaiah Sastri is alleged to have been committed by the petitioner, on that account Punnaiah Sastri need not be made a party. He further contended that the respondent in para 9 of his written statement had averred that Punnaiah Sastri had of his own volition and discretion filed his nomination as what he regarded as a guard nomination and the respondent never induced him nor requested him to file his nomination or withdraw the same and that as the nomination was intended to be a guard nomination, it was naturally withdrawn as a matter of course in due time. The petitioner contends that in view of this averment also Punnaiah Sastri cannot be deemed to be a candidate within the meaning of Section 79 (b). Further, Punnaiah Sastri never held himself out as a candidate at any time, nor did he in fact even wish to stand or continue as a candidate.

7. In his additional statement which the election-petitioner was called upon to file to clarify his position in relation to the status of Punnaiah Sastri, he stated thus:—

"Sri G. V. Punnaiah Sastri was not a candidate within the meaning of Section 79(b) of the Representation of the People Act, for the following among other grounds:—

(a) Punnaiah Sastri's nomination does not seem to be a valid nomination nor was he duly nominated. The person who is duly nominated or claims to be duly nominated will not be a candidate unless he began to hold himself out as a prospective candidate. He has to satisfy two requirements. Firstly, he must hold himself out as a candidate as from the time of the election in prospect. Secondly, he must be validly nominated. Even assuming without admitting that he was duly nominated, he did not hold himself out as a candidate at any time.

(b) The first respondent (the petitioner herein) averred in his written statement that Punnaiah Sastri was only a Guard Nomination. It cannot therefore be said that Punnaiah Sastri held himself out as a prospective candidate at any time.

(c) Punnaiah Sastri's name was not found in the list of contesting candidates published under Section 38 of the R. P. Act.

(d) Unless the petitioner herein, by positive evidence establishes that Punnaiah Sastri is a candidate within the meaning of Section 79 (b) of the Act, satisfying both the requirements mentioned therein, this application must be dismissed."

8. Even though the petitioner in his election petition stated that the 1st respondent had induced Punnaiah Sastri to stand as a candidate and thereafter to withdraw as such, now he seems to take the stand that he was not a candidate at all, that he never filed a nomination paper nor was he duly nominated. A certified copy of the list of validly nominated candidates obtained by the respondent, has been filed. When shown to the petitioner, he did not dispute the correctness of the said list.

9. After filing his counter, the election-petitioner filed another petition (Application No. 155/1967) with a request to implead Punnaiah Sastri in the election petition on the ground that the omission to implead him was due to some misapprehension as to the exact status of Punnaiah Sastri. This petition was opposed by all the three respondents. Respondents 2 and 3 in the main petition took the same stand as respondent No. 1.

10. The points that fall for determination in view of these two applications are:—

(1) Whether the election petition contains allegations of corrupt practice against Punnaiah Sastri?

(2) Whether Punnaiah Sastri is a candidate within the meaning of Section 82(b)?

(3) Whether there was non-compliance with the provisions of Section 82 (b) and the election petition is therefore liable to be dismissed under Section 86 (1)?

(4) Whether Punnaiah Sastri can now be impleaded as a party-respondent?

11. In order to attract Section 82 (b) of the Representation of the People Act, it is essential that there should be allegations of corrupt practice against the candidate in the petition. What is meant thereby is that the allegations must suggest and indicate that the candidate has committed a corrupt practice or is guilty thereof. It is immaterial whether he has done the same in his own interest or as a candidate. Even if it is done as an agent, the case will be covered by the provision. There is ample authority in support of those propositions. In *S. B. Adityan v. S. Kandaswami*, AIR 1958 Mad 171 it was held by the Madras High Court that the expression "any candidate who is alleged to have committed corrupt practice" employed in Section 82 (b) must mean any candidate who is alleged to have committed corrupt practices and that there is no scope for importing any concept of vicarious liability under Sec-

tion 82 (b). In *S. B. Adityan v. S. Kandaswami*, AIR 1958 SC 857 the Supreme Court held that when Section 82 (b) talks of allegations of corrupt practice against a candidate it means allegation that a candidate has committed a corrupt practice. Similar was the view taken in *Amin Lal v. Hunnamal*, AIR 1965 SC 1243.

12. So then it is to be seen whether there are any allegations of corrupt practices against Punnaiah Sastri in the sense that he has committed them. Whatever may be said of other allegations, there are indeed two allegations categorical enough which far from being merely narrative of sequence of facts that took place in connection with the election, positively show that the charge of commission of corrupt practice was made against Punnaiah Sastri. At one place in the amended petition, at page 7, it has been said that all the signatories headed by Sri Punnaiah Sastri were entrusted with Rs. 50,000/- to be distributed among the scheduled caste voters and Communist voters in Guntur Town, including various specified areas, and they procured votes for the respondent by paying them at the rate of Rs. 5/- each. Obviously enough it is a specific charge of corrupt practice coming under Section 123 (1) (A) (b) against Punnaiah Sastri as well. That is the indisputable position which even the petitioner on being asked could not disown. Then there is an allegation at page 8 of the annexure to the petition, to which also reference has been made in the earlier part of this order. Therein the petitioner has shown that Punnaiah Sastri, induced to stand as a candidate, was given Rs. 500/- by the 1st respondent. What he actually stated thereafter is this:—"Sri Punnaiah Sastri accepted the offer and filed his nomination." Again in the same para he stated thus:—"thereupon apprehending some violent reaction the first respondent induced Punnaiah Sastri to withdraw from the contest offering him a reward of Rs. 500/- which he gave him towards his deposit."

13. If the said amount constituted gratification or reward, there is little doubt that receipt of the said amount as a motive or as a reward for standing or withdrawing from being a candidate, is well within the ambit of the amended provision of Section 123 (1) (B) (a) and is a corrupt practice. It is clear from allegation in the petition that the receipt of Rs. 500/- constituted a motive for standing and a reward thereafter for withdrawal. As the law stood before the amendment of Section 123 receipt of bribe was not a corrupt practice but as a result of the amendment, not only giving but also receiving (bribe) is equally an offence and is a corrupt practice, within the meaning of Section 123 of the Repre-

sentation of the People Act. Thus it is manifest that there are allegations of corrupt practices against Punnaiah Sastri in the election petition, as it stood before the amendment and also thereafter. Of course, in the election petition there are a large number of other corrupt practices alleged to have been committed by the 1st respondent and his agents and other persons on his behalf but that is not a matter of consideration for the purposes of the present application. The point for consideration would be simply whether or not there are allegations of corrupt practices in the petition against a candidate who is not made a party respondent. The correctness or otherwise of the said allegations need not now come up for consideration for it is sufficient if there are allegations to that effect. As we have already seen, there are such allegations in the election petition.

14. Then the only other point to be considered for the purposes of Section 82 is whether Punnaiah Sastri is a candidate within the meaning of that provision. The petitioner now chooses to deny that he was a candidate. It is not easy to understand why the petitioner in the face of his clear averments in the election petition to the contrary has chosen now to contend that Punnaiah Sastri was not a candidate. His averments in the petition are categorical that Punnaiah Sastri was induced to stand as a candidate, that he accepted the offer of Rs. 500/- towards deposit which was, in fact, paid by the 1st respondent to him, and then again he was successfully induced to withdraw from the contest. The very expression "withdrawal from the contest" implies that he was a duly nominated candidate who as such alone could withdraw from the contest under Section 37 of the Representation of the People Act. Had he not gone through the process of filing nomination paper, which must be in order, and come out successful in the scrutiny by the Returning Officer his name would not have found a place in the list of validly nominated candidates prepared under Section 36(8) of the Representation of the People Act. The petitioner could not remain unaware of the fact that Punnaiah Sastri was a duly nominated candidate for himself being a candidate it was in his interests to know about all the candidates so that he may raise objection in relation to the various nomination papers filed. Besides he must have necessarily looked into the list of validly nominated candidates for he was a person directly interested in that matter. He could not help himself to remain ignorant of all these events. He must also have been aware of the later list of contesting candidates prepared under Section 38 after withdrawal of candidates if any. His assertion that he is not aware and his

denial as to Punnaiah Sastri's filing nomination paper or his having been duly nominated or his withdrawal after due nomination, cannot be acceptable. At any rate, the certified copy of the list of validly nominated candidates, prepared under S. 36(8) and filed in Court bears standing testimony to the fact that Punnaiah Sastri was duly nominated. This list has been shown to the petitioner who could not deny the truth thereof. All that he contends, thereafter is that as the respondent himself had said in his written statement that he did not induce Punnaiah Sastri to stand or withdraw as a candidate but that the nomination of Punnaiah Sastri was intended to be a guard nomination, it must follow that his candidature was not real or effective but was a mere make-believe or showy matter and as he never held himself out also as a prospective candidate, he cannot be regarded as a candidate. Stress is laid on the words "began to hold himself out" used in Sec. 79 (b) of the Representation of the People Act. That section defines candidate in the following terms:

"Candidate means a person who has been or claims to have been duly nominated as a candidate at any election, and any such person shall be deemed to have been a candidate as from the time when with the election in prospect, he began to hold himself out as a prospective candidate".

15. It would appear from the language of the definition that it has concerned itself not only with the meaning of 'a candidate' but also the time from which a person will be deemed to be a candidate. While the first part of the definition gives the meaning of the term 'candidate' the second part introduces a legal fiction by providing that a person coming within the meaning clause may be regarded as a candidate as from the time with the election in prospect, he began to hold himself out as a prospective candidate. The second clause will not be applicable unless the condition of the first clause is satisfied. To come within the meaning clause he must be a person who must have been duly nominated as a candidate or at least who claims to have been duly nominated though not actually nominated which may happen in cases where the nomination paper was rejected but the person claims it was wrongly rejected. So then unless a person files his nomination paper in accordance with the law in force, he cannot possibly be regarded as a candidate. Even if he files his nomination paper but the same is rejected and he acquiesces therein and does not claim to have been duly nominated he will not be within the meaning of Sec. 79 (b). Thus he should either be duly nominated or must claim to have been duly nominated in order to

come within the definition of candidate. The question of holding out arises only if the above two conditions are satisfied, and even that only for purposes of determining the starting period of his candidature. Though as a matter of fact he can be a candidate only when duly nominated or an occasion has arisen by reason of which he can claim to have been duly nominated, his candidature may relate back to the time from which he started holding himself out to be a prospective candidate with the election in prospect. Thus the significance of holding out lies in determining the starting time of candidature and that only if he satisfies the conditions of the first clause. His holding out may yet be of no avail if that was not done with the election prospect. The contention, therefore of the petitioner that unless it is proved that Punnaiah Sastri has held himself out as a prospective candidate, he cannot be held to be a candidate, even though he might have filed his nomination paper and was validly nominated and his name appeared in the list of validly nominated candidates, cannot be tenable in view of the terms of Section 79 (b).

16. The only other point to be considered then is that since the term candidate as defined in Section 79 (b) shall continue to have that meaning in other provisions unless the context otherwise requires as is clear from the opening Clause of Section 79, whether there is sufficient context in Section 82 which may give a different meaning to that term. We may read here the provisions of both Sections 82 and 86 (1), which are in the following terms:—

"82. A petitioner shall join respondents to his petition (a) Where the petitioner, in addition to claiming a declaration that the election of all or any of the returned candidates is void, claims a further declaration that he himself or any other candidate has been duly elected, all the contesting candidates other than the petitioner, and where no such further declaration is claimed, all the returned candidates; and

(b) any other candidate against whom allegations of any corrupt practices are made in the petition.

* * * * *

86 (1). The High Court shall dismiss an election petition which does not comply with the provisions of Section 81 or Section 82 or Section 117."

Section 82 casts duty on the petitioner to make certain persons specified in Clauses (a) and (b) thereof party-respondents to the petitions as enjoined by the said clauses. It is open under law to a petitioner to claim in his petition only the declaration that the election of all or any of the returned candidates is void. He can as well claim a further declara-

tion that the petitioner himself or any other candidate has been duly elected. Whereas in the former case it is sufficient if he makes a returned candidate or returned candidates, as party-respondents, in the latter case he has to implead as respondents all the contesting candidates, i.e., candidates whose names were included in the list of validly nominated candidates and who did not withdraw their candidature within the prescribed period. In this way all the defeated and returned candidates have to be on record. It is significant to note that in case any allegations of corrupt practice are made in the petition against a candidate, be he a contesting candidate or not, he has necessarily to be made a party-respondent in either case. The words 'other candidate' used in contra-distinction to the words 'contesting candidates' employed in clause (a) manifestly show the clear intention of the legislature that all candidates who came within the definition of the candidate as in Section 79 (b) and who on account of withdrawal of candidature under Section 37, are not included in the list of contesting candidates prepared under Section 38 of the Representation of the People Act, are within the meaning of that term. Such candidates have necessarily to be made party-respondents if there are allegations against them of any corrupt practice. It is immaterial whether it is a single corrupt practice or many that are alleged in the petition. They are in either case necessary parties to the constitution of the petition. In other words in their absence the petition cannot be tried, but as enjoined by Section 86 (1) has to be dismissed in limine. It is no doubt provided in Section 99 that in case any charge of corrupt practice is made in the petition, the High Court shall give a finding at the time of the final disposal of the petition whether the said corrupt practice has been proved and shall also specify the names of all persons, if any, who have been proved at the trial to have been guilty of such corrupt practices and this it has to do only after notice being given to the persons concerned to show cause why they should not be named and after giving them opportunity to meet the case against them as enjoined in clauses (a) and (b) to the proviso to Section 99. The legislature has given special importance to corrupt practices committed by candidates and did not leave it open to the discretion of the petitioner to join such candidates in the petition but made it obligatory under a special provision on him to make them party-respondents to the petition itself on pain of dismissal of the petition so that from the very initial stage the attention of the Court may be centered on these allegations and the enquiry there-

into may be made in the presence of those persons. That is the obvious intention of the Parliament.

17. It follows, therefore, that Punnalali Sastri, who was a candidate other than a contesting candidate as he had withdrawn his candidature was a necessary party to the petition as allegation of corrupt practice was made against him in the petition. His non-inclusion is therefore fatal to the petition.

18. This position in law is no longer in doubt and is well settled by authority, including the compelling authority of the Supreme Court. In *Chatur Bhuj Chunnial v. Election Tribunal, Kanpur*, AIR 1958 All 809 the Allahabad High Court after exhaustive discussion on the subject held that sub-clause (b) of Section 82 of the Act must be interpreted as covering cases where a candidate is alleged to have committed a corrupt practice at any time even though he may have ceased to participate in the contest by withdrawing his candidature or may have been incapable of participating in the election because his nomination was rejected but he claims to have been duly nominated. The Bombay High Court in *Baburao Tatyaji v. Madho Sridhar*, AIR 1961 Bom 29 held to the same effect that a candidate who had withdrawn his candidature under Section 37 after filing his nomination does not cease to be a candidate and therefore so far as Sec. 82 (b) is concerned must be made a party to the election if allegation of corrupt practice is made against him. It further held that the context in Section 82 (b) does not require to construe the word candidate in any other sense than in Section 79 (b). The same is the view of the Punjab High Court as expressed in *Abhe Singh v. Nihal Singh Ramji Lal*, AIR 1964 Punj 209, which has been affirmed in appeal by the Supreme Court in AIR 1965 SC 1243. It has been laid down by their Lordships following the decisions in *Mohan Singh v. Bhanwarilal*, AIR 1964 SC 1366, that a person who was duly nominated candidate though he withdrew his candidature within the time prescribed by the rules must for the purpose of Section 82 (b) still be regarded as a candidate. When an election petition contained any imputation of corrupt practice against such a person, it cannot be regarded as properly constituted unless he was impleaded as a respondent. It may be remembered that in that case only one of the several grounds set out by the petitioner to set aside the election related to the candidate who was not made a party respondent. Similar was the circumstance of the case in *Har Sarup v. Brij Bhushan*, AIR 1964 All 340. This case went in appeal to the Supreme Court, AIR 1967 SC 836. Their Lordships

observed that if purity of election has to be maintained, which is the purpose of Section 123, a person who is a candidate as defined in Section 79 (b) will remain candidate even and if he withdraws till election is over and if he commits a corrupt practice whether before or after his withdrawal, he would be a necessary party under Section 82 (b).

19. It is unnecessary for me to multiply citations. It is clear that Punnaiah Sastri, who had withdrawn from the contest, was a candidate for the purposes of sub-section (b) of Section 82 and he was a necessary party to the petition. His non-inclusion must entail the penalty under Section 86(1) of the Representation of the People Act.

20. Section 86(1) is express and explicit and enjoins on the Court to dismiss any petition which does not comply with the provisions of Sections 81, 82 and 117. This provision being mandatory in nature has to be obeyed in full. The Court has no power to condone or dispense with or waive non-compliance.

21. The petitioner, in order to remedy this defect, has filed an application that he may be permitted to implead Punnaiah Sastri as a party-respondent even at this stage as his non-inclusion was based on a bona fide belief that he is not necessary party to the petition.

22. It is urged that it is discretionary with the Court even in such circumstances to permit the petitioner in exercise of its powers under Order 1, Rule 10, C. P. C., to add a party to the petition. It is difficult to subscribe to this contention. It is not as though the provisions of the Civil Procedure Code are made applicable without any qualifications. Section 87 of the Representation of the People Act makes the provisions of the Civil Procedure Code available so far as they are not inconsistent with the provisions of the Act. In fact, Section 87 says that subject to provisions of this Act or any rules made thereunder, every election petition shall be tried as nearly as may be in accordance with the procedure applicable under the Civil Procedure Code to the trial of the suits. The provisions of the Civil Procedure Code are thus made subordinate to the provisions of the Act and can be followed only when there is no express provision in the Act and only to the extent they mean no inconsistency with it. I may refer in this behalf to the following observations of the Supreme Court in Jagannath v. Jaswant Singh, AIR 1954 SC 210:—

"The general rule is well settled that the statutory requirements of election law must be strictly observed and that an election contest is not an action at law or suit in enquiry but is a purely statutory proceeding unknown to the common

law and that the Court possesses no common law power.

"It is also well settled that it is a sound principle of natural justice that the success of a candidate who has won at an election should not be lightly interfered with and any petition, seeking such interference must strictly conform to the requirements of the law. None of these propositions however has any application if the special law itself confers authority on a Tribunal to proceed with a petition in accordance with certain procedure and when it does not state the consequences of non-compliance with certain procedural requirements laid down by it.

It is always to be borne in mind that though the election of a successful candidate is not to be lightly interfered with, one of the essentials of that law is also to safeguard the purity of the election process and also to see that people do not get elected by flagrant breaches of that law or by corrupt practices.

In cases where the election law does not prescribe the consequence or does not lay down penalty for non-compliance with certain procedural requirements of that law, the jurisdiction of the Tribunal entrusted with the trial of the case is not affected."

It is clear from the above that it is only when the special law does not prescribe the consequences of non-compliance with certain procedural requirements that the Court has power to exercise its discretion consistent with the principles of justice. If the consequences of non-compliance are provided in special law the Court would not be justified in ignoring the same or in permitting avoidance of the consequences by adopting procedure which would bring about such a result. In this view of the matter it is impossible to hold that the petition which ought to be dismissed under the mandatory provisions of Section 86 (1) can at all be kept alive and be proceeded with either by invoking the powers under Order 1 Rule 10, viz., by impleading the necessary party or by permitting the party to delete that portion of the allegations in the petition which necessitate the impleading of Punnaiah Sastri. This proposition again is well settled by chain of authorities. In Kamraj Nadar v. Kunj Thevar, AIR 1958 SC 687 their Lordships while holding that if provisions of Section 82 which prescribe who shall be joined as respondents to the petition are not complied with, the Tribunal is bound to dismiss the petition observed that the defect of non-joinder of necessary parties cannot be cured by amendment inasmuch as the Election Tribunal has no power to grant such amendment, be it by way of withdrawal or abandonment of part of the claim or

otherwise. The same principle has been reiterated in *Inamati Mallappa v. Desai Basavaraj Ayyappa*, AIR 1958 SC 698 and AIR 1965 SC 1243 and some other decisions of the Supreme Court. The petitioner, relying on the last para of the decision in AIR 1965 SC 1243, has argued that the observations contained therein must mean that the Court can notwithstanding the provisions of Section 86 (1) direct the necessary party to be impleaded in exercise of its powers under Order 1, Rule 10, C. P. C. The observations of their Lordships are not susceptible of the inference that the petitioner seeks to draw. It was observed there that even if there was power to permit the joinder of parties that could not be exercised at any rate after the time has run against the petitioner. In the present case also the same difficulty would arise if it be assumed that Order 1, Rule 10, C. P. C. was available to remove the defect in Section 82 (b) for unless that defect is removed within the period of limitation, the stable infirmity which would warrant dismissal of the petition under Section 86 (1) would endure. Judged from any angle the petition for amendment cannot be allowed. On the other hand, the application of the 1st respondent must be allowed and the Election Petition must be dismissed in limine.

23. The plea of waiver raised by the Election Petitioner invoking R. 13 of O. 1, Civil Procedure Code, has to necessarily yield to the mandatory provisions of Section 86 (1) which leaves no option to the Court but to dismiss the petition.

24. I, therefore, allow Application No. 150 of 1967, disallow Application No. 155 of 1967, and dismiss Election Petition No. 11 of 1967 in limine. The petitioner shall pay the costs of all the three respondents, which are fixed at Rs. 200/- to each.

VGW/D.V.C.

Order accordingly.

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(V 56 C 26)

**P. JAGANMOHAN REDDY, C. J.
AND KUMARAYYA, J.**

Jujjuvarapu Kotamma, Appellant v. Pappala Simhachalam and others, Respondents.

Second Appeal No. 391 of 1962, D/- 25-1-1967, against decree of Sub. J., Eluru, in A. S. No. 341 of 1965.

(A) Civil P. C. (1908), S. 11 — Res judicata — Party to the suit — Meaning — Predecessor in interest of a party is

not a party to the suit nor a party interested.

A predecessor-in-interest of a party to the former suit is not contemplated by S. 11. Consequently such a predecessor-in-interest of a party to the former suit will not be bound by any decision in the former suit against the party. (1881-82) ILR 6 Bom 703, Ref. (Paras 7 & 10)

The expression 'same parties' is self-explanatory. It means the same persons as in the former suit who were parties to that suit. For the purpose of this section, a party is a person who appears on the record at the time of the decision. In case his name is struck off at any stage of the suit or he is discharged from the suit or his name has been introduced by fraud or without knowledge or he was a minor on record unrepresented by a guardian, he cannot be said to be a party to the litigation. A person merely interested in the litigation cannot be said to be a party to the suit. Such a person is neither bound to make himself a party nor can he be bound by the result of the litigation. AIR 1920 Nag 184, Rel. on. (Paras 5 and 6)

The underlying policy of the section in using the expression 'between parties under whom they or any of them claim' seems to be that a decision obtained in a properly constituted proceeding will bind not only the parties but all persons on whom the right or interest may devolve. A person is said to claim under another when he derives his title through that other by assignment or otherwise. The right claimed by him must be attributable to the party in the former suit and further this right must have been acquired subsequent to the commencement of the said suit. As a privy or representative in interest he would then be bound by the decision reached against his predecessor-in-interest. (Para 7)

Explanation VI to S. 11 creates a fiction where the scope is limited by the clear language of the explanation. It purports to lay down that parties who are represented by the party in previous suit in respect of a public or private right claimed in common for such persons and others come within the said expression. A predecessor-in-interest cannot be deemed to be a person interested within the meaning of Explanation VI also. AIR 1922 Pat 63 and AIR 1927 Mad 844 and AIR 1949 Mad 379, Rel. on. (Paras 9 & 10)

(B) Civil P. C. (1908), S. 11 — General principles of res judicata — Applicability — General principles are wider than provisions of S. 11 and apply to cases not coming within four corners of the section — If, however, case falls within terms of S. 11 conditions of the section must be strictly complied with. AIR 1962 SC 633, Rel. on. (Para 5)

Cases Referred: Chronological Paras

- (1962) AIR 1962 SC 633 (V 49) =
1962 Supp (1) SCR 206, Janakirama Iyer v. Nilakanta Iyer 5
- (1949) AIR 1949 Mad 379 (V 36)=
1948-2 Mad LJ 211, Narayanaswami v. Parvatibai 10
- (1927) AIR 1927 Mad 844 (V 14)=
ILR 50 Mad 877, M. Jagannadham v. M. Venkata Subbarao 10
- (1922) AIR 1922 Pat 63 (V 9)=
ILR 1 Pat 174, Kali Dayal v. Umesh Prasad 9
- (1920) AIR 1920 Nag 184 (V 7)=
3 Nag LJ 130, Narhar v. Narain 6
- (1910) ILR 33 Mad 459 = 20 Mad LJ 732, Seshappayya v. Venkat Ramanna Upadhyaya 9
- (1881-82) ILR 6 Bom 703, Ahmedbhoy Hubibbhoy v. Vulleebhoy Cassumbhoy 8
- (1873) 14 Moo Ind App 367=11 Beng LR 244 (PC), Jogendro Deb Roy v. Funindro Deb 8
- (1886) ILR 8 All 324=1886 All WN 101, Sita Ram v. Amir Begam 9

K. Ramachandra Rao, for Appellant; N. C. V. Ramanujachari and C. Srinivasachari, for Respondents (Nos. 1, 3 and 4).

KUMARAYYA, J.:— The short point that falls for determination in this second appeal is whether the suit of the plaintiff is barred by the principle of res judicata on account of the decision in O. S. 152 of 1942 against the 5th defendant which has become final having been affirmed by the Appellate Courts. Of course, there is another point raised, grounded, as it is either on what is alleged to be want of cause of action for the plaintiff or extinction of her right, if any, by reason of the sale deed in favour of the 5th defendant. Based as the action of the plaintiff is on the theory and assertion that her sale deed is a valid sale deed, it is neither proper nor possible for us to pronounce on this question when it is obvious that if the question of res judicata be decided in favour of the plaintiff, correct decision of the said question can be based only on the facts that may be investigated and found by the Courts below. Of course if the question of res judicata is held against the plaintiff the other question would not arise at all for consideration. So then the only point that we have to decide now is the question of res judicata.

2. The facts of the case are in a narrow compass. The suit property, acres, 3.64 cents in extent, is a zeroiti land situate in Thangellamudi Village originally belonging to Veburupaka Subbayya, the father of the plaintiff. The said Subbayya, according to the case of the plaintiff, has executed a will on 5-5-1941 bequeathing to her all his property includ-

ing the suit property on condition that she should pay off all his debts and maintain for life his wife Sobhanadri. The plaintiff, as a result, became the owner in possession of all the properties on the death of her father. She however, conveyed the suit land to her husband, the 5th defendant, under a sale deed dated 14-7-1941 to meet the expenses of the obsequies and pay off the debts of her father. Her husband, thereafter, continued in possession of the suit land. While so, defendants 1 to 3 sought to physically dispossess him on the basis of a sale deed registered on 19-1-1942 long after the death of Subbayya and when the 5th defendant got an order in his favour under Section 144, Cr. P. C. they brought against him O. S. No. 152 of 1942 on the file of the District Munsif's Court, Eluru. That was an action for recovery of possession laid on the basis that their father Appanna got an agreement of sale from Subbayya on 18-5-1941 and a sale deed thereafter on 2-6-1941 in relation to the suit property. The latter document was executed not only by Subbayya but also by Ghantayya alleged to be his adopted son.

Subbayya died the very next day before the sale deed could be registered. A few days later, Appanna also died on 17-6-1941. Defendants 1 to 3 therefore presented the sale deed for registration before the Registrar. Whereas Ghantayya admitted the execution of the document, Sobhandri, the widow of Subbayya, denied the sale deed. Eventually the document was registered on 19-1-1942. Thereafter as the defendant No. 5 obtained orders in his favour under Section 144 Cr. P. C. defendants 1 to 3 filed the said suit. To that suit defendant No. 5 was the sole defendant. Defendant No. 5 disputed the truth and validity of the sale deed alleged to have been executed by Subbayya and Ghantayya. He denied also that it was supported by consideration. He further denied that Ghantayya was the adopted son of Subbayya. He pleaded that during his life-time, Subbayya had executed a will in pursuance whereof his wife became the owner of the suit property. Later she executed, for valuable consideration, a sale deed in his favour as a result of which he came in lawful possession of the suit land. In this state of pleadings, the District Munsif, after inquiry, came to the conclusion that the sale deed was true and valid and supported by consideration and binding on the defendant, that Ghantayya was the legally adopted son of Subbayya and that the will alleged was not true. As a result he decreed the suit. These findings were affirmed in appeal and finally in second appeal in S. A. No. 1514 of 1946 decided on 19th August, 1948. It is significant to note that soon after O. S.

No. 152 of 1942 was decided against the 5th defendant herein, Ghantayya, claiming to be the adopted son of Subbayya brought a suit O. S. No. 40 of 1947 in the District Court, Eluru against the plaintiff herein and also her husband, defendant No. 5 for possession of all other properties that Subbayya died possessed of. But that suit ended wholly in favour of the plaintiff and defendant 5. Defendants 1 to 3 herein were, however, not made parties to that suit. It was found therein that the will in favour of the plaintiff was true and valid and that Ghantayya was not the legally adopted son of Subbayya. Ghantayya preferred an appeal A. S. 78/50. But that was ultimately withdrawn by him. As a result the decision on O. S. No. 40 of 1947 became final.

Before that suit was filed the 5th defendant, in execution of the decree in O. S. No. 152 of 1942, was dispossessed from the suit land in April, 1946. The plaintiff thereupon gave notice to defendants 1 to 3 demanding possession of the land and thereafter brought the present suit impleading also defendant No. 4 as the alienee in possession from defendants 1 to 3. She prayed that a decree for possession of the suit property may be granted in her favour by ejecting the defendant 1 to 4 in order to enable her to perform the warranty of title and peaceful enjoyment of the suit property which was necessary as warranted by her sale deed in favour of the 5th defendant and that an account be taken of the income of the suit property from April 1946, which was the date of dispossession of defendant 5 until the date of putting him back into possession. She also, in the alternative claimed that if the sale deed in favour of the father of defendants 1 to 3 ultimately be proved to be true and valid, a decree may be granted in her favour for the unpaid purchase money due on the sale deed with a charge on the suit property for the same.

3. Defendants 1 to 4 resisted the suit on the basis that the will by Subbayya was not true, that after the sale by Subbayya in favour of their father, there remained no interest left in the property with the deceased which could pass off to the plaintiff, that at any rate the plaintiff was bound by the decree and judgment in O. S. No. 152 of 1942 and that they themselves are not bound by the decision in O. S. No. 40 of 1947 to which they were not parties that the plaintiff is not entitled in the alternative to any sale amount as nothing was due from defendants 1 to 3, the entire sum having been paid to Ghantayya.

4. The Trial Court, after framing the issues in the case, took up issue No 2 as the preliminary issue and holding it against the plaintiff dismissed the suit. The said issue No. 2 reads thus:—

"2. Whether the decision of this Court in O. S. No. 152 of 1942 and in the appeal and second appeal arising therefrom is res judicata against the plaintiff?"

The aggrieved plaintiff went in appeal. The appellate court agreed with the trial court on the question of applicability of the principle of res judicata. Nevertheless it remanded the case to the Trial Court having observed that the plaintiff may still implead Ghantayya in relation to the alternative relief claimed by her and that if it be found that the entire sale consideration was paid to Ghantayya, the plaintiff, subject to the law of limitation, was entitled to recover the said amount from him. Against the order of remand the plaintiff came in appeal to this Court. As no stay orders were obtained therein, the Trial Court proceeded with the trial. Once again the suit was dismissed. Aggrieved by that decree and judgment, the plaintiff went in appeal but with little success. Sometime thereafter judgment was rendered by this Court in the appeal preferred by the plaintiff referred to above. All the findings of the Appellate Court were set aside and the Appellate Court was directed to decide the case on all the points including the issue of res judicata. Thus all the proceedings after remand in the trial and Appellate Courts were rendered ineffective by reason of this order. The original appeal was thereafter taken back on file. The parties requested the Appellate Court that the material that was brought on record after remand may be read in the appeal as additional evidence. The Appellate Court considered afresh the question of res judicata and also the merits of the alternative relief of recovering the purchase money from defendants 1 to 3 and found both the questions against the plaintiff and in favour of defendants 1 to 4. As a result, the plaintiff came once again to this Court. The questions involved being of some importance, not covered by any direct decision, the case is before us on reference.

5. As we have stated at the very outset the only question that can be properly decided in this appeal, having regard to the state of the record is the question of res judicata. We are concerned not so much with the general principles of this doctrine as with the specific provisions of Section 11, C. P. C. which governs the case. Learned Counsel, Mr. K. Ramachandrarao, has rightly argued that though the general principles of res judicata based, as they are on the avowed policy of law that no one should be vexed twice over in respect of the same matter and that there should be finality to the decisions of Courts and consequent end to litigation, are wider

than the provisions in that behalf contained in S. 11 C. P. C. and are applicable to cases which do not come within the four corners of the said section. It is well settled that where a case does fall within the terms of Section 11 C. P. C., the conditions laid down therein must be strictly complied with. If the conditions prescribed therein under which the decision in a suit can be *res judicata* are not satisfied it is not permissible to resort to general principles of *res judicata*. This argument gains sufficient strength also by reason of the compelling authority of the Supreme Court in *Janakirama Iyer v. Nilakanta Iyer*, AIR 1962 SC 633 at p. 641. There *Gajendragadkar, J.*, (as he then was) speaking for the Court observed thus:—

"Where Section 11 is thus inapplicable it would not be permissible to rely upon the general doctrine of *res judicata*. We are dealing with a suit and the only ground on which *res judicata* can be urged against such a suit can be the provisions of Section 11 and no other. In our opinion therefore there is no substance in the ground that the present suit is barred by *res judicata*." Thus the question raised has to be decided strictly on the provision of Section 11, C. P. C. and no other. The said section so far as is material for our purpose, reads thus:—

"11. No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised and has been heard and finally decided by such Court.

Explanation I
 Explanation II
 Explanation III
 Explanation IV
 Explanation V

Explanation VI. Where persons litigate *bona fide* in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purpose of this section, be deemed to claim under the persons so litigating."

The contention is that the present case governed though as it is by Section 11 does not satisfy the conditions of Section 11 as the plaintiff in the present suit was neither a party to the former suit nor can she be held to be a person claiming under any of the parties to that suit. The section refers to "the same parties" or "parties under whom they or any of them claim". The expression

'same parties' is self-explanatory. It means the same persons as in the former suit who were parties to that suit. For purposes of Section 11, C. P. C. it may be borne in mind that a party is a person whose name appears on the record at the time of the decision. In case his name is struck off at any stage of the suit or he is discharged from the suit or his name was introduced by fraud or without knowledge or he was a minor on record unrepresented by a guardian he cannot be said to be a party to the litigation. Similar is the case with the person who applied in vain to be brought on record. There may be other cases besides. It is difficult to give an exhaustive list of the same. It is sufficient to bear in mind that the person must be in fact a party to the former litigation at the time of the decision of the case.

6. Judged thus, it cannot be postulated that the plaintiff was a party to the former suit. Indeed she was in no way a party to the suit. She was not sought to be brought on record even though defendant 5 set up her title for the period before he himself acquired right by virtue of the sale deed executed by her. After she had sold her right she may not concern herself with any dispute in relation to that land until it becomes necessary for her to do so which could happen only in the event of success of the plaintiffs in that case when she may be called upon by the 5th defendant to discharge her obligation under the sale deed. By reason of such interest or conditional obligation, she cannot be deemed to be a party to the former suit. Nor was it incumbent on her to make herself a party to the said suit. If the plaintiffs wanted to bind her they could make her party as soon as they came to know of her in the same manner as the plaintiff in this suit, notwithstanding their transfer of right in favour of defendant 4 who is in possession, has made them parties to the litigation. As held in *Narhar v. Narain*, AIR 1920 Nag 184 at p. 186 the person merely interested in litigation cannot be said to be a party to the suit. Such a person is neither bound to make himself a party; nor can he be bound by the result of the litigation. It must be noted that the provision refers to the same parties and does not introduce any fiction in that behalf. It follows that the plaintiff who was not *eo nomine* a party cannot come within the description of party to the former suit. So the dispute between defendants 1 to 3 and plaintiff cannot be said to be a dispute between the same parties within the meaning of Section 11, C. P. C.

7. Then the next question is whether she is a person claiming under a party to the former suit. The expression used

in Section 11 is between parties under whom they or any of them claim. The underlying policy seems to be that a decision obtained in a properly constituted proceeding will bind not only the parties but all persons on whom the right or interest may devolve. A person is said to claim under another when he derives his title through that other by assignment or otherwise. The right claimed by him must be attributable to the party in the former suit and further this right must have been acquired subsequent to the commencement of the said suit. As a privy or representative in interest he would then be bound by the decision reached against his predecessor in interest. It is unnecessary to detail here the various aspects of this question. Suffice it to say that plaintiff is not claiming any right under the 5th defendant. In fact she acquired no right from him which she may set up in the case. On the other hand it was she who had conferred on him right in the property by executing a sale deed. If at all it is defendant 5 who can be said to possibly claim under the plaintiff but not vice versa. Section 11 does not contemplate a case of a person who is a predecessor-in-interest of a party to the former suit. The expression 'under whom' is inconsistent with any such theory. If she set up any claim in this case it is in her own right and not at any rate under defendant 5 who was a party to the former suit.

8. It is, however, argued that the scope of that expression used in Section 11 has been enlarged by the deeming provision in Explanation VI to that section. It is true certain persons who would not otherwise have come under that expression used in substantive provision have been by reason of fiction introduced in Explanation VI included in that expression. Even so, the scope of fiction is limited by the clear language of the explanation. It purports to lay down that parties who were represented by a party in previous suit in respect of a public or private right claimed in common for such persons and others come within the said expression. The explanation categorically says that where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall be deemed to claim under persons so litigating. The explanation thus takes in cases of persons interested where litigation was in a representative capacity. It is not however confined to cases contemplated by Order 1, Rule 8, C. P. C. or Section 91 C. P. C. The language of the explanation may cover a much wider field the only condition being that it should satisfy essential requisites provided therein. Not only that litigation must be

bona fide but also it should relate to a public or a private right in common and that should be claimed for themselves and others. It means there should not only be a community of interest but also the litigation should in fact be in a representative capacity.

There can be little doubt that what defendant 5 had claimed in the former suit was a private right which vested exclusively in him by reason of the sale deed. He did not claim any right in common with the plaintiff. Indeed neither under the sale deed nor even under the will, which was source of right of the plaintiffs, could he claim a right in common with the plaintiff. The will executed by Subbayya did not give any right to him. It was essentially and wholly in favour of the plaintiff and the sale deed executed by the plaintiff was exclusively in favour of the 5th defendant. If he was claiming any right in the property it was exclusively for himself. He was claiming no right or interest in common with himself and the plaintiff in the property. Community of interest they did have none in relation to the property at any relevant period. All that he did say while setting up the will or disputing the adoption of Ghanayya or the sale deed in favour of the plaintiffs therein was that the plaintiff herein was the owner of the suit land prior to the sale deed in his favour and thereafter he is the owner in possession. Where a right is thus claimed exclusively for himself and not in common with the plaintiff and there could be no right acquired or maintained in common the case cannot fall within the explanation. The pleas taken by the 5th defendant in the litigation cannot be on the basis of a representative character but only in an individual character. It is, however, argued since all the rights that the plaintiff had become vested in him by reason of the sale in favour of defendant 5 with the result that defendants 1 to 3 could effectively sue defendant 5 alone in their suit brought for recovery of possession, it should be assumed that defendant 5 sufficiently represented the interest of the plaintiff and the plaintiff should therefore be held to be bound by the decision in that case.

Learned Counsel contends that defendant 5 had thus enjoyed the privacy of estate and hence could bind the plaintiff. Reliance is placed on Ahmedbhoy Hubibhoy v. Vullebhoy Cassumbhoy, (1881-82) ILR 6 Bom 703 at p. 709. That case is of little assistance to the respondents. On the other hand it goes against them. There Latham, J., at page 709 divided the persons other than parties to a suit in which a decree or judgment has been obtained into 3 classes with reference to their position as affected by the judgment. The first category is of persons

as this matter is concerned whether the detention is under Rule 30 (1) (b) of the Defence of India Rules or under Sec. 3 (1) (a) of the Preventive Detention Act. The aforesaid two cases had again to be considered in another decision of the Supreme Court in the case of Smt. Godavari Shamrao v. State of Maharashtra, AIR 1964 SC 1128, on 29-1-1964 and Gajendragadkar J., as he then was, was a party to this decision as his Lordship was in the two earlier decisions. In Godavari's case, AIR 1964 SC 1128, Wanchoo J., as he then was, speaking for the Court, while referring to the aforesaid two decisions (Rameshwar Shaw and Makhan Singh Tarsikka's cases, AIR 1964 SC 334 and AIR 1964 SC 1120, respectively) observed as follows:—

“Those two cases” (referring to Rameshwar Shaw and Makhan Singh Tarsikka's cases, AIR 1964 SC 334 and AIR 1964 SC 1120, respectively), “were concerned with the service of an order of detention under the Preventive Detention Act or under the Rules on a person who was in jail in one of two circumstances, namely — (1) where he was in jail as an undertrial prisoner and the period for which he was in jail was indeterminate, or (2) where he was in jail as a convicted person and the period of his sentence has still to run for some length of time. In those cases the service of the order of detention under the Preventive Detention Act or under the Rules in jail would not be legal for one of the necessary ingredients about which the authority had to be satisfied would be absent, namely, that it was necessary to detain the person concerned which could only be postulated of a person who was not already in prison.”

Observing as above, their Lordships upheld the order of detention in the case as the petitioners in that case were detained under the Preventive Detention Act by the orders of the Commissioner of Police which when sent to the State Government for approval, the latter revoked the same and passed orders of detention under the Defence of India Rules, and the order of the State Government was served on the petitioners while they were already lodged in jail, in pursuance of the earlier order of detention of the Commissioner of Police. In viewing this aspect, their Lordships observed in Godavari's case, AIR 1964 SC 1128, as follows:—

“In these circumstances it would be in our opinion an empty formality to allow the appellants to go out of jail on the revocation of the order of November 7 and to serve them with the order dated November 10, 1962, as soon as they were out of jail.”

Even so, Mr. Mazumdar, the learned counsel for the State, submits that the decision of the Supreme Court in the case of Gopi Ram v. State of Rajasthan, AIR 1967 SC

241, is an authority for the proposition that the order of detention can be served on an undertrial prisoner and the same cannot be held to be invalid on that ground. He draws our attention to the following passage in para 8 at p. 242:—

“Since he was already in jail custody, the argument proceeds, how could the District Magistrate be reasonably satisfied that his detention in jail was necessary for preventing him from acting in a manner prejudicial to public safety, etc? Reliance was strongly placed by the learned counsel on certain observations in Makhan Singh's case, AIR 1964 SC 1120, in support of his contention that if a person is already in jail, the service of an order of detention on him is bad. As we read that decision as well as the one in Rameshwar Shaw's case, AIR 1964 SC 334, the validity of an order of detention does not necessarily depend upon whether the order was served on him when he was or was not in jail custody. All the surrounding circumstances have got to be borne in mind for deciding whether or not the order is valid.”

Their Lordships of the Supreme Court have consistently held in the aforesaid decisions (Rameshwar Shaw, Makhan Singh Tarsikka and Godavari's cases, AIR 1964 SC 334; AIR 1964 SC 1120 and AIR 1964 SC 1128 respectively) that the service of an order of detention while a person is lodged in jail as an undertrial prisoner or as a convict for some length of time, makes the order invalid in the eye of law. In Gopi Ram's case, AIR 1967 SC 241, their Lordships have not decided anything to the contrary. They have only held that the validity of the order of detention does not necessarily depend upon whether the order was served on him when he was or was not in jail custody. This observation of their Lordships will have to be understood in the context the case under their consideration. In Gopi Ram's case, AIR 1967 SC 241, the order of detention was originally passed by the District Magistrate, Ganganagar, on 5-4-1963 and the same could not be served as the man was absconding. He was arrested on 1-11-1964 for offences under Sections 307/395, Indian Penal Code and was released on bail. The detention order dated 5-4-1963 was served on him on 4-11-1964.

The original order of detention was cancelled by the Government on 18-1-1965 because of some defect and he was released on 21-1-1965. A fresh order of detention had been passed by the District Magistrate, Ganganagar, on 19-1-1965. The order of cancellation was served on him on 21-1-65 and he was released in pursuance thereto. Immediately thereafter, he was arrested for offences under Sections 307/395, I. P. C., under a warrant issued by the Sub-Divisional Magistrate, Karampur. Prior to this on 19-1-65 the District Magistrate, Ganganagar, made the impugned order of detention of the petitioner. This order was

served on him in jail on 23-1-1965 while he was in detention in pursuance of the warrant issued by the Sub-Divisional Magistrate, Karampur. In the circumstances of this case, their Lordships observed as follows:—

"In these circumstances the order dated January 19, 1965, cannot but be regarded as being based upon the satisfaction of the District Magistrate regarding the necessity of the detention of the petitioner arrived at before the petitioner was detained in jail as an undertrial prisoner."

And their Lordships refused to set aside the detention order in this case merely because the detention order was served while he was in jail custody. It may be noticed here that in Gopi Ram's case, AIR 1967 SC 241, the District Magistrate, Ganganagar, passed the impugned order of detention while another officer, namely, Sub-Divisional Magistrate, Karampur, had issued the warrant of arrest which also introduces a distinguishing feature in this case. Coming to the Assam cases, AIR 1951 Assam 43 and AIR 1952 Assam 175, in Labaram's case, AIR 1951 Assam 43, he was an undertrial prisoner in connection with a non-bailable police case and there was no prospect of his release either on bail or otherwise. In Haridas' case, AIR 1952 Assam 175, he was also in detention in connection with a criminal case and awaiting trial. It was not established that there was any prospect of his release from detention in that case. From the aforesaid discussion it may be safely concluded that as an abstract proposition of law, it cannot be said that all orders of detention served on a person while in jail custody are for that reason alone invalid.

The facts and circumstances of each case will have to be judged. It is, however, absolutely clear that if the person is lodged in jail in connection with a non-bailable case or when he is undergoing a sentence for some length of time, the order of detention cannot be served on him while in such detention. Although an order can be passed while the person is in detention provided the other conditions under Section 3 (1) (a) of the Preventive Detention Act are satisfied, such an order cannot be served on the person while in detention. The position will not be the same if the petitioner is arrested not in connection with any particular offences but with a view to detain him under the Preventive Detention Act. Then the order passed under the Preventive Detention Act fulfilling the other conditions laid down under the law can be served on him even while he is in detention. Every case will have, therefore, to be judged on its own facts and circumstances. The danger of "double detention" must be in esse and not in posse; it must be a real danger and that is the test which must be applied in determining the validity of an order of detention, when served in jail custody.

It is sufficient to state as will be shown below that this danger is absent in the instant case, while their Lordships of the Supreme Court found that to be present in the cases of Rameshwar Shaw, AIR 1964 SC 334 and Makhan Singh, AIR 1964 SC 1120, but not in the cases of Godavari, AIR 1964 SC 1128 and Gopi Ram, AIR 1967 SC 241, as already discussed here-in above. Having laid down the law as above, we have to consider whether in the case of this petitioner it can be said that he fulfils the test laid down for holding that the order of detention served on him while he was in jail is invalid. The petitioner's own case is that, but for the detention order, he would have been released on bail in all the cases brought against him as bail bonds had already been accepted by the Magistrate. He also claims that he was already discharged in the other police case. If that is the position, the service of the order of detention on the petitioner while he was in jail custody cannot be said to be invalid on that score. As their Lordships of the Supreme Court observed "it would be, in our opinion, an empty formality" to allow him to get out of the jail and then take him back behind the bars after service of the detention order. The contention of the learned counsel, therefore, cannot be accepted.

5. It appears, the State Government constituted an Advisory Board under the Preventive Detention Act by notification dated 30th May, 1961. That Board was constituted by Hon'ble Mr. Justice S. K. Dutta, as he then was, as Chairman with two other members. While the said Board was functioning, a second Board was constituted by the State Government by notification dated 15th February 1968, with Mr. K. P. Mathur as Chairman with two other members. The material portion of this notification dated 15th February 1968 may be read:—

"GOVERNMENT OF ASSAM

Orders by the Governor
Political 'A' Department
Notification.

The 15th February 1968.

No. PLA. 18/63/31.—In exercise of the powers conferred by sub-section (1) of Section 8 of the Preventive Detention Act, 1950 (Act 4 of 1950), the Governor of Assam is pleased to constitute a second Advisory Board with the following gentlemen as Members with immediate effect to review the cases of persons detained under the Preventive Detention Act:—

1. Shri K. P. Mathur, Vigilance Commissioner, Assam, Shillong.
2. Shri N. K. Chaudhury, Presiding Officer, Labour Tribunal, Gauhati.
3. Shri Rambhadra Medhi (Retired District Judge), Member, Foreigners Tribunal, Nowgong.

The Governor is also pleased to appoint Shri K. P. Mathur to be the Chairman of the Board.

There is then the third notification of the State Government dated 1st May, 1968, whereby the two earlier Boards were dissolved and a new Board was reconstituted with Mr. K. P. Mathur as Chairman. The material portion of the notification may be read:—

“GOVERNMENT OF ASSAM

Orders by the Governor

Political (A) Department

Notification.

The 1st May, 1968.

No. PLA. 18/68.—The Governor of Assam is pleased to dissolve the two Advisory Boards constituted under Notification No. C. 526/57/75, dated 30th May, 1961, and No. PLA. 18/68/31, dated 15th February 1968, and in exercise of the powers conferred by sub-section (1) of Section 8 of the Preventive Detention Act, 1950 (Act 4 of 1950), the Governor of Assam is further pleased to reconstitute the Advisory Board with the following gentlemen as Members, with immediate effect, to review the cases of persons detained under the Preventive Detention Act:—

1. Shri K. P. Mathur, Vigilance Commissioner, Assam, Shillong.
2. Shri A. S. Khongphai, Advocate.
3. Shri S. R. Khaund, Advocate, Assam High Court, Gauhati.

The Governor is also pleased to appoint Shri K. P. Mathur to be the Chairman of the reconstituted Advisory Board.

The learned counsel submits that when the order of detention was served on the petitioner on 3rd March, 1968, the only Board that was in existence was the Board constituted under the Government notification dated 15th February 1968. On 2nd April 1968 when the case was placed by the State Government before the Board, this Board was functioning. The petitioner's case was considered by a different Board which was reconstituted under the Government notification dated 1st May, 1968, and, as such, it cannot be said that the Government has referred the matter to this Board within thirty days from the date of detention as required under Section 9 of the Act.

5-A. Section 8(1) of the Act is as follows:—

“8. Constitution of Advisory Boards.—

(1) The Central Government and each State Government shall, whenever necessary, constitute one or more Advisory Boards for the purposes of this Act.

(2) Every such Board shall consist of three persons who are, or have been, or are qualified to be appointed as, Judges of a High Court, and such persons shall be appointed by the Central Government or the State Government, as the case may be.

(3) The appropriate Government shall appoint one of the members of the Advisory Board who is or has been a Judge of a High Court to be its Chairman, and in the case of a Union Territory, the appointment to the Advisory Board, of any person who is a Judge of the High Court of a State shall be with the previous approval of the State Government concerned:

Provided that nothing in this sub-section shall affect the power of any Advisory Board constituted before the commencement of the Preventive Detention (Second Amendment) Act, 1952, to dispose of any reference under Section 9 pending before it at such commencement.”

Section 9 also may be read:

“9. Reference to Advisory Boards.—In every case where a detention order has been made under this Act, the appropriate Government shall, within thirty days from the date of detention under the order, place before the Advisory Board constituted by it under Section 8 the grounds on which the order has been made and the representation, if any, made by the person affected by the order, and in case where the order has been made by an officer, also the report by such officer under sub-section (3) of Section 3”.

The Board that has heard the petitioner's case on 8th May, 1968 is the reconstituted Board and is a successor to the Board that was constituted in the Government notification dated 15th February, 1968. Under the General Clauses Act, Section 18 provides that in any Central Act or Regulation made after the commencement of the Act, it shall be sufficient, for the purpose of indicating the relation of a law to the successor of any functionaries or of corporations having perpetual succession, to express its relation to the functionaries or corporations. Section 17 of the said Act also refers to substitution of functionaries. Besides, under Section 21 of the same Act, where, by any Central Act or Regulation, a power to issue any notification, order, scheme, rule, form, or by-laws is conferred, then that power includes a power, exercisable in the like manner and subject to the like sanction and conditions, if any, to add to, amend, vary or rescind any notifications, orders, rules or by-laws so issued. From all these provisions, it is clear that there can be no valid objection to the present Board considering the case of the petitioner which was pending before the earlier Board. The objection of the learned counsel in that behalf is overruled.

6. Thirdly, it is contended that the order of confirmation by the State Government was beyond three months of the date of detention. According to the petitioner, the order of confirmation was passed by the Government on 28-6-1968 which was clearly beyond three months of the date of detention. According to Mr. Mazumdar the

order was actually passed by the Government on 22-5-68 when the Chief Minister approved of the release order against seven persons out of a good number including the petitioner. Since the Chief Minister has agreed to the note put up by the Chief Secretary for releasing only seven persons out of a large number of detenus whose detention orders have been held to be on sufficient grounds by the Advisory Board, he submits that by a process of elimination it can be definitely inferred that the Government in the same breath must be deemed to have confirmed the orders of detention in the cases of those whose names do not appear in the list of the release order. Section 11 of the Act may be read:

"11. Action upon the report of Advisory Board.

(1) In any case where the Advisory Board has reported that there is in its opinion sufficient cause for the detention of a person, the appropriate Government may confirm the detention order and continue the detention of the person concerned for such period as it thinks fit.

(2) In any case where the Advisory Board has reported that there is in its opinion no sufficient cause for the detention of the person concerned, the appropriate Government shall revoke the detention order and cause the person to be released forthwith."

The scheme of the Preventive Detention Act is that an order of detention can be passed when valid grounds exist to satisfy the detaining authority to pass such order in conformity with the conditions laid down under the law and if the order is passed by an officer the same has to be approved by the Government within twelve days of the order. In other words, the order of the District Magistrate, which is the order in the instant case, will automatically lapse on the expiry of twelve days unless Government approves of the order under Section 3 (3). Under Section 7, the grounds have to be communicated to the detenu not later than five days from the date of detention and he may submit his representation to the Government against the order, if he so desires. Under Section 9, the Government has to refer the case of the detenu to the Advisory Board within thirty days from the date of detention and place before the Board the grounds on which the order has been made and the representation, if any, made by the person and in case the order had been made by an officer, his report under sub-section (3) of Section 3.

The Advisory Board has to submit his report to the Government within ten weeks from the date of detention under Section 10. It is only on receipt of this report that Government is required to consider under Section 11 what further

orders it will pass under the said section. While Section 11 (2) gives no option to the Government to pass any order other than releasing the detenu on the report of the Board holding that there is no sufficient ground for his detention, under Section 11 (1) it is open to the Government to release the detenu even though the Advisory Board has held that the order of detention is passed on sufficient grounds. The words used in Section 11 (1) are "the appropriate Government may confirm the detention order and continue the detention of the person concerned" whereas the words used in Section 11 (2) are "the appropriate Government shall revoke the detention order". The word 'may' in Section 11 (1) goes to show that it leaves the Government with an option to consider the case of the detenu even at that stage whether it will confirm the order and continue the detention or pass any other order. No option is left to Government in the case under Section 11 (2).

That being the position, it is absolutely necessary that on receipt of the Advisory Board's report, the Government considers the case of the detenu and makes an order confirming the order of detention. We have considered the submission of Mr. Mazumdar in all its aspects but are unable to accept the submission that there was any order of confirmation in this case earlier than 28-5-68. That being the position, the order detaining the person is beyond three months which was the limit for the order of the District Magistrate which must be deemed to have spent its force on the expiry of three months in absence of confirmation of the Government within that period. The scheme of the Act shows that Government with all the time limits laid down at various stages is left with only about a fortnight after the receipt of the Advisory Board's report within ten weeks from the detention order, to consider the matter. All these time limits laid down with care are with a view to protect the liberty of a citizen who is kept under detention without a trial. The preventive detention is a very serious thing and the provisions of law in that behalf must be strictly construed, and the safeguards which are provided under the law should be liberally interpreted. Mr. Mazumdar, however, contends that even though the order of confirmation by the Government is held as being passed on 28-6-68, such an order need not be passed within three months of the date of detention. In making this submission he draws our attention to Article 22 (4) of the Constitution which may be read:

"22 (4). No law providing for preventive detention shall authorise the detention of a person for a longer period than three months unless—

(a) an Advisory Board consisting of persons who are, or have been, or are qualified to be appointed as, Judges of a High Court has reported before the expiration of the said period of three months that there is in its opinion sufficient cause for such detention;

Provided that nothing in this sub-clause shall authorise the detention of any person beyond the maximum period prescribed by any law made by Parliament under sub-clause (b) of clause (7); or

(b) such person is detained in accordance with the provisions of any law made by Parliament under sub-clauses (a) and (b) of clause (7)

We may also read Article 22 (7):

"22 (7). Parliament may by law prescribe—

(a) the circumstances under which, and the class or classes of cases in which, a person may be detained for a period longer than three months under any law providing for preventive detention without obtaining the opinion of an Advisory Board in accordance with the provisions of sub-clause (a) of clause (4);

(b) the maximum period for which any person may in any class or classes of cases be detained under any law providing for preventive detention; and

(c) the procedure to be followed by an Advisory Board in an enquiry under sub-clause (a) of clause (4)."

Mr. Mazumdar's argument is that Article 22 (4) by itself has not put any restriction of time limit for passing the order of confirmation within three months or any particular time limit. He contends that since the Advisory Board has already approved of the order of detention, detention beyond three months is automatically permitted under the law and there is no time limit laid down for the Government to pass the confirming order after receipt of this approval of the Board. The argument, however, fails to take note of the legal position that Article 22 (4) enables the Legislature to make necessary law providing for preventive detention and it has further laid down certain conditions for such legislation. In conformity with the imperative directions in Articles 22 (4) and 22 (7), Parliament has passed the Preventive Detention Act. This Act has laid down various time limits as noticed earlier. Since this law which has been passed by Parliament, has laid down that preventive detention cannot be ordered for more than a period of twelve months from the date of detention under Section 11A, it has provided for various safeguards with some provision for scrutiny by a responsible Advisory Board regarding the sufficiency of the grounds on which the detention order is passed.

The order of the District Magistrate, as noted earlier, lapses after twelve days if no Government approval is given. This necessarily means that Government approval must be given within this short period laid down and it cannot be contended that the order of approval can be passed beyond expiry of twelve days and since the order is after all approved, the detention cannot be held to be invalid. Similarly, the time limit of thirty days within which the Government has to place the case of the detenu before the Advisory Board is necessary because the Board itself has to exercise its powers in conformity with the procedure laid down under Section 10 and even for this a time limit is fixed, namely the Board has to submit its report to the Government within ten weeks of the detention. After receipt of the Board's approval, it is incumbent on the Government to consider the detenu's case for the purpose of confirming the order if it so desires in order that the detention may be continued. Prior to the passing of the confirmation order by the Government, the order that exists is that of the District Magistrate, which is in force because of the Government approval, given within twelve days of the detention.

It has to be given a further lease of life beyond three months by making an order of confirmation by the Government and unless this order of confirmation is passed within a period of three months, there will be no force in the order of detention. The order will automatically lapse for not securing the confirmation of the Government within the period of three months. Section 11(1) can only be construed in this manner in order to safeguard the interests of the detenu as provided under the law. All the time limits laid down under the Act from after the passing of the first order must be held to be mandatory provisions and although Section 11 (1) does not in terms mention any time limit, the time limit of three months is implicit in the entire scheme of the Act and the setting of the provisions. The view which we have taken finds support in a decision in the case of Sangappa Mallappa v. State of Mysore, AIR 1959 Mys 7, and with respect, we agree with the views expressed therein on the interpretation of Section 11 (1) read with Article 22 (4) of the Constitution. The impugned order of detention must therefore be struck down in absence of a confirming order of the Government within three months from the date of detention. The third contention of the Learned Counsel for the petitioner must, therefore, be upheld.

7. In the view we have taken on the above ground, it is not necessary to consider the fourth ground urged by the learned Counsel for the petitioner. We

may, however, make it clear that detention orders have to be passed with care and the provisions of law and the safeguards that are laid down must be kept in view by the detaining authority. When the detaining authority passes an order, it has got to be reasonably satisfied on the materials and informations placed before it. When the grounds are given to the detenu, those grounds which are the conclusions of the detaining authority on the facts disclosed at that stage, must be clear and specific. There must not be any vagueness about them. The object is to enable the detenu to make an effective representation against the order and unless the grounds are given with sufficient particulars on which he is expected to make a representation, the salutary provision for making the representation will become meaningless and illusory. Another factor which the detaining authority must consider is that the grounds which are furnished must have direct connection with the object for which the detention order is passed.

If the detention order is passed with a view to prevent the person from acting in any manner prejudicial to the security of the State or the maintenance of public order, the grounds given must have reasonable connection with those objects. Each ground has to be considered by the detaining authority on the touch-stone of the object for prevention of which the particular order is passed. If any of the grounds is found to be irrelevant inasmuch as it has no reasonable probative value in respect of the object for which the detention order is made, the presence of such a ground will vitiate the order of detention. It is true that the Court is not final arbiter of the sufficiency or otherwise of the satisfaction determination of which must rest with the detaining authority, but when the matter comes before the Court the detaining authority has got to establish that the grounds are relevant and germane and not foreign to the object, for which the order is passed. In this particular case, the learned Counsel for the petitioner has strenuously contended that some of the grounds are absolutely irrelevant, illusory and non-existent, and, as such, the order is liable to be set aside even on that score. In the view we have taken on the third ground, as aforesaid, we are, however, not inclined in this case to pursue this matter.

8. In the result, the application is allowed and the impugned order is hereby quashed in exercise of our powers under Article 226 of the Constitution. The petitioner shall be released forthwith. Issue Writ accordingly.

9. M. C. PATHAK, J.: I agree.
SSG/D.V.C. Petition allowed.

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(V 56 C 6)

S. K. DUTTA, C. J. AND M. C. PATHAK, J.

Mt. Singma Sangma Mechik, Plaintiff-Petitioner v. Mt. Khilji Sangma Mechik and another, Defendants-Respondents.

Civil Revn. No. 10 (H) of 1967, D/- 5-7-1968.

(A) Assam and Nagaland High Court (Jurisdiction over District Council Courts) Order, 1954, Cl. 6 — Garo law — Transfer of Akhing land — Garo husband being only guardian and Manager of wife's properties cannot dispose of the property without explicit assent of mother of house.

Under the Garo law the Akhing land belongs to the mother of the house and her Nokma and not to the father of the house. The Garo husband is only a guardian and manager of his wife's properties and as such he cannot dispose of them, nor can he make the property liable for any debt incurred by the father of the house without an explicit assent of the mother of the house and other female members of the family and some other important members of the family group. No Akhing land can be disposed of in any way without the consent of the mother of the house, Charas and Chat-chis and prominent female members of the mother's Ma'chong, or family group. Consequently the Garo husband has no legal right to encumber the Akhing land by taking loan from some other persons without the express consent of his wife and other important female members of the family. He also has no right to transfer the Akhing land for such debt without the express consent of the mother of the house and other female members.

(Paras 11 and 13)

(B) Limitation Act (1908), Sec. 1 and Arts. 142 and 144 — Applicability — Act does not apply to disputes between members of Garo tribe who are included amongst Scheduled Tribe — Adverse possession cannot therefore be applied.

(Para 14)

S. M. Lahiri, N. M. Lahiri, B. M. Mahant, for Petitioner; K. P. Bhattacharjee, for Respondents.

PATHAK, J.:— This is an application under Clause 6 of the Assam and Nagaland High Court (Jurisdiction over District Council Courts) Order, 1954 against the judgment and order dated 29-4-1967 passed by Sri G. N. Bhattacharyya, Judicial Officer, District Court, Garo Hills District Council, Tura. In Miscellaneous Appeal No. 6 of 1966, by which the Learned Judicial Officer rejected the petitioner's appeal and affirmed the judgment and order dated 29-8-1966 passed

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by Sri S. Dam, Judicial Officer, Subordinate Court, Garo Hills District Council, Tura, in Miscellaneous Case No. 32 of 1963.

2. The facts of the case are briefly as follows: The plaintiff-petitioner instituted Miscellaneous Case No. 32 of 1963 in the Subordinate Court of the Garo Hills District Council claiming the Akhing of Boldamgiri village as the Nokma of the clan. Her case was that her father late Tosu was the Nokma of Boldamgiri Akhing. Late Tosu incurred some debts, but could not repay. One Khewil Marak cleared the debts of Tosu and he got the Akhing land temporarily transferred in his favour from Tosu Nokma. Khewil had two wives, namely, Damje Sangma and Gonje Sangma. Khewil died in 1963. Gonje had one female issue, namely Jiji Mechik. Damje had none. Jiji was married to Singwan Marak, defendant No. 2. Both his wives having died. Khewil married Khilji Sangma, defendant No. 1.

3. Tosu had also two wives, namely Namje Sangma and Manje Sangma. The main wife Namje had two daughters, Singme Sangma Mechik, the plaintiff and Dongme. But Manje had no issue.

4. It was contended by the plaintiff that the transfer of the Akhing land by Tosu to Khewil was only conditional and not absolute and as such it did not confer any title on Khewil and through him on the defendants. The Akhing land or any part of it could not be sold out without the consent of the Maharis, and that at the time of transfer of the Akhing in question, a condition was laid down that on the plaintiff attaining majority, the Akhing would revert to the plaintiff and that the third wife of late Khewil, namely defendant No. 1, did not belong to 'Sko-Mechik clan and that she was not supplied as wife to late Khewil by her Maharis and as such she could not be Nokma of the Akhing and that the defendants secretly registered their names as Nokmas of the Akhing and therefore they could not legally claim the Nokmanship under the customary law.

5. The case of the defendants-respondents was that the property was transferred by Tosu Nokma to Khewil Marak as he had paid all the debts of Tosu and that Khewil Nokma had two wives, namely Damje Sangma and Ganje Sangma and that Damje Sangma had no issue while Ganje Sangma had one daughter, Jiji Sangma, wife of defendant No. 2 and that after the death of Damje, Khewil took defendant No. 1 as his third wife and thus the defendants claimed the property through Khewil Sangma.

6. The case was heard by the Learned Judicial Officer, Subordinate Court, Garo Hills District Council, who dismiss-

ed the plaintiff's case. The plaintiff preferred an appeal before the Garo Hills District Council Court, which dismissed the appeal. Thereafter the plaintiff moved the High Court under Cl. 6 of the Assam High Court (Jurisdiction over District Council Courts) Order, 1954, in Civil Revision No. 2 (H) of 1964 and the High Court by its judgment and order dated 21-12-1964 set aside the judgments and orders of the Courts below and sent the case back to the Subordinate District Council Court for proper decision.

7. After remand, the Learned Judicial Officer, Subordinate Court, Garo Hills District Council, recorded evidence of the parties and by his judgment and order dated 29-8-1966 dismissed the plaintiff's case. Against the said judgment and order, the plaintiff preferred an appeal before the District Court, Garo Hills District Council, which was registered as Miscellaneous Appeal No. 6 of 1966. The Learned Judicial Officer by his order dated 29-4-1967 dismissed the plaintiff-petitioner's appeal, and against this order the present petition has been filed in this Court.

8. Mr. Lahiri, the Learned Counsel for the petitioner, has submitted before us that the property in dispute is Akhing land and it belonged to the mother of the house and her Nokma and not to the father of the house nor to Nokrom. In other words, the suit property belonged to Namje Sangma, the mother of the plaintiff. From Section 29 of the Garo Law, by Jobang D. Marak, it is found that the Garo-husband is only a guardian and manager of his wife's properties and as such he cannot dispose of them nor enter them into any liabilities without an explicit assent of the mother of the house and other female members of the family and some other important members of the family group. From Section 36 of the same book we find that no Akhing land can be disposed of in any way without the consent of the mother of the house, Charas and Chatchis and prominent female members of the mother's 'Ma' chong, or family group. In the instant case, the admitted position is that the suit land which is Akhing land was transferred for the debts of Tosu Sangma in favour of Khewil.

9. The point that falls for determination in this case is whether by the transfer of the Akhing land made by Tosu Sangma to repay his debts any title passed to Khewil, depriving the plaintiff who was a minor at the time of the transfer.

10. The Learned Lower Appellate Court has relied on two orders passed by the Deputy Commissioner, Garo Hills on 26-9-1935 and 4-1-1936. From the order of the Deputy Commissioner dated 26-9-1935 quoted in the judgment of the

Lower Appellate Court, it is found that Khewil paid Rs. 766-8-0 to clear the debts of Tosu Nokma, who borrowed the same from Thejing and Gijjing. Khewil wanted the Akhing but Namje and the Maharis and Chatchis present objected to giving the Akhing to Khewil unless Tosu's name was added there. The Deputy Commissioner decided that half of the amount, that is, Rs. 383-4-0 must be paid by Tosu to Khewil by 4-1-1936 and if he paid, then Khewil and Tosu would be joint Nokmas in respect of the Akhing land and on the failure of Tosu to pay the amount in question to Khewil, the Akhing of Boldamgiri would go to Khewil with his wife Gonje as Nokma. From the order of the Deputy Commissioner dated 4-1-36 as quoted in the Lower Appellate Court's judgment it is found that Tosu failed to pay the amount as ordered and therefore the Deputy Commissioner ordered that the Akhing went to Khewil.

11. Under the Garo Law, the Akhing land belongs to the mother of the house and her Nokma and not to the father of the house and the Garo-husband is only a guardian and manager of his wife's properties and as such he cannot dispose of them, nor can he make the property liable for any debt incurred by the father of the house without an explicit assent of the mother of the house and other female members of the family and some other important members of the family group. No Akhing land can be disposed of in any way without the consent of the mother of the house, Charas and Chatchis and prominent female members of the mother's Ma'chong, or family group. From Major A. Playfair's book called "The Garos", we find the following in the Inheritance Chapter:

"The system which divides the Garo tribe into certain clans and "motherhoods," the members of which trace back their descent to a common ancestress, and which has laid down that descent in the clan shall be through the mother and not through the father, also provides that inheritance shall follow the same course, and shall be restricted to the female line. No man may possess property, unless he has acquired it by his own exertions. No man can inherit property under any circumstance whatever."

12. From the above mentioned two orders of the Learned Deputy Commissioner, it does not appear that the mother of the house, namely Namje, wife of Tosu, transferred the land or she expressly allowed her husband to transfer the Akhing land. It also does not appear from the said orders of the Deputy Commissioner that the liabilities incurred by Tosu in connection with the Akhing land were incurred with the explicit assent of the mother of the house and other

female members of the family. At the relevant time, the daughter of Namje, namely the plaintiff was a minor. So the question of taking her consent did not arise at all.

13. On a consideration of the above facts and the incidents of Garo Law, I hold that Tosu had no legal right to encumber the Akhing land by taking loan from some other persons without the express consent of Namje and other important female members of the family and he also had no right to transfer the Akhing land for such debt without the express consent of the mother of the house and other female members. In the circumstances, by the Deputy Commissioner's orders referred to above, title in the Akhing land could not pass to Khewil. At the most, it can be said that the Nokmaship vested in Tosu was transferred to Khewil and when Khewil died the Akhing land would revert to the mother of the house and her daughter and since Namje is no more, the Akhing land must come to the plaintiff, the daughter of Namje. The title in the Akhing land cannot be said to have passed to Khewil by mutation in the revenue records. The finding of the Learned Lower Appellate Court that the transfer of the Akhing land by Tosu in favour of Khewil was unconditional and absolute is not correct inasmuch as Tosu had no authority to encumber the Akhing land and transfer the same in violation of the Garo Customary Law. By the transfer of the Akhing alleged to have been made by Tosu and enforced by the executive orders of the Deputy Commissioner the title to Akhing could not pass but only the Nokmaship or the managerial right of Tosu as husband of Namje might have passed.

14. Rule 39 of the Rules for the Administration of Justice and Police in the Garo Hills District, 1937, reads as follows:

"Although the Indian Limitation Act, 1908 (Act IX of 1908), has been barred by Notification No. 5868, A. P., dated the 8th September, 1934, the principles of the Act should be closely followed in disputes between persons not belonging to a Scheduled Tribe or Tribes specified in Items 1 and 2 of Part I—Assam, of the Schedule to the Constitution (Scheduled Tribes Order, 1950)."

The Limitation Act, therefore, is not applicable to the instant case as both the parties belong to the Scheduled Tribe and as such the question of adverse possession does not arise here. The delay on the part of the plaintiff in coming to the Court cannot deprive her of the Akhing. It appears that Khewil died in early part of 1963 and the plaintiff put forth her claim in the same year for the

AkHING and the Nokmaship. In the circumstances, I hold that the Akhing of Boldangiri has been inherited by the plaintiff as the legal representative of her mother Namje. I hold that the names of Khilji Sangma and her son-in-law Singwan Marak, defendants Nos. 1 and 2 as Nokmas of Boldangiri Akhing land should be removed inasmuch as they were appointed Nokmas on the basis that the title in the Akhing land vested in Khewil. As it has been held that title in the Akhing land has vested in the present plaintiff, the names of the defendants cannot stand in the register of Nokmas in respect of the said Akhing. It is further directed that the members of the 'Sko-Mechik' clan should now select the Nokma of the Boldangiri Akhing in accordance with the customary law of the Garos.

15. In the circumstances, the judgment and order of the Judicial Officer, District Court, Garo Hills District Council, Tura, passed in Miscellaneous Appeal No. 6 of 1966 are set aside.

16. The petition is allowed. But in the entire facts and circumstances of the case, we pass no order as to costs.

17. S. K. DUTTA, C. J.:— I agree.
GGM/D.V.C. Petition allowed.

AIR 1969 ASSAM & NAGALAND 25 (V 56 C 7)

P. K. GOSWAMI, J.

(On difference of opinion between
NAIDU AND DUTTA, JJ.)

M. Gurumoorthy, Petitioner v. Accountant General, Assam & Nagaland and others, Respondents.

Civil Rule No. 377 of 1965, D/- 29-2-1968.

(A) Constitution of India, Arts. 229 and 202 to 207 — Rules under Art. 229(2) — Assam High Court Appointment and Conditions of Service Rules (1956), R. 4 read with Sch. I — Appointment of officers and servants of High Court — Power of Chief Justice — Power to frame rules regarding conditions of service — Rules regarding salaries, allowances, leave or pensions only require previous approval of Governor — Appointment made within framework of Art. 229 read with rules duly made cannot be questioned by anybody — On facts held that appointment of petitioner not being in accordance with Art. 229 read with rules thereunder was invalid.

Under Article 229 (1), the Chief Justice or such other Judge or Officer of the Court, as he may direct, is the final authority in appointing officers and ser-

vants of the High Court subject of course to the proviso in respect of person not already attached to the Court. While under Clause (2) of Article 229 the Chief Justice is authorised to make the Rules in respect of all kinds of the conditions of service of officers and servants of the High Court, the proviso to this clause requires that the rules so made, so far as they relate to salaries, allowances, leave or pensions, require the approval of the Governor of the State. The Rules so made will be subject to the provisions of any law made by the State Legislature. Although the Chief Justice makes the rules regarding the conditions of service and even can at the first instance propose Rules relating to the salaries, allowances, leave or pensions, those relating to the latter have got to receive the approval of the Governor of the State before these can be enforced. The Rules regarding the conditions of service in general which have nothing to do with salaries, allowances, leave or pensions need not be sent to the Governor for approval. (Para 13)

Once the Rules are made by the Chief Justice under Article 229 of the Constitution and those relating to salaries and other specified matters have been approved by the Governor, the appointment thereafter by the Chief Justice of the personnel cannot be questioned by the Governor nor by anyone. It is only when approval is accorded by the Governor such Rules relating to salaries and other matters specified have statutory force under Art. 229. The Chief Justice is then the sole authority while exercising the powers within the framework of Article 229 of the Constitution read with the Rules duly framed. (Paras 11, 19)

The petitioner was holding the temporary post of the Secretary to the Chief Justice of the High Court from 24-8-56 to 24-8-1959. At the time of his temporary appointment there were already seven permanent stenographers (4 posts of Grade I and 3 posts of Grade II) which was the 'sanctioned strength' according to Rule 4 read with Sch. I Categories XII and XIII mentioned in Class III services under the Assam High Court Appointment and Conditions of Service Rules 1956. In 1958 the State Government accorded its sanction to High Court's proposal to reorganise the stenographer's cadre in the High Court with retrospective effect. According to the reorganised cadre the sanctioned strength of 7 remained the same out of which one post was a selection grade post carrying a higher salary. By an order dated 7-5-59 the Chief Justice appointed the petitioner as Secretary to the Chief Justice-cum-selection grade stenographer on a revised scale of pay as a probationer and also directed that the temporary post of a

Secretary be merged in the selection grade post with effect from 24-8-1959.

Held on the facts and circumstances of the case, that the Chief Justice had no power to make an additional appointment of a Secretary-cum-selection Grade Stenographer on a particular scale in absence of a sanction from the Government for the eighth post outside the cadre and sanctioned strength of 7 posts prescribed by the Assam High Court Appointment and Conditions of Service Rules, 1956. Hence, the order of appointment of the petitioner on the new post had no legal force being not in conformity with the provisions of Art. 229 of the Constitution. (Paras 18, 19, 21)

(B) Constitution of India, Pre.— Powers and responsibilities entrusted to different persons and authorities under Constitution — Desirability of exercising those powers within strict limits laid down in Constitution and their working in co-operation and in harmony pointed out.

The Constitution having entrusted its powers and responsibilities to different persons or authorities at different stages under diverse circumstances, those persons or authorities will have to work and operate in harmony and not in hostility, seeming or otherwise.

The checks and balances replete in our Constitution do not necessarily mean subordination of one authority to another. These constitutional safeguards are the safety valves of a democratic Constitution as is ours. Powers properly and tolerantly exercised strictly within limits laid down in a written Constitution cannot engender unhappy frictions.

(Paras 9, 10)

S. K. Ghose, P. Chaudhuri and D. N. Chaudhuri, for Petitioner; Dr. J. C. Medhi, and A. M. Mazumdar, Jr. Govt. Advocate, for Respondents.

ORDER:— This matter has come to me on a difference between Nayudu, J., as he then was and Dutta, J.

The facts necessary for our purpose may be narrated in some detail with relevant references for easy understanding:

The petitioner was a Stenographer in the Income-Tax Appellate Tribunal, Calcutta Bench. He applied for and was appointed to the temporary post of the Secretary to the Hon'ble Chief Justice of this Court, on a pay scale of Rs. 400-20/2-500 sanctioned by the Government on 30-7-56. The petitioner joined this post on 24-8-56. Government sanction to the continuance of this temporary post was annually obtained up to 24th August, 1959. An earlier request by the High Court to make the post permanent was not acceded to by the Government on the ground that the post had not till then completed five years of its continuance.

The Government, however, advised the High Court (vide Annexure VII dated 16-12-58) to submit a proposal for its permanent retention through a Schedule of new scheme the following year.

2. In 1955 the Government of Assam reorganised the Stenographers' Cadre under the Government by a Resolution dated 22-10-55 (Annexure VI) and the following classification with improved scales of pay was introduced:

(See scales of pay on page 27)

Finding this improvement in the case of the Stenographers serving under the Government, the High Court submitted to the Government a proposal for Re-organisation of Stenographers' service in the High Court and the letter dated 14th February, 1956 (Annexure V) may be quoted:

"I am directed to say that this Court is experiencing much difficulties in securing efficient Stenographers and it is hardly necessary for the Court to stress the importance of having competent Stenographers to take down their Lordships' judgment in open Court and transcribe them. Every effort was made to secure efficient Stenographers but it was without success.

2. The sanctioned strength of Stenographers of this Court's Establishment is as follows:—

Stenographer Grade I—4

Stenographer Grade II—3

The nature of work of the Stenographers attached to the Hon'ble Judges is of an arduous nature. They attend their Lordships' residences earlier than the scheduled office hours for taking dictation of judgment, office files and other matters and again sometimes in the evening hours they attend the residences of Hon'ble Judges for taking dictation. They generally cannot avail themselves of any holidays in view of the volume of work entrusted to them. They do not receive any remuneration whatsoever for such arduous work. Further, the Stenographers already serving in this Court's Establishment have no incentive to do better and more efficient work as the existing Stenographers' Service do not offer sufficient incentive.

3. In view of the circumstances, the Hon'ble the Chief Justice has been pleased to re-organise the Stenographers Service in the Assam High Court with effect from 21-5-55 as below to attract competent Stenographer with sufficient incentive on the lines of the Government Notification No. AAP.274/54/25, dated 22-10-1955.

(a) Selection Grade Stenographer—

There will be one Selection Grade Stenographer in the scale of pay of Rs. 400-20-600 p.m. plus dearness allowance and

(Scales of Pay)

- "(1) Selection Grade Stenographer—Rs. 400—20—600
 (2) Stenographer, Grade I (Senior)—Rs. 250—10—270—EB—15—360—(EB)—20—400.
 (3) Stenographer, Grade I (Junior)—Rs. 150—8—190—(EB)—10—290—(EB)—12—350.
 (4) Stenographer, Grade II—Rs. 100—6—130—EB—7—200.

other allowances as admissible under the rules.

(b) Stenographers Grade I (Senior)—

There will be three posts of Stenographers Grade I (Senior) in the scale of pay of Rs. 250-10-270-EB-15-360-EB-20-400/- p.m. plus dearness allowance and other allowances as admissible under the rules.

(c) Stenographer Grade I (Junior).

There will be one post of Stenographer Grade I (Junior) in the scale of pay Rs. 150-8-190-EB-10-290-EB-12-350/- p.m. plus dearness allowance and other allowances as admissible under the rules.

(d) Stenographer Grade II.

There will be two posts of Stenographers Grade II in the scale of pay of Rs. 100-6-130-EB-7-200-7-200/- p.m. plus dearness allowance and other allowances as admissible under the Rules.

(e) Stenographers attached to the Hon'ble Judges shall be designated as Personal Assistants and they will be entitled to a special pay of Rs. 50/- p.m. unless they hold the Selection Grade post. I am, therefore, to request the Govt. to communicate their approval to the above proposal at an early date".

The Government agreed to this proposal as per Annexure (X) dated 6-8-58, which also may be set out below:

"With reference to your letter no. quoted above, I am directed to say that the Governor of Assam is pleased to agree to the proposed re-organisation of the Stenographers Service in the Assam High Court, with effect from the 21-5-55 subject to the condition that, the procedure of recruitment, promotion etc. should be in the same or similar manner as laid down in Govt. Resolution No. AAP.274/54/25 dated 22-10-55 (enclosed for ready reference).

The pay scales may also be same as accepted by Govt. on the recommendation of the Pay Committee. Everything should be on the same lines as laid down in the aforesaid Resolution and there cannot be any relaxation in the matter of qualifications".

3. It is seen that the petitioner was appointed against the temporary post of Secretary to Chief Justice outside the cadre of the Stenographers. At the time of his appointment there were already seven Stenographers, which was the 'sanctioned strength' as noticed earlier in the High Court letter (Annexure V) a fact which was reiterated by the High Court in Annexure XII dated 15-7-59. Even so, we find a letter from the Regis-

trar of the High Court to the Government dated 16-12-58 (Annexure XI), same as Annexure 'Q' and the following extract thereof makes the point.

"It may be mentioned in this connection that although Government was pleased to communicate their sanction to the re-organisation of the Stenographers' service in this Court's establishment, a clarification on the point whether Government sanction referred to the post of the Secretary to the Chief Justice-cum-Stenographer or a separate post in the Selection Grade of Stenographers, was sought for, to which no reply has yet been received by the Court.

I am therefore to request you to obtain clarification on the point at an early date".

For the first time, from the High Court and a combination of two posts, namely, Secretary to the Chief Justice-cum-Stenographer was envisaged in this paragraph.

Next, Government's reply to this letter came by way of Annexure 'R' dated 27-4-59, which bears quoting in extenso as correspondence now reveals more than what meets the eye.

"I am directed to say that beyond prescribing some posts of Stenographers, the High Court appears to have made no rules regarding the conditions of their service; and while agreeing to the reorganisation of Stenographers' service, subject to the condition that their conditions of service should be similar to those laid down in Government Resolution dated 22-10-55, the intention of the Government only was that there should be uniformity in service conditions throughout the State. It was far from the Government's intention to interfere in any way with the constitutional powers of the High Court.

Government, therefore, consider that the High Court should frame rules in conformity with the said Government Resolution while reorganising the Stenographers' Service in the High Court.

Further I am to invite your attention to High Court's letter No. 4921 Estt. dated 16-12-58, and to say that under the aforesaid Government Resolution, a Stenographer, whether a Selection Grade or Grade I or Grade II, when attached to a Minister or Chief Minister as Private Secretary is given the Gazetted Status. All other posts of Stenographers whether of Selection Grade, Grade I or Grade II in the Secretariat are non-gazetted. As such a Stenographer whether of the Se-

lection Grade, Grade I (Senior) or Junior or Grade II when attached to the Chief Justice as Private Secretary, may be given the Gazetted Status. Government's sanction for the Selection Grade Stenographer was for the post of the Secretary to the Chief Justice-cum-Stenographer only and not for an additional Selection Grade post".

The last sentence of the above paragraph has caused all confusion and misunderstanding. The High Court on receipt of this letter thought that Annexure 'R' is the sanction of the Government for the purpose of merger of the two posts, namely the temporary post of the Secretary and the Selection Grade post. Sinha, C. J., thereupon passed on 7-5-59 the following orders:

(Annexures 'S' & 'T').

(1) "In exercise of the powers conferred on me under Article 229 of the Constitution of India, read with (1) Rule 11 of the Assam High Court Appointment and Conditions of Service Rules; (2) Letter No. LJJ.74/56/26 dated 6th August, 1958; and (3) Letter No. LJJ.74/56/36 dated the 27th April, 1959, of the Government of Assam, Law Department I hereby direct that the post of Secretary to the Hon'ble Chief Justice be merged into the post of Selection Grade Stenographer, with effect from 24th August, 1956, the date when the present incumbent, Sri M. Gurumoorthy was appointed.

I further direct that the pay scale of the Secretary to the Hon'ble Justice be revised to Rs. 450-30-600/- p.m. with effect from 1st October, 1956, as recommended by the Pay Committee and accepted by the Government".

(2) "In exercise of the powers conferred on me under Article 229 of the Constitution of India, read with Rule 5 (1), Part II of the Assam High Court Appointment and Conditions of Service Rules, I hereby appoint Sri M. Gurumoorthy, as Secretary to the Hon'ble Chief Justice of Assam-cum-Selection Grade Stenographer in a substantive capacity, in the pay scale of Rs. 450-30-600/- p.m., with effect from 24th August, 1958. Sri M. Gurumoorthy will be deemed to have been placed on probation with effect from 24th August, 1956, under Rule 4(ii), Part II of the Assam High Court Appointment and Conditions of Service Rules."

In pursuance of these orders, the petitioner joined his new post and was even drawing salary on those terms. It stated that his lien to his substantive post is also terminated. Already, however, a controversy regarding the regularity of the orders dated 7-5-59 was raised and the matter was being examined and pursued at different levels.

In this context, Sinha, C. J., discovered that by the absorption of the peti-

tioner as the Selection Grade Stenographer, which was one of the seven sanctioned posts already being held substantively by other permanent incumbents, he unintentionally effected retrenchment of a permanent hand. The following extract from the High Court's letter dated 15-7-59 (Annexure XII) may be quoted:

"3. Thus while giving effect to the above Government order by appointing the Secretary to the Hon'ble Chief Justice to the Selection Grade post with effect from 24-8-56 one old Grade I Stenographer's post automatically stood retrenched with effect from that date for which the Court has now got to move Government again for sanction of such post with retrospective effect".

4. So to counterbalance this unintended retrenchment and to keep all the Stenographers on their liens to the respective posts, one post of pre-organised Grade I (now Grade I Junior) is necessary with effect from 24-8-56.

5. I am, therefore, to request you that necessary sanction may kindly be accorded for the post of one pre-reorganisation Grade I Stenographer (now Stenographer Grade I Junior after reorganisation) with effect from 24-8-56 and to communicate the Government's sanction at a very early date".

Government wrote back on 27-11-59 pointing out the irregularity of the appointment in absence of sanction, as will appear from the following extract from Annexure XIII, at page 148:

"Prima facie therefore the A. G.'s contention as per the letter No. GAI/2611 dated 20-8-59 to the High Court appears to be correct and the High Court's order appointing Sri M. Gurumoorthy to the post of selection grade Steno with effect from 21-8-56 appears to be irregular." Sinha, C. J., also addressed a D.O. letter 3-8-60 to the Finance Minister detailing the above position and stating that while the temporary post of the Secretary thus stood retrenched with effect from 24-8-56, one permanent post of Stenographer fell short and therefore, the Court moved the Government on 15-7-59 to sanction one post of Stenographer, Grade I (Junior) (vide Annexure A-1 at page 71 of the record).

4. One would wish that the suggestion of Sinha, C. J., in the shape of a proposal communicated from the High Court were acceded to by the Government to put an end to the controversy. However, this was not to be. By the time the Finance Minister replied on 12-1-61 (Annexure B-1 at page 71 of the record) to Sinha, C. J.'s letter dated 3-8-60, the latter had already retired and Deka, C. J., assumed office. Suffice it to say that the Government did not agree to the High Court's proposal and made

some counter suggestion which however, found favour with Deka, C. J., who on 8-2-61 vacated the two orders of Sinha, C. J., dated 7-5-59 and forwarded a proposal to Government for regularising the matters regarding the appointment. After a few months, Deka, C. J., was succeeded by Mehrotra, C. J., who on the representation of the petitioner vacated the order of Deka, C. J., on 27-9-61 in the following terms:

"In my opinion, the order of my predecessor dated the 8th February, 1961, is without jurisdiction and is hereby vacated and the earlier orders dated the 7th May, 1959, passed by Chief Justice Sri C. P. Sinha, are hereby restored and shall remain in force". (Vide Annexure G-1 at page 78)

Mehrotra, C. J., also allowed other consequential increments to the petitioner. The Government on 7-10-61 (vide Annexure M-1 at page 85 of the record) directed the Accountant General, not to issue pay slip to the petitioner until further order and the impasse was created leading to the Writ Application in Civil Rule 349 of 1962 filed on 26-9-62 and withdrawn on certain terms on 12-7-63. Those terms having not been complied with, the present application under Article 226 of the Constitution was filed on 16-11-65 and a Rule Nisi issued.

5. It may be mentioned, meanwhile the petitioner was appointed as Assistant Registrar of the High Court on 2-1-64 (vide Annexure 'M' at page 52 of the record) and even a Selection Grade Stenographer was also appointed from the existing Cadre of the Stenographers with effect from 3-1-64.

6. The petitioner prays in this application as under:

"To issue Rule on the Respondents to show cause why a writ in nature of Mandamus or a writ of like nature should not be issued directing the Respondents No. 1 and No. 2 to give full effect to the orders dated the 7th May, 1959 and 27th September, 1961, passed by the Hon'ble the Chief Justice and to act in terms of the said orders dated 7th May, 1959 and 27th September, 1961."

The petitioner abandoned the additional prayer concerning his appointment as Assistant Registrar, and it is not necessary to set out that relief.

7. Mr. Ghose, the Learned Counsel for the petitioner submits that the orders passed by Sinha, C. J., on 7-5-59 in exercise of his powers under Article 229 of the Constitution of India are valid and binding in law, and that the sanction for the post is to be found in Annexures 'P', 'Q' and 'R', and that the orders of Sinha, C. J., clearly mention the Annexures 'P' and 'R' on which the order was based. Dr. Medhi, the Learned Counsel for the Respondents, contests this proposition and

submits that in absence of any rules or approval of the Governor under Article 229 of the Constitution, regarding salaries and other specified matters, Annexures 'P', 'Q' and 'R' cannot be a substitute for a rule or a sanction in this behalf. He, therefore, submits that the orders of Sinha, C. J., are void ab initio and, as such, the order of Deka, C. J., dated 8-2-61 was valid and the order of Mehrotra, C. J., restoring the order of Sinha, C. J., was clearly unconstitutional and invalid. Dr. Medhi urged two preliminary objections, firstly that since the appointment of the petitioner as Assistant Registrar on 2-1-64, he has no legal right to maintain this petition and obtain the reliefs asked for, and, secondly that the petitioner's entire claim now would be one for recovery of dues or its adjustment and this he could not ask for in a proceeding under Article 226 of the Constitution as an alternative remedy by way of a suit is available to him. Both these submissions found favour with Nayudu, J., as he then was, and even if it were possible to dispose of this Rule on such pleas, the matter being one of constitutional importance needs to be judicially settled on the merits.

8. The present controversy is between the Chief Justice on the administrative side and the State Government on the other. This matter will have to be approached objectively, completely oblivious of the attitude of the parties facetiously coming to the surface in the correspondence.

9. The Constitution having entrusted its powers and responsibilities to different persons or authorities at different stages under diverse circumstances, those persons or authorities will have to work and operate in harmony and not in hostility, seeming or otherwise.

10. The checks and balances replete in our Constitution do not necessarily mean subordination of one authority to another. These constitutional safeguards are the safety valves of a democratic Constitution as is ours. Powers properly and tolerantly exercised strictly within limits laid down in a written Constitution, cannot engender unhappy frictions.

11. Once, for example, the Rules are made by the Chief Justice under Article 229 of the Constitution and those relating to salaries and other specified matters have been approved by the Governor, the appointment thereafter by the Chief Justice of the personnel cannot be questioned by the Governor nor by anyone. The Chief Justice is then the sole authority while exercising the powers within the framework of Article 229 of the Constitution read with the Rules duly framed. To illustrate, in the present context, if the particular additional post of the peti-

tioner in the cadre with the salaries fixed has been sanctioned by the Governor there will be no more jurisdiction left in the Governor to interfere with the actual appointment. The validity or otherwise of the orders in question will therefore have to be determined on the language of Article 229 of the Constitution. The most important question thus to be considered is what are the powers of the Chief Justice under Article 229 of the Constitution and what are his limitations.

12. We may read now Article 229 of the Constitution:

"229. (1) Appointments of officers and servants of a High Court shall be made by the Chief Justice of the Court or such other Judge or officer of the Court as he may direct:

Provided that the Governor of the State may by rule require that in such cases as may be specified in the rule no person not already attached to the Court shall be appointed to any office connected with the Court save after consultation with the State Public Service Commission.

(2) Subject to the provisions of any law made by the Legislature of the State, the conditions of service of officers and servants of a High Court shall be such as may be prescribed by rules made by the Chief Justice of the Court or by some other Judge or officer of the Court authorised by the Chief Justice to make rules for the purpose:

Provided that the rules made under this clause shall, so far as they relate to salaries, allowances, leave or pensions, require the approval of the Governor of the State.

(3) The administrative expenses of a High Court, including all salaries, allowances and pensions payable to or in respect of the officers and servants of the Court, shall be charged upon the Consolidated Fund of the State, and any fees or other moneys taken by the Court shall form part of that Fund".

13. It is admitted that the Governor of the State has not made any rules with reference to the proviso to Clause (1) of Article 229 of the Constitution. In any case, this proviso does not require any consideration. From a perusal of Article 229 (1), it is clear that the Chief Justice or such other Judge or Officer of the Court, as he may direct, is the final authority in appointing officers and servants of the High Court subject of course to the proviso in respect of person not already attached to the Court. It is also admitted that the State Legislature has not made any law under Clause (2) of Article 229 regarding the conditions of service of officers and servants of the High Court. It therefore, remains for the Chief Justice of the High Court to make rules regarding the conditions of

service of officers and servants thereof. This power of the Chief Justice can be exercised by any Judge or officer of the Court authorised by the Chief Justice to make the Rules. Even if these Rules are made under Clause (2), they will be subject to the provisions of any law made by the State Legislature, but, as pointed out earlier, no such laws have been made. While under Clause (2) the Chief Justice is authorised to make the Rules in respect of the conditions of service of officers and servants of the High Court, the proviso to this clause requires that the rules so made, so far as they relate to salaries, allowances, leave or pensions, require the approval of the Governor of the State. It will be seen that the conditions of service mentioned in Clause (2) are wide enough to include all kinds of conditions of service of officers and servants and without the proviso it might have been embraced the salaries, allowances, leave or pensions. Under Article 229 it is necessary for the Chief Justice to make the rules under Clause (2) and also to obtain the approval of the Governor in respect of those rules which he makes relating to salaries, allowances, leave or pensions. It is, therefore, clear that although the Chief Justice makes the rules regarding the conditions of service and even can at the first instance propose rules relating to salaries, allowances, leave or pensions, those relating to the latter have got to receive the approval of the Governor of the State before these can be enforced. The rules regarding the conditions of service in general which have nothing to do with salaries, allowances, leave or pensions need not be sent to the Governor for approval. In order to understand the scheme of this Article as to why this dichotomy was introduced, we have to refer to some other Articles of the Constitution.

14. Article 202 of the Constitution relates to the procedure in finance matters and may usefully be set out here:

"202 (1) The Governor shall in respect of every financial year cause to be laid before the House or Houses of the Legislature of the State a statement of the estimated receipts and expenditure of the State for that year, in this Part referred to as the "annual financial statement".

(2) The estimates of expenditure embodied in the annual financial statement shall show separately—

(a) the sums required to meet expenditure described by this Constitution as expenditure charged upon the Consolidated Fund of the State, and

(b) the sums required to meet other expenditure proposed to be made from the Consolidated Fund of the State;

and shall distinguish expenditure on revenue account from other expenditure.

(3) The following expenditure shall be expenditure charged on the Consolidated Fund of each State—

(a) the emoluments and allowances of the Governor and other expenditure relating to his office;

(b) the salaries and allowances of the Speaker and the Deputy Speaker of the Legislative Assembly and, in the case of a State having a Legislative Council, also of the Chairman and the Deputy Chairman of the Legislative Council;

(c) debt charges for which the State is liable including interest, sinking fund charges and redemption charges and other expenditure relating to the raising of loans and the service and redemption of debt;

(d) expenditure in respect of the salaries and allowances of Judges of any High Court;

(e) any sums required to satisfy any judgment, decree or award of any Court or arbitral tribunal;

(f) any other expenditure declared by this Constitution or by the Legislature of the State by law, to be so charged".

Article 203 provides as follows:—

"203. (1) So much of the estimates as relate to expenditure charged upon the Consolidated Fund of a State shall not be submitted to the vote of the Legislative Assembly but the discussion in the Legislature of any of those estimates.

(2) So much of the said estimates as relate to other expenditure shall be submitted in the form of demands for grants to the Legislative Assembly, and the Legislative Assembly shall have power to assent, or to refuse to assent, to any demand, or to assent to any demand subject to a reduction of the amount specified therein.

(3) No demand for a grant shall be made except on the recommendation of the Governor".

Article 204 may be quoted here:

"204 (1) As soon as may be after the grants under Article 203 have been made by the Assembly, there shall be introduced a Bill to provide for the appropriation out of the Consolidated Fund of the State of all moneys required to meet—

(a) the grants so made by the Assembly; and

(b) the expenditure charged on the Consolidated Fund of the State but not exceeding in any case the amount shown in the statement previously laid before the House or Houses.

(2) No amendment shall be proposed to any such Bill in the House or either House of the Legislature of the State which will have the effect of varying the amount or altering the destination of any grant so made or of varying the amount

of any expenditure charged on the Consolidated Fund of the State, and the decision of the person presiding as to whether an amendment is inadmissible under this clause shall be final.

(3) Subject to the provisions of Articles 205 and 206, no money shall be withdrawn from the Consolidated Fund of the State except under appropriation made by law passed in accordance with the provisions of this Article.

Article 205, which is not necessary to be quoted, relates to the procedure regarding the supplementary, additional or excess grants.

15. A perusal of Articles 202 to 204 as well as the remaining Articles 205 to 207 of the Constitution clearly bring out the Governor's responsibility in financial matters and it is because of this responsibility entrusted to him under the Constitution that some provision has to be made even in the matter of the High Court's expenditure relating to salaries, allowances, leave or pensions of the officers and servants of the High Court as is provided under Article 229 (2) of the Constitution. Since the source of the money is from Government exchequer, it is necessary for the Governor to know what the expenditure is under various heads. It is elementary that no money can be spent out of public revenues without an Appropriation Act authorising the expenditures under various heads. Since money has to be provided for by the Government, it is necessary that the rules relating to salaries, and other allowances etc., as provided under Article 229 (2) of the Constitution, have got to be approved by the Governor so that he may know the demands that would be made under various heads. There may be another indirect reason namely that some uniformity has to be maintained in the salaries of the various services.

This being the position, the next question which we have to address ourselves is whether Rules have been framed by the Chief Justice under Article 229 (2) and whether the same received the approval of the Governor as required in respect of the items enumerated in the proviso to Article 229 (2) of the Constitution. It is admitted by Counsel of both sides that the Assam High Court Appointment and Conditions of Service Rules 1956 hereinafter referred to as the 1956 Rules, apply in the present case and that the same in respect of the items enumerated in the proviso to Article 229 (2) had received the Governor's approval. It is admitted that the Rules which were framed in 1961 by the Chief Justice were not sent to the Governor for his approval, and, therefore, no reference would be made to these rules, so far as they relate to salaries, allowances, leave

or pensions. Rule 4 of the 1956 Rules may be set out:

"Each category of the Services consists of so many and such posts as are set out in Schedule I hereto annexed subject to any additions thereto or modification thereof as may from time to time

"Category XII. Stenographer Grade I, Stenographer attached to the Chief Justice draws a special pay of Rs. 50/- per mensem for performing the duties of Private Secretary.

Four Rs. 150.8-190 (E. B.) posts. 10-290 (E. B.) — 12. 850 per mensem.

Category XIII. Stenographer Grade II.

Three Rs. 100.6-180 (E. B.) posts. 7-200 per mensem.

Schedule II enumerates the tests to be passed by incumbent before confirmation. It will be seen that the test to be passed by the Stenographers Grade I and Grade II is also separately shown. The Schedule which enumerates the various services and posts does not, however, mention the post of the Secretary to the Chief Justice except what has been noted against category XII, above.

16. The 1956 Rules thus not having made any provision for such an appointment as made, it is necessary to find out if the letters dated 5-8-58 (Annexure P) and 27-4-59 (Annexure R) of the Government of Assam contained the Governor's sanction for the post. From the very order dated 7-5-59 of Sinha, C. J., it is clear that the 1956 Rules alone would not be sufficient to make the appointment in question, in the exercise of the powers under Article 229 of the Constitution. He had thus to refer to the letters, Annexures P and R, in his order. It is, therefore, to be seen whether these letters can be interpreted as Governor's sanction for the post to which the petitioner was appointed by the order of the Chief Justice on 7-5-59.

17. Shortly put, the Government version is that it has sanctioned one Selection Grade post in the total strength of the Cadre of seven Stenographers in the High Court. It has also made it clear that the Selection Grade post should be filled by promotion strictly on merit from Stenographers Grade I (Senior and Junior) appointed substantively. According to Government, there were already seven permanent Stenographers holding the seven posts including some in Grade I in the Cadre. The order appointing the petitioner, a temporary employee in the High Court, from outside the cadre will make the total strength of the Cadre of Stenographers eight, for which there was no Government sanction. This position appears to be very well conceded by the High Court (vide Annexure XII dated 15-7-59) when it had written for sanction for an additional post of a Stenographer subsequent to Sinha, C. J.'s

be fixed by the Chief Justice with the approval of the Governor where necessary". Schedule I sets out the pay and cadre of High Court service and posts, and the material portion is under Class III Services against Category Nos. 12 and 13, which may be extracted here:

orders dated 7-5-59. This would also go to show that so far as the Annexures P, Q and R are concerned, even the High Court did not think that these were sufficient as a sanction for the petitioner's appointment already made.

18. In the instant case, under Article 229 of the Constitution it is clear that the Chief Justice has the power of giving appointment to the petitioner. The Chief Justice can prescribe his conditions of service. The Chief Justice cannot, however, make an additional appointment of a Secretary-cum-Selection Grade Stenographer on a particular scale in absence of a sanction from the Government for the eighth or such a post.

19. In absence of any State Legislation in this regard, the proper implementation of the powers under Article 229 of the Constitution, abridged by the limitations imposed enabling the Executive to retain control over the financial aspect, is that the Chief Justice or some Judge or Officer of the Court authorised by him should make the rules prescribing conditions of service and those portions relating to salaries, allowances, leave and pensions should be sent to the Governor for his approval. It is only when approval is accorded by the Governor, such rules, relating to matters specified, have statutory force under Article 229 of the Constitution. It is admitted by either party that the 1956 Rules are holding the field, but in these Rules we do not find any post of the Secretary-cum-Selection Grade Stenographer. These Rules ought to have been amended from time to time and the necessary amendments incorporated therein. At any rate, the Rules regarding salaries incorporated in the relevant notifications of the Government, which were, on approval by the Governor, made applicable to the High Court staff, are inextricably connected with and become bound up with the 1956 Rules framed under Article 229 of the Constitution.

20. But the dispute arises as to the interpretation of Annexures P, Q and R.

for by the applicant was an Importer's mark and that he was the owner thereof by selection in so far as this country was concerned. Justice Shah has stated in his Judgment that he was not inclined to agree with that finding of the Deputy Registrar. It is necessary to bear in mind certain principles concerning the point involved. Mr. Justice Shah, in his judgment in another case, being Consolidated Foods Corporation v. Brandon & Co. Pvt. Ltd., 66 Bom LR 612=(AIR 1965 Bom 35) has held as follows:

".....in case of a distinctive mark within the meaning of the Act, right to the exclusive use thereof can be acquired immediately on that mark being used as a trade mark i.e. used by the trader in his business upon or in connection with his goods and it is not necessary to prove either the length of the user or the extent of the trade. It may be noted that the word 'Monarch' in this case, as conceded by the counsel at the Bar, is a distinctive mark and, therefore, it follows that if it is shown that this mark was used by the petitioner corporation as a trade mark in this country upon or in connection with its food products even for once prior to the use of that mark by the respondent company in 1951, and if there is no evidence to show that this mark was abandoned by it, it would be entitled under S. 18 of the Act to apply for registration of that mark as its trade mark and also to oppose an application made by any other trader for the purpose of registering that mark in his name."

He has further held that if it is shown that the distinctive mark was used by a trader as a trade mark upon or in connection with his products even for once prior to the use of that mark by another trader, and if there is no evidence to show that this mark was abandoned by him, he would be entitled under Section 18 of the Act to apply for registration of that mark as his trade mark. The learned Judge reached those conclusions on the basis of four English judgments considered and analysed by the learned Judge in his judgment. As stated by the learned Judge, therefore, in the case of a foreign mark, a person first to introduce and use it in India would become entitled to claim it in India as proprietor thereof. The Judgment in (1927) 44 RPC 405 shows that — if the foreign owner of a mark sells goods in this country, he may become the owner of that mark. It further shows:

"For the purpose of seeing whether the mark is distinctive, it is to the market of this country alone that one has to have regard. For that purpose foreign markets are wholly irrelevant, unless it be shown by evidence that in fact goods have been sold in this country with a foreign mark on them, and that the mark

so used has thereby become identified with the manufacturer of the goods. If a manufacturer having a mark abroad has made goods and imported them into this country with the foreign mark on them, the foreign mark may acquire in this country this characteristic, that it is distinctive of the goods of the manufacturer abroad. If that be shown, it is not afterwards open to somebody else to register in this country that mark, either as an importer of the goods of the manufacturer or for any other purpose. The reason of that is not that the mark is a foreign mark registered in a foreign country, but that it is something which has been used in the market of this country in such a way as to be identified with a manufacturer who manufactures in a foreign country."

To the same effect is the decision of the Comptroller-General reported in 39 RPC 171, In the matter Isola Ltd., which also was relied upon by Mr. Rege. Mr. Bhabha cited in this connection 68 RPC 178, In the matter of Gaines Animal Food Ltd.'s application. In our opinion, the decision in that case is in no way useful to us and therefore, we do not refer to the same.

37. Another case relied upon in this connection was Ebrahim Currim v. Essa Abba Sait, (1901) ILR 24 Mad 163. In that case, the plaintiff had for many years imported into Bombay and Madras umbrellas bearing the "Stag" mark from a Glasgow Firm, where it was held "that the prior use in Scotland of the mark did not justify the Scotch firm and the defendant in claiming that the plaintiff's user of the trade mark was illegal or otherwise than an exclusive user."

38. A person may become a proprietor of a trade mark in diverse ways. The particular mode of acquisition of proprietorship relied upon by the applicant in this case is of his user for the first time in India in connection with watches and allied goods mentioned by him of the mark "Caltex", which at the material time was a foreign mark belonging to Degoumois & Co. of Switzerland and used by them in respect of watches in Switzerland. Before the Deputy Registrar and before Mr. Justice Shah, proprietorship was claimed on the basis that the applicant was entitled to it as an importer's mark. Several authorities were cited and were considered and principles deduced and relied upon in that behalf. In our opinion, it is not necessary in this case to go into details about facts in the various decided cases dealing with importer's marks. In many of those cases, the dispute was between a foreign trader using a foreign mark in a foreign country on goods which were subsequently imported by Indian importers and sold by them in this country under that very mark. In short it was a com-

petition between a foreign trader and the Indian importer for the proprietorship of that mark in this country. We have already reached a conclusion that so far as this country is concerned, Degoumois & Co. have totally disclaimed any interest in the proprietorship of that mark for watches etc. In India, the mark "Caltex" was a totally new mark for watches and allied goods. The applicant was the originator of that mark so far as that class of goods is concerned, and so far as this country is concerned. He in fact used it in respect of watches. There is no evidence that that mark was used by anyone else in this country before the applicant, in connection with that class of goods. Unquestionably, the applicant's user was not large, but that fact makes no difference, because so far as this country is concerned, the mark was a new mark in respect of the class of goods in respect of which the applicant used it. We therefore, hold that the applicant is the proprietor of that mark.

39. The next point for decision is whether the use of the mark was likely to deceive or cause confusion. It involves the decision whether there was any tangible danger of deception or confusion being caused by the use of that mark. Under the provisions of S. 11, Clause (a) of the Act, a mark is disentitled to be registered if the use of it is likely to deceive or cause confusion. It may be stated that S. 12 does not fall for consideration in this case in this respect, because the mark is identical and, therefore, no question of it's being deceptively similar to the mark of the opponents arises.

40. The Deputy Registrar held that though the marks were identical, as the competing goods were entirely different in character, and as there was not only no connection in the course of trade between the competing goods, but also the fact that the competing goods were never sold at the same shop much less at the same counter, and as the trade channels through which the respective goods passed were entirely different, and as the reputation that the opponents' marks had acquired was only in respect of the goods for which their marks were in fact used, there was no tangible danger of any deception or confusion arising. The learned Judge held in the appeal against the order of the Deputy Registrar that this decision of the Deputy Registrar was quite right in law, and that there was no question of any confusion arising in the mind of the public. It is now well settled that whether there is a likelihood of deception or confusion arising is a matter for decision by the Court, and that no witness is entitled to say whether the mark is likely to deceive or to cause confusion. For example see *Parker-Knoll Ltd. v. Knoll International Ltd.*, 1962 RPC 265 at pp. 273,

274 (HL). It is therefore clear that evidence by a witness that it is likely that purchasers of the goods will be deceived is inadmissible, but the evidence which would be admissible would be of a witness who is accustomed to buy articles in question, and he can say that he himself would be deceived.

41. In this case the two marks are identical. Therefore, there is no question of any confusion arising because of any "similarity" between the rival marks. It is the finding of the Deputy Registrar and also of the learned Judge that there is no connection between the two marks in the course of trade or by reason of there being any common trade channels. That finding has not been challenged before us. The only ground urged by Mr Rege in support of the contention that there was likelihood of deception and confusion, was that there is a danger that the goods of the applicant would be taken by purchasers as being the goods of the opponents, that is, as indicating that the goods had some connection with the opponents. Mr Rege invited our attention to certain leading cases on this point.

42. Mr. Rege relied upon the case reported in *In the matter of Dunn's Trade Mark*, (1890) 7 RPC 311. In that case, one Dunn applied to register a label for baking powder containing conspicuously the words "Fruit-Salt Baking Powder". The application was opposed by one Eno on the ground that he had registered the words 'Fruit-Salt' as a trade mark for certain preparations, and had used those words to denote his preparation. The case reported is a decision of the House of Lords. We need not set out the various pieces of evidence relied upon in that case. Lord Watson held that Dunn's use of the words "Fruit-Salt" would have the effect of deceiving the people as there would be a suspicious connection between the two articles in the minds of many persons.

43. Another case relied upon by Mr. Rege is that of *Edward Hack for the registration of a Trade Mark* (1942) 58 R P. C. 91. In that case, an application was made for registration of the words "Black Magic" in respect of laxatives. The application was opposed by the proprietors of the mark "Black Magic", which was registered for being used in respect of "Chocolate and chocolates". The judgment shows that it could be held that there is a tangible danger of confusion, if it could be found that there is a risk of confusion in that some persons would be likely to think that the two "Black Magic" preparations were made by the same manufacturers, and others to wonder if this might be the case.

44. Another case relied upon by Mr. Rege was *Eastman Photographic Mate-*

rials Co. Ltd. v. The John Griffiths Cycle Corporation Ltd. and Kodak Cycle Co. Ltd. (1898) 15 R. P. C. 105. In that case, the Eastman Company were manufacturing Kodak cameras, and also started manufacturing certain cameras specially adapted for being used on bicycles, which were known as "Bicycle Kodaks". The Eastman Company had invented the mark "Kodak" and were using it in respect of their goods. Another company, John Griffiths Cycle Corporation Ltd., applied for registration of the word "Kodak" for cycles. They thereafter got registered a new company called "Kodak" Cycle Company Ltd. That company along with John Griffiths Cycle Corporation started advertising "Kodak cycles". The Eastman Company commenced an action against them for preventing the use by them of the mark "Kodak". Evidence was led in that case which showed a close connection between the bicycles and the photographic trades. It was held in that case that no intelligible reason had been suggested why the defendants took the term "Kodak" to be applied to their cycles, or registered that word as a Trade Mark, or used it as the title of the company, except for the purpose of connecting themselves in some way with the plaintiff company and its business; and that was their real and sole object. It was further held that the defendants' action in adopting the mark 'Kodak' and giving the name to the new corporation was really to try and get a monopoly of the word "Kodak" as connected with cycles, and that they wanted to use the word "Kodak" and acquire a monopoly of it, as applied to cycles, in the hope and intention of, in some shape or other, identifying their company with the plaintiff company whose "Kodaks" were so well known in the market to cause the public to suppose either that the defendant company was connected with the plaintiff company, or to lead the public to suppose that the goods which the defendant company was going to sell were the goods of the plaintiff company, and so to obtain the benefit of the large reputation of the plaintiff company. On those considerations, it was held that there was danger of confusion, and that no registration of the defendants' mark ought to have been made.

45. The next case relied upon was that reported in *In the matter of an application by Ferodo, Ltd.*, 62 R. P. C. 111. It was an application for defensive registration of the mark "Ferodo" in connection with Pharmaceutical articles and tobacco and certain smokers' requisites. The mark was registered in several clauses but it was principally used for brake linings and clutches. The Judgment in that case is useful as it shows that in judging whether there is a tangible danger of decep-

tion or confusion resulting, a test would be whether the person seeing the mark attached to the new class of goods would assume that they originated from the proprietor of the mark or a registered user. It further shows that in assessing whether there is a tangible danger of deception or confusion, the nature of the goods is an important factor, for more special in character those goods are and, the more limited their market, the less likely will be the inference that there is such a tangible danger.

46. Mr. Rege also relied upon the judgment in the case of *Walter v Ashton*, (1902) 2 Ch. D. 282. In our opinion, the principles governing this aspect of the case are well established, and it is not necessary to refer to any further authorities in support of those principles.

47. Mr. Bhabha took us through the judgments in the said three cases reported in (1890) 7 R. P. C. 311, (1942) 58 R. P. C. 91 and (1898) 15 R. P. C. 105. He also invited our attention in detail to the facts in those cases, and the points of similarity and distinction between those cases and our case, and how, in the light of the comparisons and distinctions made by him, those principles should be applied to this case. He pointed out that in all those cases, there was a trade connection between the competing goods. He argued that, therefore, the principle of trading on another's reputation as a factor likely to cause deception or confusion would apply only when the user of both the marks was confined to the same or similar classes of goods. He argued that the principle of causing confusion would not be applicable when it was alleged that advantage was sought to be taken of the reputation of the opponents generally, and not in respect of the reputation in respect of the actual user in connection with a particular class of goods. In our opinion, it is not necessary to go in detail into the aspect of comparisons and distinctions as pointed out by Mr. Bhabha. One must never forget that what Section 11(a) requires to be decided is whether the mark sought to be registered is likely to deceive or cause confusion. That likelihood must vary on the facts of each case. Human conduct is varied and complex. The importance of a particular fact or facts may vary in the perspective of the totality of the facts of each case. The importance of a particular fact may increase or diminish when considered in combination with different sets of facts. What has to be decided in a case is whether on the totality of the facts of that case, it is likely that there would be deception or confusion. It would, therefore, be totally misleading to rely only on some individual fact or facts from a decided case and put emphasis on them without taking into ac-

count other facts in combination with which that particular fact was looked upon as yielding any principle. All factors which are likely to create or allay deception or confusion must be considered in combination. Broadly speaking, factors creating confusion would be, for example the nature of the mark itself, the class of customers, the extent of the reputation, the trade channels, the existence of any connection in the course of trade, and several others. Of course, it need not be stated that it would not be that all such factors would exist in each and every case.

48. Now, before proceeding to consider the facts of this case, it is necessary to bear in mind that in proceedings for application of registration, the onus of proving that the mark is not calculated to deceive or cause confusion lies on the applicant. That proposition is well established. For example, see the judgment of Lord Watson in the above case in (1890) 7 RPC 311 and also the judgment in Edward Hack's case, in (1942) 58 RPC 91.

49. In this case, the goods are totally different. There is no trade connection between them. There is no connection in the course of trade, nor any common trade channels. There are factors against holding that there would be any danger of deception or confusion. But we must consider the factors which tend to show that there is a likelihood of creating deception or confusion. The opponents have been using their mark on a very large scale since 1937. Their sales in 1956 exceeded Rs. 30 crores. Their publicity is wide spread and large. In 1956 they spent over a million rupees on advertisements. The goods in respect of which they use the trade mark "Caltex" are mainly petroleum, kerosene and lubricants like greases and oils etc. The goods in respect of which the applicant seeks registration are mainly watches. The class of goods in respect of which the applicant seeks registration is wider than watches and watches can be both costly and cheap. It cannot go without notice that the goods in respect of which the applicant in fact used the mark before he applied for registration were very cheap watches. The goods of the opponents are used by persons all over India, in cities and in villages, in different walks of life, rich or poor, literate or illiterate. The goods of the applicant are different in nature. But they are watches. They can be cheap watches. The potential market for them is, therefore, similar to that of the existing market of the opponents, in the sense that the goods of both the parties are not special goods. They are goods which would be purchased by the common man. Now, so far as the word "Caltex" is concerned, it is common to

the opponent's mark as also to the opponents' name. To mention the mark "Caltex" is also to mention the name of the owner. The mark is unlike the Lion or the "Stag" mark where there would be no direct connection between the mark and the name of its owner. The opponents are a large company known by many as having large resources, and therefore, capable of starting any new industry or trade. Because of that reason, there is a greater probability of the public believing that any goods with the mark "Caltex" on them would be the goods of the opponents. This is, in our opinion, sufficiently established by the 36 affidavits referred to above. The deponents of these 36 affidavits are from different parts of India, and from different vocations. In this connection, it may be stated that one of the deponents, Pujara, in his cross-examination, has stated that he would not be confused if he found the mark "Caltex" on other goods, like potato chips, hats, umbrellas, etc. Such evidence on this particular point is not of much assistance. A witness who says so may be more particular or may have a sub-conscious background, whereby he makes the necessary distinction between the mark as used on different kinds of goods. Although such evidence would be weak, even such weak evidence has not been produced by the applicant. There is no affidavit on behalf of the applicant of any witness who says that he would not be so deceived or confused. But, there is the evidence of Rajpal, who even in his cross-examination has stated that he would take all goods bearing the mark "Caltex" to have been manufactured by the opponents. The evidence of the other deponents as contained in their affidavits is similar. There is an additional factor to be taken into consideration. The applicant has given no explanation why he selected the word "Caltex". Mr. Bhabha contended that although the applicant has not specifically stated the reason for his selection, it can be inferred from the other statements of the applicant on the record. He pointed out that the applicant has stated that in about April 1955 he had gone to Switzerland; that he saw the mark applied by Degoumois & Co. on their watches; and that their watches had good sales. He says that these facts by themselves provide the reason for his making the selection. But, unfortunately for the applicant, it is also his evidence that Degoumois & Co. had other marks in respect of their watches. As a matter of fact, on the first order which the applicant placed with Degoumois & Co., which is dated 6th April 1955, the mark originally selected by him in respect of the categories of watches covered thereby was "Sandy",

which also was a mark of Degoumois & Co. He got the mark "Sandy" changed to "Caltex" only subsequently. Why he made the change has not been explained. It would be legitimate to infer that he selected the mark "Caltex" to take advantage of the reputation of that mark as used by the opponents in connection with their goods. The applicant's selection of the mark was made, to use the words of Lord Denning in 1962 RPC 265 (HL), with intention to deceive and cause confusion, and he must, therefore, be given credit for success in his intention, and we should not hesitate to hold that the use of that mark is likely to deceive or cause confusion. In this connection, the following passage from the judgment in *Edward Hack's case*, (1942) 58 RPC 91, occurring at p. 106 is relevant:

"I think that a large number of persons if they heard of a laxative called 'Black Magic' or saw advertisements of a laxative called 'Black Magic' would be likely to think that that laxative was made by the same firm who made the 'Black Magic' chocolates".

On the facts of this case, we have no hesitation in holding that a large number of persons, if they see or hear about the mark "Caltex" in connection with watches, would be led to think that the watches were in some way connected with the opponents, or they would at least wonder whether they were in any way connected with the opponents. Persons seeing the mark attached to watches, which is a new class of goods, would assume, or are most likely to assume, that they originated from the proprietor of the mark, namely, the opponents.

50. We are, therefore, of the opinion that if the application for registration is granted and the mark is used in connection with the goods in respect of which the application is made, it is likely to cause deception and confusion.

51. Mr. Rege urged that the applicant acted dishonestly in selecting the mark "Caltex", with the intention of trading on the wide reputation which that mark enjoys in India, that the applicant's case is not founded on truth, and that, because of these two reasons, the applicant should be held disentitled to registration under the discretionary provisions contained in cl. (e) of Section 11 of the Act. Under that provision there is prohibition against registering a mark "which would otherwise be disentitled to protection in a Court." The provision contained in cls. (a) to (d) of that section shows that the factor which is to be taken into account for not registering a mark is a factor connected with the mark itself, in contradistinction, for example, to a factor concerning the person applying for registration or the facts or circumstances under

which or the intention with which he applies for registration. The provision contained in clause (e) is discretionary. It is to be considered in cases when an application is made for registration. Such application has to be made under S. 18. Sub-section (4) of Section 18 also contains a provision for the exercise of discretion in accepting or refusing to register, because it provides: "the Registrar may refuse the application or may accept it absolutely or subject to such amendments, modifications, conditions or limitations, if any, as he may think fit." Both these provisions confer a discretion in accepting or refusing registration. It would be unreasonable to ascribe to the Legislature an intention to provide for such a discretion at two places in the same enactment, and that too without making any distinction as to the circumstances under which it can be exercised, or the objects for which it should be exercised. It leads to the conclusion that the Legislature intended to make a provision for the exercise of discretion but in different set of circumstances under clause (e) of Section 11 and under sub-section (4) of Section 18. In this connection, Mr. Bhabha invited our attention to the following statement in Kerly on Trade Marks, 8th Edition at page 167:

"This section is directed to some positive objection to registration and not to mere lack of qualification. It contemplates some illegality inherent in the mark itself."

The statement is made in Kerly in relation to Section 11 of the English Act, which is, for this purpose, in *pari materia* with clause (e) of Section 11 of our Act. One of the cases relied upon by Kerly in support of that statement is that of *Hassan El-Madi's application for trade mark*, 71 RPC 281. In construing the provision of the English Act, Lloyd Jacob J. observed in that case at p. 295:

"In my judgment, the reference in Section 11 to disentitlement to protection in a Court of Justice is to be related to something inherent in the mark applied for. That to me would follow from the fact that the phrase is qualified by "by reason of its being likely to deceive or cause confusion or otherwise", and the fact that it introduces as proper for consideration any matter arising out of the form and nature of the mark applied for which could properly be objected to as unsuitable for inclusion in the Register." In our opinion, the prohibition contained in clause (e) of Sec. 11 must, therefore, be restricted to some illegality inherent in the mark itself and not de hors the mark itself. Mr. Rege's contention cannot be considered under the provisions of Section 11(e).

52. The question then arises whether the above two causes for disentitlement

urged by Mr. Rege can prevent registration under Section 18(4). There is no absolute right to registration, and the Registrar has discretion to refuse registration. That is the well-settled position in law, and neither side has naturally urged any contention to the contrary. Mr. Rege's allegation that the applicant was actuated by dishonesty in selecting the mark concerns his motive. The other allegation of Mr. Rege that the applicant's case was not founded in truth ascribes to the applicant dishonest conduct. Mr. Bhabha, however, contended that there is no such plea at all taken by the opponents before the Registrar, nor have any particulars in that behalf been given. This complaint is not justified. There is such a plea taken by the opponents. It is to be found in the very first document which they filed before the Registrar, namely, the Notice of Opposition. It is stated in para 5 of the grounds of opposition. In the language in which it is taken, however, dishonesty as such has not been specifically stated. But what has been stated is that the Registrar should in the exercise of his discretion refuse to grant the application for registering the mark. But after the notice of opposition was filed, the opponents filed the affidavit of Berv dated 8th December 1959. In para 15 of that affidavit, it is stated that any one in India using the trade mark "Caltex" as a trade mark on goods not of the manufacture of Caltex (India) Ltd. would be using it merely for the purpose of deceiving the public into supposing that they are manufactured by Caltex (India) Ltd. This is a clear allegation of dishonesty and the plea was taken before the Deputy Registrar before the proceedings before him concluded. In any event, that plea was argued before the Deputy Registrar, and the Deputy Registrar has recorded a finding on that plea. It was also argued before Mr. Justice Shah, and he also has recorded his finding on that plea. The applicant did not, at any stage, register any protest, and it is, therefore, not open to him now to resist this argument on the ground that it was not pleaded at all. But there is another ground to hold against this particular contention of the applicant. What Mr. Rege has urged is that the Registrar ought to have exercised his discretion against registering the application of the applicant. The discretion has been vested in the Registrar under Section 18(4), for protection of the interests of the general public. In this connection, the judgment in *Midland Counties Dairy Ltd. v. Midland Dairies Ltd.*, (1943) 65 RPC 435, may be referred to. In that case, no fraud was alleged, and as a matter of fact, the chief witness for the plaintiff disclaimed any allegation of fraud. It was argued that in these circumstances, the Court should exclude all

considerations of fraud from its mind. It was held "In my opinion the Court is not bound by the form of the pleadings, or by disclaimer on the plaintiff's behalf, to shut its eyes to a case of fraud if convinced that one exists." It is clear that the discretion has been vested under Section 18(4) so that the tribunal can satisfy its conscience and satisfy itself that registration of the mark would not operate as a fraud on the general public. In our opinion, therefore, it is open to Mr. Rege to urge this contention. Even if he did not urge it, it is our duty to see that what has been alleged by Mr. Rege against the applicant does not exist in the way of the application being registered.

53 and 54. (After discussing evidence His Lordship proceeded:—)

55. In our opinion, due to both the above reasons the discretion under Section 18(4) should have been exercised against registering the applicant's application. The Deputy Registrar has, however, exercised the discretion in favour of registration. Mr. Justice Shah held against exercising that discretion in favour of registering the application. He thereby interfered with the exercise of the discretion by the Deputy Registrar and actually exercised it conversely. The question arises whether in the circumstances of this case there was reason to interfere with the exercise of his discretion by the Deputy Registrar. This discretion is a judicial discretion, and the Deputy Registrar's exercise thereof should be overruled only if he has applied wrong principles of law or has not appreciated the facts before him.

56. These principles can be gathered from *In the matter of William Bailey Birmingham Ltd.* 52 RPC 136 and *In the matter of J. & P. Coats Ltd.* 53 RPC 355. Now, in this case, the material portion of the decision of the Deputy Registrar is as follows:

"The opponents have very vehemently urged that the application should be refused by the Tribunal in the exercise of its discretion. No doubt Section 18 of the Trade and Merchandise Marks Act, 1958 confers upon the Registrar a discretion to refuse or accept an application but then such discretion has to be reasonably and not capriciously exercised and must be based upon judicial and legal principles. Having regard to the findings of fact arrived at by me in this case, namely, that the competing goods are entirely different in character and that the respective trade channels are entirely different and that despite the reputation acquired by the opponents' mark the applicant's mark will not reasonably be likely to deceive or cause confusion, I fail to see on what legal or judicial basis can I justifiably exercise the discretion adversely to the applicant. Moreover, in view

of my aforesaid findings, any exercise of discretion adversely to the applicant in the present case would in effect amount to giving a monopoly to the opponents in the word "Caltex" irrespective of any goods whatsoever and that, would be throwing to the winds and doing violence to the basic principle of the Law of Trade Mark which permits the use and registration of the same mark by two different persons in respect of goods entirely different in character."

It is clear that the Deputy Registrar has taken into account two factors for deciding that he could not exercise his discretion against the applicant.

57. Taking the second factor first, he felt that the exercise of his discretion adversely to the applicant would, in effect, amount to giving a monopoly to the opponents in the word 'Caltex' irrespective of any goods whatsoever. The use of the words "in the present case" suggests that he was limiting his statement that "any exercise of discretion adversely to the applicant would in effect amount to giving a monopoly to the opponents" to this particular case only, and that he was not stating it by way of a general proposition applicable to all cases. Therefore, this statement must be considered in that restricted sense. In our opinion, read in that restricted sense it is difficult to understand its meaning. How could the exercise of the discretion against the applicant result in the creation of a monopoly in the opponents in the word "Caltex" in respect of every conceivable kind of goods? The exercise of his discretion against registration would disentitle only the applicant to use the mark "Caltex." But that would not be creation of a monopoly in the opponents. A monopoly means a sole right being vested in the applicant to use mark to the exclusion of all other persons. By the mere fact of exercising discretion in that way, none other than the applicant would be disentitled to use the mark in respect of goods falling in the classes other than those for which the opponents have registered their mark. It is quite clear that even if the discretion was exercised against the applicant, it could not have conferred any monopoly on the opponents as apprehended by the Deputy Registrar, or prevented any other person in a fit case from using the word "Caltex" as his trade mark in respect of other goods as permitted under the trade mark law. Thinking in terms of monopoly in this context was basically wrong. When considering the question of the exercise of his discretion the Deputy Registrar has taken into account a principle which had no application to the facts of this case.

58. Turning now to the first reason, the Deputy Registrar felt that there was

no legal or judicial basis for exercising the discretion adversely to the applicant because of the findings of fact which he has arrived at. No finding of fact arrived at by him, either individually or cumulatively with the other findings of facts, would make the exercise of his discretion against the applicant otherwise than on a legal or judicial basis. The findings of fact arrived at by him in connection with the proprietorship of the applicant and the question whether there was a tangible danger of deception or confusion arising, were arrived at by him for those purposes only. He had to reconsider those findings of fact, to the extent that they were relevant for the purpose of exercising discretion in conjunction with various other facts which were relevant for that purpose and which we have already pointed out when considering the two grounds urged by Mr. Rege in support of exercising the discretion against registering the application. He has, therefore, failed to appreciate, that is, to take into consideration, all the relevant facts. A Court is therefore entitled to interfere with such an exercise of discretion. The approach would have had to be different if the Deputy Registrar had considered the other questions of fact, weighed them and come to a conclusion that he ought to exercise the discretion against the applicant. In the latter event a Court could have interfered, not merely because the Court would, on its own, have taken a different view, but only if there was something fundamentally wrong in his appreciation of the facts concerned. What the Deputy Registrar felt was that in view of his findings of fact, he was debarred from considering the other relevant facts either by themselves or even in combination with the facts as found by him, for the purpose of deciding how to exercise his discretion. This is not a case of merely a wrong appreciation of the facts before him by the Deputy Registrar. It is much stronger. In these circumstances, therefore, we are of the opinion that the learned Judge was justified in interfering with the exercise of his discretion by the Deputy Registrar.

59. The appeal, therefore, fails and is dismissed with costs.

60. Liberty to the respondent's attorneys to withdraw the sum of Rs. 500 deposited by the applicant as security for costs in this appeal.

VGW/D.V.C.

Appeal dismissed.

AIR 1969 BOMBAY 40 (V 56 C 6)
KOTVAL, C. J. AND K. K. DESAI, J.
 Indian Express Newspapers (Bombay)
 Ltd. Appellants v. Basumati Private Ltd.
 Respondents.

O. C. J. Appeal No. 35 of 1966; Summary Suit No. 4 of 1966, D/- 7-12-1967.

(A) Civil P. C. (1908), S. 10 and O. 37 Rr. 2 and 3 (as amended in Bombay) — Stay of suit — Summary suit — Questions to be decided are not of merits of claim and defence between parties — Defendant need not obtain leave to appear, though such leave is necessary to defend the suit — Appearance by defendant to apply for stay of plaintiff's suit subsequently filed — Leave to appear not necessary.

Having regard to the scheme of Order XXXVII as amended by Bombay High Court, it is now not necessary for a defendant to obtain leave to appear in a summary suit. He can also make applications which do not raise a defence to the suit without obtaining leave to defend. It is also clear that when ordering a suit to be stayed under the provisions of Section 10 the questions that the Court decides are not those of merits of claim and defence between the parties. The Court has to ascertain if a previously instituted suit is pending in a Court of competent jurisdiction and whether the matter in issue in the subsequently instituted suit is directly and substantially in issue in the previously instituted suit. AIR 1955 All 309 (FB), Rel. on. (Para 14)

A defendant in a summary suit would be entitled to apply to the Court for stay of the subsequently instituted suit. This is so because the true intent of the provisions in Section 10 is that common matters in issue in two suits should be ordinarily decided in a previously instituted suit. This would be the position even if the subsequently instituted suit may be a summary suit. (Para 15)

(B) Civil P. C. (1908), Ss. 100 and 101 — Question of fact — Date of institution of suit — Concession regarding the date on which plaintiff lodged the plaint in a suit in accordance with Rr. 104 and 105 of Bombay High Court Original Side Rules — Held that concession related to question of fact and was binding on party in second appeal. AIR 1934 Bom 91, Disting. (1940) 44 Cal WN 604 and (1935) ILR 62 Cal 1115 and AIR 1940 Oudh 441, Ref. (Para 12)

Cases Referred: Chronological Paras
 (1966) 68 Bom LR 407=1966 Mah LJ 649, Krishnanath Balkrishna v. Ram Ratan 14
 (1966) Appeal No. 45 of 1966 D/- 5-9-1966 (Bom.), Shantiniketan Co-op. Housing Society Ltd. v. Oil Corporation of India (Pvt.) Ltd. 18

(1962) AIR 1962 Bom 241 (V 49)=63
 Bom LR 947 (FB), Elphinstone Etc. Mills v. Sondhi Sons 18
 (1957) AIR 1957 Andh Pra 491 (V 44)=1956 Andh WR 197, Sriramchandra v. Mahalakshamma 18
 (1957) AIR 1957 Cal 727 (V 44)=61 Cal WN 559, Shorab Modi v. Mansato Film Distributors 19
 (1955) AIR 1955 All 309 (V 42)=ILR (1955) 1 All 295 (FB), Ramrichpal Singh v. Dayanand Sarup 14
 (1954) 56 Bom LR 916, Jagannath Murlidhar v. Rupchand 14
 (1954) AIR 1954 Mad 1057 (V 41)=ILR (1954) Mad 1052 (FB), Central Brokers v. Ramnarayana Poddar & Co. 18
 (1953) AIR 1953 SC 198 (V 40)=1953 SCR 1159, Asrumati Debi v. Kumar Rupendra Deb Rajkot 18
 (1953) AIR 1953 Bom 80 (V 40)=54 Bom LR 754, Dewanchand & Sons v. Dora Few 14
 (1953) AIR 1953 Bom 117 (V 40)=54 Bom LR 844, Jai Hind Iron Mart v. Tulsiram 19
 (1940) 44 Cal WN 604, Suproakash Chandra v. Amulliya Chandra 9, 11
 (1940) AIR 1940 Oudh 441 (V 27)=ILR 16 Luck 184, Raisuddin v. Basti Sugar Mills Ltd. 9
 (1935) ILR 62 Cal 1115, Heerendranath Datta v. Dheerendranath Niyogi 9
 (1934) AIR 1934 Bom 91 (V 21)=36 Bom LR 84, Ram Gopal v. Ram-sarup 9, 10, 11, 12
 (1933) AIR 1933 Bom 85 (V 20)=35 Bom LR 15, Jiwani Lal v. Pirojshaw 19
 (1927) AIR 1927 Bom 480 (V 14)=29 Bom LR 981, Dharamsi Chemical Co. v. Ochharlal 10
 (1926) AIR 1926 Bom 250 (V 13)=28 Bom LR 138, Pestonji v. Jamshedji 14
 (1925) AIR 1925 PC 150 (V 12)=28 Bom LR 1488, Diwanchand v. Weld & Co. 10
 (1922) AIR 1922 Bom 276 (V 9)=ILR 46 Bom 431, Sennaji Kapurchand v. Pannaji Devchand 14
 (1912) 1912-1 KB 259=81 LJKB 439, Symon & Co. v. Palmer's Stores Ltd. 14

A. B. Diwan with S. J. Sorabji instructed by Chimanlal Shah and Co., for Appellants; F. S. Nariman with Mr. Murzaban Mistree instructed by Divekar and Co., for Respondents.

K. K. DESAI J.: This is the plaintiff's appeal from the order dated March 30, 1966, passed by Mr. Justice Mody on the defendants' Notice of Motion dated February 11, 1966, whereby the Summary Suit No. 4 of 1966 was stayed pending the hearing and final disposal of the defendants' Suit No. 2270 of 1965 in the High Court at Calcutta with liberty to the plaintiffs to proceed with their above

suit in so far as it concerned the plaintiffs' two claims of Rs. 5,000/- and Rs. 582/-. The costs of the Notice of Motion were made costs in the cause.

2. The relevant facts are as follows:

3. In March 1963 the plaintiffs sold and the defendants purchased from the plaintiffs Hoe Rotary Printing Machine for the price of Rs. 2,50,000. Originally, the defendants had executed in favour of the plaintiffs' Bankers a demand promissory note thereunder promising to pay the said price along with interest at $7\frac{1}{2}$ per cent per annum. The plaintiffs demanded payment of the price repeatedly by correspondence which forms part of the annexures to the plaint. The promissory note executed in favour of the plaintiffs' Bankers was in August 1964 substituted by a demand promissory note for the above sum of Rs. 2,50,000 and interest at $7\frac{1}{2}$ % per annum directly in favour of the plaintiffs. That promissory note was antedated May 30, 1963, and a copy of that promissory note is Ex. D to the plaint. The defendants paid three respective amounts of Rupees 2,000 each respectively on June 15, October 29 and December 31, 1964, to the plaintiffs towards interest payable in respect of the above price. On December 11, 1964, the plaintiffs sold and delivered three Inter-Type Machines of the value of Rs. 5,000 to the defendants. In March 1965, at the instance of the defendants the plaintiffs deputed their employee one P. M. Rajgopalan from Bombay to Calcutta in connection with the working of the machinery and thereby incurred the expense of Rs. 582. The defendants paid further amount of Rs. 2,000 for interest on March 29, 1965. They further paid a sum of Rs. 1,00,000 towards the debt of the price and the promissory note on August 12, 1965. In spite of repeated demands made in correspondence, the defendants failed to make further payments. As the defendants failed to make further payments, the plaintiffs ultimately filed the above Suit No. 4 of 1966 on the Original Side of this Court for recovering the aggregate sum of Rupees 1,92,684.72 in respect of the price of the machineries delivered and the expense of Rs. 582 incurred. The plaintiffs claimed interest at the rate of $7\frac{1}{2}$ per cent per annum from December 16, 1965.

4. In December 1965 the defendants filed their Suit No. 2270 of 1965 in the High Court at Calcutta. The defendants thereafter proceeded to take out the Notice of Motion dated February 11, 1966, for stay of the trial of the plaintiffs' above suit until the disposal of the defendants' suit at Calcutta. By an ex parte application made on February 10, 1966, the defendants obtained an order of an interim stay of the plaintiffs' suit pending the hearing of their Notice of

Motion. The defendants had filed their appearance in the plaintiffs' suit and but for the above ad interim injunction the plaintiffs would have in accordance with the rules governing summary suits proceeded to take out a summons for judgment in connection with the claim made in the suit. Ordinarily, the defendants would have on such summons for judgment by affidavit in reply shown cause and indicated their defence to the suit and applied for leave to defend the suit. The plaintiffs were prevented from taking out the summons for judgment because the defendants had obtained ad interim injunction as mentioned above. The plaintiffs filed their affidavit in reply on the defendants' Notice of Motion on February 5, 1966 and took out a Notice of Motion dated March 8, 1966, claiming that pending the hearing of the plaintiffs' suit the defendants should be restrained by an order of injunction from proceeding with their Calcutta suit. Both the Notices of Motion came to be disposed of by Mr. Justice Mody by a common judgment delivered on March 30, 1966.

5. In support of their Notice of Motion the defendants by their affidavit and arguments contended that the plaintiffs' suit was instituted on January 10, 1966. That is the allegation in paragraph 2 of the affidavit in support made by Dilip-Sen Gupta on February 5, 1966. The defendants pointed out by diverse allegations that the matter in issue in the plaintiffs' suit was directly and substantially in issue in the defendants' suit pending in the High Court of Calcutta which had jurisdiction to grant the relief claimed in the suit. By their affidavit in reply, the plaintiffs denied that the Calcutta suit was instituted prior to the institution of their suit. They denied that the Calcutta suit was instituted on December 23, 1965. As regards their own suit the plaintiffs pointed out in paragraph 10 of the affidavit in reply the following facts:

"The plaint x x x was signed and declared x x x on 20th December 1965, along with petition for leave under clause 12 of the Letters Patent. Leave under clause 12 was granted x x x on 22-12-1965 and the plaint was lodged on the same day. The Courts were closed on 24-12-1965 and reopened on 10-1-1966. The Prothonotary and Senior Master appears to have admitted the plaint on the reopening of the Courts on 10th January 1966 and the suit is taken as filed on 10-1-1966."

As regards the defendants' suit, they stated: "It appears that the plaint in the Calcutta suit was declared on 23rd December 1965. Leave under Clause 12 of the Letters Patent is also asked for in the said suit. There is nothing to show whether leave under Clause 12 of the Letters Patent was granted and if so

when." At the hearing, on behalf of the plaintiffs, it was not contended that the defendants' suit was not filed in the High Court of Calcutta on December 23, 1965. In that connection, the learned Judge has stated that:

"There is no dispute that the said Calcutta Suit No 2270 of 1965 was filed on 23rd December 1965."

As regards their own suit, the plaintiffs appear to have stated that their suit must be deemed to have been filed on December 24, 1965. In that connection, the learned Judge recorded: "There is now no dispute that the present suit must be deemed to have been filed on the 24th of December 1965." Apparently, it was not contended before the learned Judge that the Plaintiffs' suit could be considered as having been filed at any time prior to December 24, 1965. Having regard to the statements and contentions made as above before him, as regards the question whether the defendants' suit was previously instituted, the learned Judge held: 'It is, therefore, clear as a question of fact, that the Calcutta suit was filed one day earlier than the present suit'.

6. The learned Judge negatived the contention that the matters in issue in the Bombay suit were not substantially the same as those in the Calcutta suit. The plaintiffs' contention was that their claims for the price of Rs. 5,000 in respect of three Inter-Type Machines and for Rs 582 being the expenses incurred for deputing P. M. Rajgopalan to Calcutta were not subject-matter of the Calcutta suit. In the result, the Court should hold that the matters in issue in the Bombay suit were not substantially the same as those in the Calcutta suit. The learned Judge held that the two claims on the basis whereof the above contention was being advanced by the plaintiffs were triable in this Court. They were subject-matter of separate causes of action, but the rest of the claims in the suit were matters in issue in the defendants' suit at Calcutta and arose as a separate cause of action from the other two claims and were liable to be stayed under Section 10 of the Code of Civil Procedure. The plaintiffs' contention that the defendants could not appear and take out a Notice of Motion for stay unless they had obtained leave to defend in accordance with the procedure prescribed for summary suits was negatived by the learned Judge. The learned Judge held that leave of the Court was required only for the purpose of defending the suit. The application for stay of the suit did not amount to an application or a step in the nature of defending the suit. Having made the above findings on the Notice of Motion of the defendants, the learned Judge granted stay to the extent already mentioned

above. The learned Judge has dealt with the contentions made by the parties on the Notice of Motion of the Plaintiffs for injunction against the defendants from proceeding with the Calcutta suit. We are not concerned with that part of the judgment in this appeal.

7. On behalf of the plaintiffs, the following contentions are made:

(1) The plaintiffs' suit in this Court was previously instituted suit. The contention was that the plaintiffs' suit must be held to have been instituted when the plaintiffs presented on December 20, 1965, their petition for leave under Clause 12 of the Letters Patent along with the plaint in this suit.

(2) Under Section 10 of the Code of Civil Procedure the direction is that the Court in which a subsequent suit is filed should not proceed to a trial thereof. In summary suit having regard to the procedure prescribed in respect thereof, "the trial" does not commence in any event until after defendant obtains leave to defend. In this case, the question of trial of the suit had not arisen because the defendants had not obtained leave to defend. The order for stay was, therefore, not correct.

(3) Partial stay of a part of the suit cannot be granted under Section 10. As the plaintiffs' claims for Rs. 5,000 and Rs. 582 were not liable to be stayed, the other part of the plaintiffs' claim was not liable to be stayed.

8. On behalf of the defendants, each of these contentions was denied. It was further contended that an order granting stay was not a judgment within the meaning of Clause 15 of the Letters Patent and the above order was, therefore, not appealable. It was also contended that the plaintiffs had approached the Supreme Court for special leave to appeal in respect of the above order by Special Leave to Appeal Petition No. 736 of 1966. In the matter of that petition the defendants had appeared as caveators. The Supreme Court had rejected that petition by its order dated August 16, 1966. The plaintiffs had accordingly no right of appeal.

9. In connection with the first contention that the plaintiffs' suit was previously instituted, Mr. Diwan has repeatedly drawn our attention to the facts alleged on behalf of the plaintiffs in paragraph 10 of the affidavit in reply, which we have already quoted above. He has emphasised that the plaintiffs had approached this Court for obtaining leave under Clause 12 of the Letters Patent by a petition signed and declared on December 20, 1965. The plaintiffs had along with that petition produced the plaint in this suit for examination thereof by the Court for consideration of

the petition for leave under Clause 12. He has in that connection relied upon the statement in paragraph 1 of the petition for leave that "the said plaint is lodged in the office of the Prothonotary and Senior Master of this x x Court for admission". He has insisted that without submission of the plaint in connection with the leave application the Plaintiffs could not have obtained an order dated December 22, 1965, whereby leave under Clause 12 had been granted. His insistence was that when the plaintiffs submitted the plaint along with the leave application the plaintiffs had duly presented the plaint to this Court and had accordingly instituted the suit within the meaning of the provisions in Order VI Rule 1 of the Code of Civil Procedure as discussed in the case of *Ramgopal v. Ramsarup*, 36 B. L. R. 84 = (AIR 1934 Bom 91). He pointed out that in that case the observations of *Beaumont, C. J.*, were to the effect that presentation of the plaint for obtaining leave under Clause 12 of the Letters Patent amounted to institution of suit. He further argued that this very case had been followed by the High Court at Calcutta in the case of *Suproakash Chandra v. Amullya Chandra*, (1940) 44 Cal WN 604. He relied upon the decision in the case of *Heerendranath Datta v. Dheerendranath Niyogi*, (1935) ILR 62 Cal 1115 where also the Court had held that presentation of the plaint to a Court was equivalent to institution of suit in Court. In this very connection, he referred to the case of *Raisuddin v. Basti Sugar Mills, Ltd Basti*, ILR 16 Luck 184 = (AIR 1940 Oudh 441) where, in connection with a pauper suit, the Court held that the same must be held to have been instituted at the date when the pauper petition was presented.

10. In reply, Mr. Nariman for the defendants has contended that the true construction of the provisions in Section 10 of the Code of Civil Procedure is that two live suits must be on the record of two competent Courts. That was according to him the effect of the word "pending" contained in Section 10. A suit to be held to be previously instituted within the meaning of that section must be a suit which is "admitted" on the file of a Court of competent jurisdiction and not merely a suit in respect whereof a plaint might have been previously presented. The contention was that mere presentation or lodging of the plaint for examination was not relevant to ascertain the fact about the date of institution of a suit in an inquiry under Section 10. The result of this contention, according to him, was that the plaintiffs' suit must be held to have been instituted and/or filed on January 10, 1966. His further and more emphatic contention was that the argument

on behalf of the plaintiffs that their suit was filed on December 20, 1965, was contrary to all arguments advanced and concession made in the trial Court. He emphasised that having regard to the contention made on behalf of the defendants in their affidavit that the plaintiffs' suit should be considered as having been filed on January 10, 1966, a very serious question about the date when the plaintiffs' suit was instituted had arisen. On that question the plaintiffs had not contended that their suit had been filed on December 20, 1965, when the petition for leave under Clause 12 had been filed or on December 22, 1965, when such leave was granted, but arguments were advanced on the footing of a concession that the suit was instituted and must be "deemed" to have been instituted when on December 24, 1965, after payment of Court-fees on that day the plaintiffs had lodged the plaint in the office of the Court. He has in that connection very strongly relied upon the learned Judge's statement in his judgment that "there is now no dispute that the present suit must be deemed to have been filed on the 24th of December 1965." He has contended that if on behalf of the plaintiffs the contention that their suit was instituted on December 20 had been made the defendants would have contested that question of fact and would have by leading evidence proved all details as to how the plaint was dealt with between December 20 and 24, on which last date the Court-fee stamps were for the first time affixed to the plaint. He has pointed out the fact that the docket of the plaint is annexed after the Court-fee stamps were included on December 24. Admittedly, these stamp papers did not form part of the plaint that was forwarded to the Court along with the petition for leave under Clause 12. He has relied upon the endorsement showing cancellation of the stamp papers on December 24, 1965. He has in that connection relied upon the endorsement made by the office of the Court that the plaint was "lodged" at "3 p.m." on December 24. In this very connection he has also pointed out that the practice of the Court is that a lodging register mentioning particulars of the date and time when plaints are lodged is maintained in the Prothonotary's office. The relevant entries in that register would show that the plaint in the plaintiffs' suit was for the first time presented for lodging at 3 p.m. on December 24. He has referred us to the endorsement "admitted" on the plaint and registers like suit register maintained by the office of the Court in connection with all suits. He has submitted that the question about the date of the institution of the suit was allowed by the Plaintiffs to be decided by the trial Court on a concession that though the suit had been 'admitted' on

January 10, 1966, since the plaint was 'lodged' on December 24, 1965, the Suit must be "deemed" to have been instituted on that day. In his submission, having regard to what has been observed in several authorities including the observations of the Privy Council in *Diwanchand v. Weld & Co.*, 28 Bom LR 1488 at p. 1495=(AIR 1925 PC 150 at p. 153) the concession of fact that the plaintiffs made as above cannot be permitted to be withdrawn except in special circumstances and without strong and adequate reasons. His further submission was that if the plaintiffs had insisted that their suit was instituted on December 22, oral evidence would have been recorded between the parties and the defendants would have had opportunity to cross-examine the evidence tendered on behalf of the plaintiffs. The contention now made on behalf of the plaintiffs related to a question of fact and cannot be allowed to be raised as the defendants did not have any opportunity to cross-examine the evidence that might have been tendered on behalf of the plaintiffs. In connection with the word "deemed" used in the sentence quoted above from the learned Judge's judgment, he pointed out that in the case of *Dharamsi Chemical Co. v. Ochhavilal*, 29 Bom Lit 981 at p. 986 = (AIR 1927 Bom 480 at p. 482), Blackwell, J., held that a suit must be deemed to have been instituted when a plaint is "lodged" for examination under the Rules of the Original Side of this Court. It was for that reason that in spite of the fact that the plaintiffs' suit was admitted on January 10, 1966, the concession of the plaintiffs was recorded by stating that the present suit must be deemed to have been filed on December 24, 1965. In connection with the case of 36 Bom LR 84=(AIR 1934 Bom 91) his submission was that the observations in that case must be confined to the question of the date of institution of suit arising under (Section 3 of) the Indian Limitation Act. In that connection he has relied upon the provisions in Sections 5 and 40 of the Court-fees Act and pointed out that a document not bearing proper stamp fees would always have to be considered as not valid and such as could not be received by Court or by any public officer. He has for that reason submitted that in no event the plaint in the present suit could be a valid document before the Court-fee stamps were cancelled on December 24, 1965. The earliest date when the plaintiffs' suit could be held to have been instituted would, therefore, never be prior to December 24, 1965.

11. Now, in this connection, it is true that in the case of 36 Bom LR 84=(AIR 1934 Bom 91) one of the questions which arose for decision was "when was the suit instituted within the meaning of Sec-

tion 3 of the Indian Limitation Act? The plaint in that case was handed over to an officer in the Prothonotary's office on May 25, 1932. On the face of the plaint it was apparent that leave to sue was required under Clause 12 of the Letters Patent. On behalf of the appellants it was contended that in such a case the plaint could not be presented except to a Judge who was the only person who could give leave to sue under the Letters Patent and that the presentation of the plaint to the proper officer in the Prothonotary's office did not amount to institution of the suit where leave to sue was required under Clause 12. Dealing with that contention, Beaumont, C. J., observed:

"x x x x, and the clause provides in effect that until leave is granted the Court shall not receive, try or determine the suit. But, I think, that the argument of the appellant really involves a confusion between "presentation of the plaint" and 'admission or receipt of the suit'. To my mind, the plaint, even where leave is required, is presented when it is handed over by the plaintiff or his agent to the proper officer in the Prothonotary's office. If leave is required, the plaint must be submitted to the Chamber Judge and leave obtained from him under cl. 12 of the Letters Patent. When that leave is obtained the officer in the Prothonotary's office must see that the plaint is in order and admit it under Order IV, Rule 2, and he cannot admit the plaint until the leave of the Judge has been obtained. But, to my mind, the obtaining of the leave of the Judge and the admission of the plaint does not affect in any way the presentation of the plaint for the purposes of the Indian Limitation Act."

Now, these observations of the learned Chief Justice have been followed in the case of (1940) 44 Cal WN 604. It is, therefore, contended on behalf of the plaintiffs that in this case the observations of the learned Chief Justice are wholly applicable. There can be no dispute that the plaint was signed and declared on December 20, 1965. The petition for leave under Clause 12 was presented on December 20, 1965. Along with the petition the plaint was forwarded to the Court so that after examining the same leave could be granted to the plaintiffs.

12. In this connection, Mr. Nariman is right that the observations of the learned Chief Justice were made with reference to the provisions in the Explanation to Section 3 of the Indian Limitation Act which were noticed in the Judgment. The Explanation provided: "A suit is instituted, in ordinary cases, when the plaint is presented to the proper officer". It is, therefore, true that the

learned Chief Justice was in the above decision only considering the question as to what should be considered the date of institution of a suit having regard to the provisions in Section 3 of the Indian Limitation Act. Mr. Nariman has further pointed out from records that in the case of 36 Bom LR 84=(AIR 1934 Bom 91) oral evidence was tendered before Mr. Justice Blackwell in the trial Court for proving facts about the manner in which the plaint was dealt with. He has, therefore, insisted that the decision of the learned Chief Justice was on the basis of findings of facts made by Mr. Justice Blackwell in the trial Court. He has, therefore, insisted that if opportunity had been afforded to the defendants, they would have proved that in this case the plaint was not "lodged" as in the case of 36 Bom LR 84=(AIR 1934 Bom 91) on the date when the petition for leave under Clause 12 was instituted. He insists that in the case of 36 Bom LR 84=(AIR 1934 Bom 91) the plaint had been "lodged" in Court even before leave under Clause 12 had been granted. In this connection, both sides have attempted to discuss before us the practice that has been followed in the office of the Prothonotary since 1954 when for the first time ad valorem Court-fees became payable in respect of suits and claims instituted in the High Court. Mr. Diwan read to us a notice that had been put up by the Prothonotary's office as to when Court-fee stamps need be affixed to the plaint when leave under Clause 12 was necessary. Admittedly, before 1954, i.e. when ad valorem Court-fees were not payable in respect of suits and claims to be instituted in the High Court, a separate petition for leave under Clause 12 of the Letters Patent was never filed. Application for leave under Clause 12 was made in the original plaint itself and "leave granted" was endorsed on the plaint itself by Court. The plaint was ordinarily "lodged" even before the question of leave under Clause 12 was considered. It is clear from the record of this suit that in connection with a petition for leave under Clause 12 the office of the Court is now willing to receive the (draft) plaint in an intended suit without Court-fee stamps annexed to it. We are unable to ascertain as to how the parties deal with a plaint in respect whereof leave under Clause 12 is refused. We are not aware as to in what manner plaints in respect whereof leave under Clause 12 is granted are dealt with. Apparently, in respect of claims in such a plaint, the Court-fee stamps would have to be affixed subsequent to the date of the order granting the leave under Clause 12 if the plaint does not carry such affixed stamps. How and when an Attorney of the plaintiffs will affix such stamps and whether even after leave is

granted he has not the liberty not to institute suits has not been ascertained. This situation arose because on behalf of the plaintiffs it was not insisted before the learned Judge that their suit had been instituted by presentation of the plaint along with the petition for leave under Clause 12 of the Letters Patent. The reason why the learned Judge stated in the judgment that "there is now no dispute that the present suit must be deemed to have been filed on the 24th of December 1965" was that the plaintiffs being aware of the Rules 100 to 105 of the Original Side Rules relating to the institution of suit and the fact that the plaint was "lodged" at "3 P. M." on 24th December, did not argue that the plaint was duly presented to any of the officers of the Court prior to December 24, 1965. The above Rules relate to institution of suits in this Court. Rule 100 refers to the manner and method of preparation of plaint and in that connection provides that particulars as required under Order VII, rules 1 to 8, of the Code of Civil Procedure should be included in the plaint. Rules 102 and 103 relate to the manner of verification of the plaint and appearance of Attorneys. Rules 104 and 105 provide:

"104. All plaints shall, except in cases of special urgency be lodged with the Assistant Master x x x x for examination, x x x x previous to their being presented to the Judge, and the plaintiff or his Attorney shall attend next morning before the Judge."

"105. The plaint and documents therewith, when so lodged, shall be properly stamped with uncanceled stamps ready for filing."

It is sufficient to state that the plaintiffs admitted before the trial Court that in accordance with Rule 104 the plaint was "lodged" with the appropriate officer for the first time at 3 p.m. on December 24 and that it was on that very day that the plaintiffs had annexed the uncanceled stamp to the plaint. Mr. Diwan, however, with intent to have the principles in the case of 36 Bom LR 84=(AIR 1934 Bom 91) applied to the plaintiffs' suit contends that the concession that was made on behalf of the plaintiffs to the learned Judge was a concession of law and not of fact and that such a concession is ordinarily held to be not binding on a party. He, therefore, submits that we should decide this appeal on the footing that the plaintiffs had in fact duly presented and lodged the plaint in this suit on December 20, along with the petition for leave under Clause 12 of the Letters Patent. Having regard to what has been discussed above, we are not prepared to accept the contention that the concession that was made on behalf of the plaintiffs that was a concession on a point of law. It

is clear to us that the concession regarding the date of the institution of the plaintiffs' suit that was made before the learned Judge was in respect of a question of fact, i.e., the date on which the plaintiffs lodged the plaint in this suit in accordance with the provisions in Rules 104 and 105. In fact, having regard to the facts stated on behalf of the plaintiffs it would be impossible to hold that the plaint in this case was "lodged" in Court at any time before December 24, 1965. In our view, if the plaintiffs wanted to contend that they had duly "lodged" the plaint in Court on December 20, 1965, along with the petition for leave under Clause 12 of the Letters Patent, they ought to have raised such a contention before the learned Judge and ought to have proved the same by leading sufficient evidence in that connection. This appeal, under the circumstances, is liable to be disposed of on the footing that the concession made on behalf of the plaintiffs before the trial Court is binding on them and that the plaint in the suit was "lodged" in Court for the first time in accordance with the provisions in Rules 104 and 105 on December 24, 1965. In the result, the finding of the learned Judge that the suit must be deemed to have been filed on December 24, 1965, binds the parties.

13. As we have come to the above conclusion, we do not find it necessary to discuss in detail the contentions made on behalf of the parties as regards the true construction and effect of the provisions in Sections 5 and 40 of the Court-fees Act. It is sufficient to state that Mr. Nariman contended that the plaint that was submitted along with the petition for leave under Clause 12 of the Letters Patent having not been duly stamped with Court-fees was not a valid plaint. In his submission, the plaint was never valid before the Court-fee stamps were annexed to the plaint for cancellation on December 24, 1965. In that connection, reference was made by both the parties to the provisions in Section 149 of the Code of Civil Procedure and discussion in diverse authorities on that section. Having regard to the above finding, it is unnecessary to discuss these authorities.

14. The second contention made on behalf of the plaintiffs was that the defendants were not entitled to take out the above Notice of Motion before obtaining leave to defend. In that connection, Mr. Diwan argued that under Section 10 of the Code the direction to Court is not to proceed with the trial of any suit. Relying upon the scheme of Order XXXVII of the Code and observations in the cases of Symon and Co. v. Palmer's Stores (1903), Ltd., (1912) 1 KB 259 and Dewanchand and Sons v. Dora Few, 54 Bom LR 754 = (AIR 1953 Bom 80), he contended

that trial in a summary suit never commences in any event until and after a defendant obtains leave to defend. In that very connection, relying upon the observations in the case of Sennaji Kapurchand v. Pannaji Devichand, 11R 46 Bom 431 = (AIR 1922 Bom 276) and other authorities, he had pointed out that interlocutory orders are permitted to be made in suits ordered to be stayed. On the basis of these authorities, he contends that the plaintiffs had a right to issue a summons for judgment and unless the defendants at the hearing of such summons had been given leave to defend the trial of the plaintiffs' suit could not commence. The contention is that the scheme of Order XXXVII is that the plaintiffs were entitled to a judgment without any trial if the defendants did not obtain leave to defend. The submission on the above footing is that before considering the above Notice of Motion, the learned Judge should have permitted the plaintiffs to have issued a summons for judgment and considered the question about granting or refusing to the defendants leave to defend. The reply of Mr. Nariman on behalf of the defendants is that the above Notice of Motion claiming stay of the plaintiffs' suit does not raise defence to the plaintiffs' suit at all. The provisions in Section 10 are mandatory and obligatory and in the result whenever facts to which the provisions of Section 10 may be applicable are disclosed to or brought before a Court, it would be obligatory to order stay of suit. He further contends that the scheme of Order XXXVII now enables a defendant to file his appearance without obtaining leave in that connection. The scheme of Order XXXVII which previously prevented a defendant from appearing without obtaining leave has now been amended. In that connection, he relies upon the observations made in Krishnanath Balkrishna v. Ram Ratan, (1966) 68 Bom LR 407 and Jagannath Murlidhar v. Rupchand, (1954) 56 Bom LR 916. In the last referred case, on behalf of the plaintiff, it was contended that in the summary suit that was before the Court the defendant was not entitled to take out a Notice of Motion for recording a compromise because he had not obtained leave to defend. The contention was negated after noticing that the marginal note to Order XXXVII Rule 3 was "Defendant showing defence on merits to have leave to appear". Tendolkar, J., however, held that under Order XXIII Rule 3 it was obligatory on the Court if an agreement of compromise was proved at any time before passing a decree to record the agreement and to proceed to pass a decree in terms of such an agreement. He observed that where a defendant seeks to have a compromise recorded he is not de-

fending a suit on merits and it was not necessary for a defendant in a summary suit to obtain leave to defend for the purpose of taking out a Notice of Motion for recording a lawful compromise. In the case of, (1966) 68 Bom LR 407, Mody, J., pointed out that the decision in the case of Pestonji v. Jamshedji, 28 Bom LR 138=(AIR 1926 Bom 250) was given in 1925 "and what applied then were the provisions of O. XXXVII, R. 3, of the Civil Procedure Code. Under O. XXXVII R. 3, it was not open to a defendant not only to defend the suit but even to appear in the suit except with the leave of the Court." He then referred to the amendments made in the scheme of Order XXXVII by this Court by exercising powers under Section 122 of the Civil Procedure Code and observed that after the amendments it was not necessary for the defendant to obtain the leave of the Court for filing his appearance although it continued to be necessary for him to obtain leave of the Court to defend the suit. In connection with the application before him made on behalf of the defendant for instalments, he held that the defendant was not applying for being heard in his defence and was making an application on the footing that the decree may be passed as applied for by the plaintiffs but that decree be made payable by instalments. It is sufficient to state that in our view, having regard to the scheme of Order XXXVII as amended by this Court, it is now not necessary for a defendant to obtain leave to appeal in a summary suit. He can also make applications which do not raise a defence to the suit without obtaining leave to defend. It is also clear that when ordering a suit to be stayed under the provisions of Section 10 the questions that the Court decides are not those of merits of claim and defence between the parties. The Court has to ascertain if a previously instituted suit is pending in a Court of competent jurisdiction and whether the matter in issue in the subsequently instituted suit is directly and substantially in issue in the previously instituted suit. Mr. Nariman is right in relying upon the observations of the High Court at Allahabad in the case of Ramrichpal Singh v. Dayanand Sarup, AIR 1955 All 309 (FB), where Malik, C. J., observed: "To my mind a plea under S. 10, Civil P. C. does not constitute a defence to the suit x x". It is clear that Mr. Diwan is not right when he contends that by claiming stay of the plaintiffs' suit by the above Notice of Motion the defendants were raising defence to the suit.

15. Now, even if Mr. Diwan may be right that the trial in summary suit does not effectively commence unless a defendant obtains leave to defend and com-

plies with the conditions imposed for such leave, in our view a defendant in a summary suit would be entitled to apply to the Court for stay of the subsequently instituted suit, this is so because the true intent of the provisions in Section 10 is that common matters in issue in two suits should be ordinarily decided in a previously instituted suit. This would be the position even if the subsequently instituted suit may be a summary suit. Now, if the contention made by Mr. Diwan is accepted, a plaintiff in subsequently instituted summary suit where defendant is refused leave to defend or does not comply with conditions imposed for leave to defend would get a decree as prayed without any trial whatsoever. In our view, the scheme of Section 10 does not permit such a situation to arise. This would be so even if Mr. Diwan is right in his submission that trial in a summary suit only commences after the defendant obtains leave to defend. In our view, an application under Section 10 of the Code of Civil Procedure does not raise any defence on the merits of controversy between the parties and relates only to the question about the proper Court for decision of such issues. This second contention therefore fails.

16. As regards the third contention that the learned Judge should not have granted stay of the suit because he was unable to stay the suit in connection with the claims for Rs. 5,000 and Rs. 582 it is sufficient to state that the defendants have in fact paid to the plaintiffs the sum of Rs. 5,000 being the price of the three Inter-Type Machines and have informed as that without prejudice to all their contentions they are forwarding to the plaintiffs the sum of Rs. 582 in respect of expenses incurred by the plaintiffs for deputing P. M. Rajgopalan to Calcutta. The defendants do not intend to go to a trial in respect of these two items in the plaintiffs' suit. The claim that will now survive in the plaintiffs' suit will only relate to the claim of the plaintiffs for the Hoe Rotary Printing Machine of the value of Rs. 2,50,000 and costs. That being the position on facts, it is not possible to accept Mr. Diwan's contention that the defendants' Motion is liable to be dismissed because only a partial order of stay can be issued.

17. As we have made findings on all the contentions made on behalf of the plaintiffs in favour of the defendants, we find it unnecessary to decide the correctness or otherwise of the preliminary objections made on behalf of the defendants.

18. Mr. Nariman contended that the order granting stay cannot be held to be judgment within the meaning of Clause

15 of the Letters Patent and accordingly this appeal is not maintainable. In that connection he referred to *Asumati Debi v. Kumar Rupendra Deb Rajkot*, 1953 SCR 1159=(AIR 1953 SC 198); *Elphinstone Etc. Mills v. Sondhi Sons*, 63 Bom LR 947=(AIR 1962 Bom 241) the unreported judgment of a Division Bench of this Court in the case of *Shantiniketan Co-operative Housing Society Ltd. v. M/s. Oil Corporation of India (Pvt.) Ltd.* in Appeal No. 45 of 1966 decided on September 5, 1966 (Bom.), the observations of the High Court of Madras in *Central Brokers v. Ramnarayana Poddar and Co.*, AIR 1954 Mad 1057 and *Sriramchandra v. Mahalakshammamma*, AIR 1957 Andh Pra 491 where the above Madras decision was followed. He submitted that inasmuch as by the order in appeal the suit of the plaintiffs has not been dismissed, the test of the final determination of the suit to render the order in appeal a "judgment" is not satisfied. He contended that what would happen in the defendants' suit at Calcutta whether it would be duly prosecuted, whether it would be decided on some preliminary contentions, whether issues of merits or controversy between the parties would be satisfactorily decided and/or not decided at all and such questions have all remained open. The effect of the order of stay granted by the learned Judge, in his submission, has only the effect of an order of adjournment of the suit. He contended that if the Calcutta suit is not decided on merits, ultimately the plaintiffs' suit would be tried by this Court. The suit thus does not stand terminated. For these reasons, according to him, having regard to the observations of the Supreme Court in the case of 1953 SCR 1159=(AIR 1953 SC 198) and what has been held by the High Court of Madras in AIR 1954 Mad 1057 the order in appeal should be held to be not a judgment and appealable.

19. Mr. Diwan has relied upon the decisions of this Court in the cases of *Jivanlal v. Pirojshaw*, 35 Bom LR 15=(AIR 1933 Bom 85) and *Jai Hind Iron Mart v. Tulsiram*, 54 Bom LR 844=(AIR 1953 Bom 117). The first case was an appeal from an order refusing stay of the suit under Section 10 of the Code. The appellant had contended that such an order was not a judgment within the meaning of Clause 15 of the Letters Patent. In their separate judgments Blackwell, J., and Beaumont, C. J., negatived that contention. The learned Chief Justice observed:

"x x x a decision of the Judge either to allow or to refuse a stay under that section is a decision, which in fact goes to the jurisdiction of the Court. If the case is brought within S. 10, then the Court has no jurisdiction to proceed with

the trial of this suit, so long as the earlier suit is pending; and when the earlier suit is determined, the matter in issue in this suit will probably be res judicata. Therefore, the decision of the Judge under S. 10 really determines the right of the plaintiffs to sue in this Court; and it seems to me that such a decision is a 'judgment' within cl. 15, of the Letters Patent and the authorities under that clause, and that such a decision is not a mere order relating to procedure in the suit."

Now, these observations of the learned Chief Justice have been referred to with approval by Chagla, C. J., in the next case referred to above. The very same is the effect of the observations of the High Court of Calcutta in the case of *Shorab Modi v. Mansata Film Distributors*, AIR 1957 Cal 727. As already stated, the question does not arise for adjudication in this appeal. It, however, requires to be stated that if we had to decide this question we would have been right in holding that we are bound by the observations made by the Division Bench of this Court in the above two Bombay cases.

20. As regards the contention that the plaintiffs have lost the right to proceed with this Appeal because the petition to the Supreme Court for leave to appeal being petition No. 736 of 1966 has been dismissed, it is sufficient to state that the order produced before us does not contain the grounds on which the leave application was rejected. It would be difficult, therefore, to proceed on the footing that the Supreme Court not only refused to grant leave but heard an appeal and dismissed the same on merits.

21. Though we have made findings against the plaintiffs, it requires to be stated that the learned Judge was right in finding that the defendants' suit at Calcutta is a vexatious suit. We agree with the reasoning of the learned Judge in arriving at that finding. Even on a cursory reading of the annexures to the plaint, it is clear that at material times the defendants had not raised any questions denying their liability to the plaintiffs for the price of the machinery mentioned in the plaint. On the contrary the defendants had executed promissory notes in that connection. The defendants had made payment of interest and also part payment of a sum of Rs. 100,000. It appears that having come to realise that because of their failure to make payment the plaintiffs were about to institute the above suit in this Court, the defendants forestalled them by filing the suit at Calcutta one day previous to the institution of this suit. Having regard to these facts, it appears to us that the defendants are not entitled to any costs of this appeal, though the appeal fails.

22. In the result, the appeal is dismissed. There will be no order as to costs.

GGM/D.V.C.

Appeal dismissed.

AIR 1969 BOMBAY 49 (V 56 C 7)

TARKUNDE, J.

Josephy Santa Vincent, Petitioner v. Ambico Industries, Bombay and others, Opponents.

Spl. Civil Appln. No. 1306 of 1966, D/- 13-10-1967.

(A) Constitution of India, Art. 227 — Error apparent on face of record — Petitioner aggrieved by a decree against him can invoke the jurisdiction of the High Court under Art. 227 if there is an error apparent on face of record though it may not be a jurisdictional error entitling him to file a revision under S. 115, Civil P. C. AIR 1966 SC 1361 and Spl. Civil Appln. No. 459 of 1965 D/- 15-12-65 (Bom.), Foll. (Para 10)

(B) Houses and Rents — Bombay Rent Act (57 of 1947), S. 15(2) (as added in 1959) — Scope — Word 'Tenant' includes a lawful sub-tenant — A sub-tenant of a contractual sub-tenant can claim protection of sub-section (2) of S. 15.

The word 'tenant' in Section 15 of the Bombay Rent Act means a contractual tenant as well as a contractual sub-tenant whose sub-lease is valid under the Act. It follows that sub-section (2) of Section 15 protects a transferee, whether by way of a sub-lease, assignment or otherwise, of a contractual tenant as well as a transferee of a lawful contractual sub-tenant. AIR 1965 SC 414, Rel on; (1963) 65 Bom LR 149 and AIR 1968 Bom 51, Disting; AIR 1966 Bom 113 and (1965) 68 Bom LR 400, Ref. (Paras 12 & 14)

Cases Referred: Chronological & Paras

- (1968) AIR 1968 Bom 51 (V 55) = 69 Bom LR 551, N. M. Nayak v. Chhotalal Hariram 6, 11
- (1966) AIR 1966 Bom 113 (V 53) = 67 Bom LR 452, Aninba D'Costa v. Parvatibai M. Thakur 15
- (1966) AIR 1966 SC 1361 (V 53) = (1966) 3 SCR 458, Surendra Nath Bibre v. Stephen Court Ltd. 10
- (1966) 68 Bom LR 400 = ILR (1967) Bom 385, Sohanlal Naraindas v. Laxmidas Raghunath Gadit 15
- (1965) AIR 1965 SC 414 (V 52) = (1964) 4 SCR 892, Anand Niwas Pvt. Ltd. v. Anandji Kalyanji's Pedhi 12
- (1965) Spl. Civil Appln. No. 459 of 1965 D/- 15-12-1965 (Bom.) 10
- (1963) 65 Bom LR 149 = ILR (1963) Bom 555, Balkrishna Maruti v. Saidanna Sayanna 2, 3, 5, 11

F. S. Nariman with V. R. Bhandare, for Petitioner; H. D. Banaji with R. Y. Rele, for Opponent No. 1.

ORDER: This petition has been filed with a view to challenge the legality of a decree passed by a Judge of the Bombay Small Cause Court and confirmed by an Appellate Bench of that Court. The property in dispute consists of a godown at Ballard Estate in Bombay. The godown is a part of an extensive estate which belongs to the Bombay Port Trust and which has been leased by the Port Trust to the first respondents Messrs. Ambico Industries. The first respondents let out the godown to the second respondents Messrs. William Jacks and Company Limited. In January 1957 the petitioner Josephy Santa Vincent went into the possession of the godown under an agreement with the second respondents. On August 1, 1959 the second respondents surrendered their tenancy to the first respondents. In April 1960, the first respondents filed a suit against the second respondents in the Bombay Small Cause Court for possession of the godown. The petitioner was not made a party to that suit. An ex parte decree for possession was obtained in that suit by the first respondents in October, 1960. When the ex parte decree was sought to be executed an obstruction was offered by the petitioner but the obstruction was ordered to be removed by the Court. The petitioner then filed a suit in the same Court for a declaration that he was the lawful sub-tenant of the second respondents and had become the tenant of the first respondents under Section 14 of the Bombay Rent Act on the determination of the second respondents' tenancy. After filing the suit, the petitioner obtained an order of interim stay against the execution of the ex parte decree. Due to some typing error in the stay order, however, the decree was executed and possession of the godown was obtained by the first respondents. Thereupon the petitioner got his plaint amended so as to add a prayer for restoration of possession of the godown.

2. The suit was dismissed by the trial Judge on two grounds. The learned trial Judge held, in the first place, that assuming the premises to have been sub-let by the second respondents to the petitioner in January 1957, the sub-lease was not validated by sub-section (2) of Section 25 of the Bombay Rent Act, that the premises cannot be held to have been lawfully sub-let to the petitioner, and that the petitioner cannot, therefore, be deemed to have become the tenant of the first respondents under Section 14 of the Act. The learned Judge observed in this connection that as the property belonged to the Bombay Port Trust the first respondents were the tenants of the godown, that the second respondents were the

sub-tenants and that the petitioner could only claim to be the sub-tenant of sub-tenants. Relying upon the decision in *Balkrishna Maruti v. Saidanna Sayanna*, (1963) 65 Bom LR 149 the learned trial Judge held that the petitioner, being the sub-tenant of a sub-tenant, cannot claim the protection of sub-section (2) of Section 15. Secondly, the learned Judge held that the petitioner had failed to prove that the premises had been sub-let to him in January 1957 by the second respondents. The learned Judge was of the view that the petitioner was only a licensee with the right of storing goods in the premises.

3. From this decree dismissing his suit the petitioner went in appeal to the Appellate Bench of the Bombay Small Cause Court. The appeal was summarily dismissed by the Appellate Bench. In its judgment the Appellate Bench proceeded on the assumption that the petitioner was a sub-tenant of the second respondents. Relying on the said decision in 65 Bom LR 149, the Appellate Bench held that a sub-tenant's sub-tenant was not protected by the Rent Act and that the trial Court was, therefore, justified in dismissing the petitioner's suit. The Appellate Bench did not decide the question whether the petitioner was a tenant or a licensee of the second respondents.

4. In order to appreciate the arguments addressed before me by Mr. Nariman for the petitioner and Mr. Banaji for the first respondents, it would be useful to refer to Sections 14 and 15 of the Rent Act. Section 14 provides in substance that where the interest of a tenant of any premises is determined for any reason, any sub-tenant to whom the premises or any part thereof have been "lawfully sub-let" shall be deemed to have become the tenant of the landlord on the same terms and conditions as he would have held from the tenant if the tenancy had continued. It follows that the petitioner can claim to have become the tenant of the first respondents on the determination of the tenancy of the second respondents if the premises had been lawfully sub-let to him by the second respondents. Now, Section 15 prior to its amendment by Ordinance No. III of 1959 ran as follows:

"Notwithstanding anything contained in any law, it shall not be lawful after the coming into operation of this Act for any tenant to sub-let the whole or any part of the premises let to him or to assign or transfer in any other manner his interest therein."

There was a proviso to this section with which we are not concerned. Section 15 was amended first by Bombay Ordinance No. III of 1959 which came into effect on 21st May 1959, and then by an Amending Act being Bombay Act No. 49 of 1959. By

the amendment the above provision of Section 15 (with a slight modification) was numbered as sub-section (1) and the following was added as sub-section (2):

"The prohibition against the sub-letting of the whole or any part of the premises which have been let to any tenant, and against the assignment or transfer in any other manner of the interest of the tenant therein, contained in sub-section (1), shall, subject to the provisions of this sub-section, be deemed to have had no effect before the commencement of the Bombay Rents Hotel and Lodging House Rates Control (Amendment) Ordinance, 1959 in any area in which this Act was in operation before such commencement; and accordingly, notwithstanding anything contained in any contract or in the judgment, decree or order of a court, any such sub-lease, assignment or transfer or any such purported sub-lease, assignment or transfer in favour of any person who has entered into possession despite the prohibition in sub-sec. (1), as a purported sub-lessee, assignee or transferee and has continued in possession at the commencement of the said Ordinance, shall be deemed to be valid and effectual for all purposes, and any tenant who had sub-let any premises or part thereof, assigned or transferred any interest therein, shall not be liable to eviction under clause (e) of sub-section (1) of Section 13.

The provisions aforesaid of this sub-section shall not affect in any manner the operation of sub-section (1) after the commencement of the Ordinance aforementioned."

5. In (1963) 65 Bom LR 149 referred to above, Mr. Justice Chandrachud had to decide the extent to which transfers which were invalid under Section 15, as it stood prior to the amendment, were validated by sub-section (2) which was added to that section. In the suit in that case, defendant No. 1 was the original tenant, defendant No. 1 had sub-let the premises to defendant No. 2, defendant No. 2 had sub-let the premises to defendant No. 3, defendant No. 3 had sub-let the premises to defendant No. 5, and it was defendant No. 5 who claimed to be in lawful possession of the premises by virtue of sub-sec. (2) of S. 15. The learned Judge held that defendant No. 5 could not claim the protection of that provision. The learned Judge observed:

"It seems to me difficult to take view that the intention of the Legislature was not only to validate transfers and assignments by tenants but also to legalise every transfer and assignment effected by the sub-tenants or by transferees and assignees of sub-tenants As I have stated earlier the protection which is intended to be conferred by the Ordinance can be availed of only by persons

who can be described as sub-lessees, assignees or transferees from the tenants..."

If the word "transfer" be used to cover a sub-lease, an assignment or any other type of transfer of a leasehold interest, the decision of the learned Judge amounts to this, that sub-section (2) of section 15 affords protection to the transferee of a tenant and not to a transferee of the tenants transferee.

6. The learned Judge's view with regard to the scope of sub-section (2) of Section 15 was upheld by a Division Bench consisting of Mr. Justice Patel and Mr. Justice Thakker in *N. M. Nayak v. Chhotalal Hariram*, 69 Bom LR 551=(AIR 1968 Bom 51). In that case the tenant of certain premises had assigned his leasehold interest to a certain person and the latter on his part had assigned his interest in the premises to the petitioner. One of the questions before the court was whether such assignee of an assignee of the leasehold interest was entitled to the protection of sub-sec. (2) of Section 15. In holding that the petitioner was not entitled to the protection, the Division Bench observed:

"The Legislature whilst introducing sub-section (2) intended to validate the sub-letting, transfer and assignment by tenants and not further sub-letting or further derivative transfer or assignment by such sub-lessees, transferees or assignees. In our opinion, the protection intended to be conferred by the Ordinance can be availed of by only those persons who can be described as sub-lessees, assignees or transferees from the contractual tenant."

7. Mr. Nariman on behalf of the petitioner made it clear that he did not accept the above cases as having been rightly decided but he agreed that these decisions are binding on me. Arguments on both sides were advanced before me on that basis.

8. Mr. Nariman argued that, in holding the petitioner in the present case to be disentitled to the protection of sub-section (2) of Section 15, the courts below had overlooked the fact that the second respondents, who had sub-let the premises to the petitioner, were themselves the lawful sub-tenants of the premises. Mr. Nariman referred in this connection to clauses (a) and (b) of sub-section (4) of Section 4 of the Bombay Rent Act. Sub-section (1) of Section 4 lays down that the Act shall not apply to any premises "belonging to the Government or a local authority" or apply as against the Government to any tenancy or other like relationship created by a grant from the Government in respect of premises taken on lease or requisitioned by the Government; but that it shall apply in

respect of premises let to the Government or a local authority. Clause (a) of sub-section (4) of Section 4 provides that the expression "premises belonging to the Government or a local authority" in sub-section (1) shall not include a building erected on any land held by any person from the Government or a local authority under an agreement, lease or other grant, even though the building may belong to the Government or the local authority, as the case may be. Then clause (b) of sub-section (4) of Section 4 lays down that "notwithstanding anything contained in Section 15" the person who holds such a building under an agreement, lease or other grant from the Government or a local authority shall be entitled to create a sub-tenancy in respect of the building or any part thereof. Since the premises in the present case belong to the Bombay Port Trust, it follows from the above provisions that the first respondents, who hold the premises from the Port Trust, were not precluded by Section 15, as it stood before the amendment, from sub-letting the premises to the second respondents. The second respondents were thus the lawful sub-tenants of the premises when they sub-let them to the petitioner. Mr. Nariman argued that the word "tenant" in Section 15 includes a contractual sub-tenant (like the second respondent) whose sub-lease is valid under the Act. According to Mr. Nariman, although the petitioner is a sub-tenant's sub-tenant, he is in the position of a tenant's sub-tenant, and is entitled to the protection of sub-section (2) of Section 15.

9. On behalf of the first respondents Mr. Banaji raised a preliminary objection to the effect that the argument advanced by Mr. Nariman cannot be entertained in this petition under Article 227 of the Constitution. On the merits Mr. Banaji argued that the second respondents were sub-tenants and not tenants as urged by Mr. Nariman and that the petitioner, claiming as he does from a sub-tenant, is not protected by sub-section (2) of Section 15 according to the rulings mentioned above.

10. On the preliminary objection Mr. Banaji argued that it was open to the petitioner to file a revision application under Section 115 of the Civil Procedure Code from the decrees passed by the Courts below and that the hearing of this petition under Article 227 of the Constitution must, therefore, be confined to such contentions as can be entertained by this court in the exercise of its revisional jurisdiction. Since no error was committed by the Courts below in the exercise of their jurisdiction, this petition, according to Mr. Banaji, was not tenable. I do not find any merit in this preliminary objection. If a revision application

were an adequate remedy in the present case, the petitioner would not have been entitled to invoke the jurisdiction of this court under Article 227 of the Constitution. This petition has been filed because, according to the petitioner, the decrees passed by the courts below are vitiated by an error of law which is apparent on the face of the record, but which is not an error in the exercise of their jurisdiction. In Spl. Civil Appln. No. 459 of 1965, decided by a Division Bench of this Court on 14th and 15th December 1965, it was held that a party who is aggrieved by a decree passed against him, and who claims that the decree is vitiated by an error of law apparent on the face of the record, can approach this court under Article 227 of the Constitution, if the error is not capable of being corrected under Section 115 of the Civil Procedure Code. Moreover, the question must now be held to have been concluded by the decision of the Supreme Court *Surendra Nath Bibre v. Stephen Court Ltd.*, AIR 1966 SC 1361. That was an appeal from the judgment of the Calcutta High Court in an application which had been filed in the High Court under Section 115 of the Civil Procedure Code as well as Article 227 of the Constitution. What was challenged before the High Court was a decree of the Court of Small Causes, Calcutta. The Supreme Court held that, since the application in the High Court had been filed under Article 227 of the Constitution as well as Section 115 of the Civil Procedure Code it was open to the High Court to correct an error of the Court below which was not an error in the exercise of that Court's jurisdiction. In the case before me the alleged error of law of the Courts below is apparent on the face of the record and the petition is, therefore, tenable under Article 227 of the Constitution.

11. Turning to the main question, namely, whether the petitioner is entitled to the protection of sub-section (2) of Section 15 of the Rent Act, it appears to me, in the first place, that the question is not covered either by the decision of Mr. Justice Chandrachud in (1963) 65 Bom LR 149 or by the decision of Mr. Justice Patel and Mr. Justice Thakkar in 69 Bom LR 551=(AIR 1968 Bom 51). As mentioned above, it was held in those cases that Section 15(2) protects a transferee of the leasehold interest from a tenant but not the transferee of a transferee. The courts in those cases, however, had no occasion to consider the scope of the word "tenant" in sub-sections (1) and (2) of Section 15. This was because in both the cases the persons who claimed the protection of sub-section (2) of Section 15 had derived their interest in the premises in dispute from

transferors who were themselves unlawful transferees under Section 15, as it stood before the amendment and who could not claim to be tenants by virtue of that section. In the present case the petitioner claims under the second respondents who were lawful sub-tenants of the premises in dispute and who, according to the petitioner, were in the same position as a tenant under Section 15 as it stood before the amendment. Now, a lawful sub-tenant like the second respondents, while he is a sub-tenant in relation to the owner of the premises, is also a tenant in relation to the head-tenant. The relations between the head-tenant and the sub-tenant are not different from the relations between a landlord and a tenant. Both the relations are governed by the provisions of the Rent Act. In matters such as fixation of rent or recovery of possession of the premises the tenant in relation to the sub-tenant has the same rights and obligations as the landlord in relation to his tenant. More than one category of sub-tenant are lawful tenants under the Rent Act. One category consists of those sub-tenants who had derived their title under tenants before the commencement of the Rent Act. Another category is the one to which the present second respondents belonged; it consists of sub-tenants of those tenants who are the lessees of buildings belonging to Government or local authorities. The second respondents in this case were admittedly the tenants of the first respondents and the question is whether the second respondents were not covered by the word "tenant" which was used in S. 15, as it stood before the amendment, and which has been used in sub-sections (1) and (2) of Section 15 as it stands at present. The Courts in the cases referred to above were not required to deal with such a question.

12. In my view, there are sound and indeed compelling reasons for holding that the word "tenant" in Section 15 includes a lawful sub-tenant. The meaning of the word "tenant" in section 15 was considered by the Supreme Court in *Anand Nivas Pvt. Ltd. v. Anandji Kalyanji's Pedhi*, AIR 1965 SC 414. A majority of the Court held that the tenant under section 15 means a contractual tenant. With reference to sub-section (1) of Section 15 Mr. Justice J. C. Shah, delivering the judgment of the majority, said:

"By clause (1) of section 15 all transfers and assignments of interest in the premises, and sub-letting of premises, by tenants, are, subject to any contract to the contrary made unlawful. The clause however saves contracts to the contrary and to be effective can operate only in favour of contractual tenants. A statutory tenant having no interest in the property it was plainly unnecessary to prohibit

transfer of what was ineffective. Nor can there be letting of the premises by a statutory tenant, for letting postulates a transfer of the right to enjoy property made for a certain time, express or implied, in consideration of price paid or promised, and a statutory tenant has merely a personal right to resist eviction. Section 15(1) therefore applies only to contractual tenants."

After pointing out that sub-section (2) of Section 15 is in terms an exception to sub-section (1), his Lordship went on to observe:

"The exception clause could manifestly not apply to statutory tenancies when the principal clause applied only to contractual tenancies. The effect of the clause is to validate assignments, transfers and sub-tenancies granted by contractual tenants, despite the prohibition contained in sub-section (1) or even in the contract of tenancy and this validation is effective, notwithstanding any judgment, decree or order of a Court".

Thus the reason why, according to the Supreme Court, the word 'tenant' in Section 15 means only a contractual tenant is that a contractual tenant, in the absence of the prohibition contained in sub-section (1) of that section, is normally entitled to transfer his leasehold interest by sub-lease, assignment or otherwise, whereas a statutory tenant has no transferable right in the premises occupied by him. Now, a right to transfer the leasehold interest can, in the absence of the prohibition contained in sub-section (1) of Section 15, be exercised not only by a contractual tenant but also by a contractual sub-tenant. This is clear from the terms of clause (i) of Section 108 of the Transfer of Property Act. That clause lays down that, in the absence of a contract or local usage to the contrary, "the lessee may transfer absolutely or by way of mortgage or sub-lease the whole or any part of his interest in the property, and any transferee of such interest or part may again transfer it." Now, it is obvious that the Legislature, in enacting Section 15 of the Bombay Rent Act, could not have intended that a contractual tenant should be prohibited from transferring his leasehold interest, but that a contractual sub-tenant should be at liberty to do so. It must, therefore, follow that the word 'tenant' in Sec. 15 both before and after its amendment, includes a contractual sub-tenant like the second respondents and that the petitioner as the sub-tenant of the second respondents can lawfully claim the protection of sub-section (2) of Section 15.

13. It appears to me that the correctness of the above conclusion is borne out by another consideration. If I were to

accept Mr. Banaji's argument and hold that the second respondents, being sub-tenants of the premises, were not tenants under Section 15 of the Act, the petitioner would still be a lawful sub-tenant of the premises without being required to depend upon the protection of sub-section (2) of Section 15. This is because, on the supposition that the second respondents were not tenants under S. 15, they were not subject to the prohibition contained in that section, and were entitled under the terms of clause (i) of S. 108 of the Transfer of Property Act to grant a valid sub-lease to the petitioner. Thus, if the second respondents are held not to be tenants under S. 15, the result would be that the petitioner would be a lawful sub-tenant of the premises without being required to rely on sub-section (2) of S. 15 and can, therefore, claim to have become the tenant of the 1st respondents under S. 14 on the determination of the second respondents' tenancy.

14. I must accordingly hold that the word 'tenant' in S. 15 of the Bombay Rent Act means a contractual tenant as well as a contractual sub-tenant whose sub-lease is valid under the Act. It follows that sub-section (2) of S. 15 protects a transferee, whether by way of a sub-lease, assignment or otherwise, of a contractual tenant as well as a transferee of a lawful contractual sub-tenant. The petitioner is, therefore, entitled to the protection of sub-section (2) of section 15, provided he was a sub-tenant and not merely a licensee of the second respondents.

15. As mentioned earlier, the Appellate Bench of the Small Cause Court has given no finding on whether the learned trial Judge was right in his conclusion that the petitioner was a licensee and not a sub-tenant of the second respondents. Mr. Nariman urged that, since the Appellate Bench has not considered that question, I should myself consider and decide it. He argued that the relevant facts are hardly in dispute and that the legal position is now clear from the decisions of this court in *Aninba D'Costa v. Parvatibai M. Thakur*, 67 Bom LR 452 (AIR 1966 Bom 113) and *Sohanlal Naraindas v. Laxmidas Raghunath Gadit*, (1966) 68 Bom LR 400. Mr. Nariman further pointed out that, despite a stay order obtained by the petitioner from the trial court, he has lost possession of the premises on account of a typing error in the stay order, and Mr. Nariman therefore urged that the final decision of the suit should no longer be delayed. I am of the view that, since some contested questions of fact are likely to be involved, the question whether the petitioner was a sub-tenant or licensee of the second respondents should be decided by the Ap-

pellate Bench of the Small Cause Court. It would, however, be appropriate under the circumstances of the case to give a direction to the Appellate Bench to dispose of the case at a very early date.

16. In the result the judgment and decree passed by the Appellate Bench of the Bombay Small Cause Court is set aside, the appeal before the Appellate Bench is restored, and the Appellate Bench is directed to dispose of the appeal after hearing the parties on the surviving question mentioned above. The Appellate Bench will dispose of the appeal, as far as possible, within two months of the receipt of this order.

17. The first respondents will pay the petitioner's costs of this petition. In assessing costs, advocate's fees will be allowed at Rs. 500.

18. For the first respondents Mr. Rele says that at present the premises in dispute are in the occupation of the first respondents as well as one F. Buharivala. By consent it is ordered that subject to the above statement of Mr. Rele the interim injunction granted by this court on August 2, 1966 shall continue to be operative during the pendency of the appeal before the Appellate Bench of the Bombay Small Cause Court.

GGM/D.V.C. Petition allowed.

AIR 1969 BOMBAY 54 (V 56 C 8)

PATEL AND NAIN, JJ.

N. Nageshwar Rao, Petitioner v. Ruth Moses and others, Respondents.

Spl. Civil Appln. No. 1685 of 1967 D/- 4-3-1968.

(A) Co-operative Societies — Maharashtra Co-operative Societies Act (24 of 1961), S. 91 — Maharashtra Co-operative Societies Rules (1961), R. 76 — Appointment of nominees — Appointment is not for any particular period.

The Co-operative Societies Act does not contemplate the appointment of a nominee for a particular period. The Act contemplates the appointment of a nominee for a particular dispute. There is no limit on the power of the nominee to decide the dispute within a particular time. Nor does it say that after the year of the office is over, he would cease to be a nominee of the Registrar. Rule 76, which permits the Registrar to make these appointments, does not say that immediately after the so-called term of the nominee ends, he shall cease to function as a nominee. Even if the Rule had so provided, it is doubtful whether the Rule could be a valid one. The appoint-

ment of the nominees is not for a period of a year. The appointment is for deciding disputes arising within the year specified. (Para 6)

(B) Co-operative Societies — Maharashtra Co-operative Societies Rules (1961), R. 77 — Is permissive and not peremptory.

Rule 77 is a permissive Rule and it merely enables the Registrar, in a case where the nominee does not decide the dispute within two months, to withdraw the case and proceed with it as mentioned in the said Rule. It does not say that the nominee's power comes to an end if the nominee does not decide the dispute within two months. (Para 7)

Miss. Minocher Homji, for Petitioner
J. S. Raymond (for No. 1) and R. T. Slippy (for No. 2), for Respondents.

PATEL J.: This is a petition under Article 227 of the Constitution of India challenging the decision of the Maharashtra Co-operative Tribunal whereby it set aside the award made by the Registrar's Nominee and remitted the matter for retrial. The short facts necessary for the purpose of the case may be stated as follows: The petitioner, who was the original opponent No. 1 in the reference, is the owner of the flat consisting of three rooms and a kitchen on the ground floor of a building known as 'Mirabelle' belonging to Mirabelle Co-operative Housing Society Ltd., which (was?) the original disputant in the reference. The petitioner purchased this flat essentially for his personal residence. However, because of certain difficulties in his way he could not occupy the said premises and he, therefore, gave the same to respondent No. 1 as a licensee on June 9, 1962 for a period of eleven months. In November 1962 the Co-operative Society gave notice to the petitioner saying that respondent No. 1 and the members of her family were a nuisance to the occupants of the building. The petitioner, therefore, called upon respondent No. 1 to vacate the premises and deliver possession to him. It seems that since February 1963 not a pie has been paid to the petitioner towards compensation for the occupation of the premises. In the meantime, there have been litigations between these parties to which it is needless to refer. The compensation that has accumulated to this day comes to near about Rs 11,520. In pursuance to the Society's notice, the Society made a complaint before the Registrar regarding the conduct of respondent No. 1 and the members of her family as she was a source of nuisance and sought eviction. The Registrar after hearing respondent No. 1 referred the matter under S. 91

of the Co-operative Societies Act to his Nominee by an order dated December 17, 1965 in the following terms:

"I, Shri D. D. Naik, Assistant Registrar, Co-operative Societies, (II), Bombay, do hereby hold that the dispute within the meaning of S. 91(1) of the Maharashtra Co-operative Societies Act, 1960, exists in this case and the same is therefore referred to Shri S. M. Dixit, Registrar's Nominee for decision."

Respondent No. 1 took the matter to the Co-operative Tribunal challenging the reference by the Registrar. However, this appeal was rejected by the Tribunal and the Nominee was directed to decide the matter. The Nominee made his award on November 1, 1966. Respondent No. 1 took an appeal to the Co-operative Tribunal. The contention before the Tribunal was that the Nominee had ceased to have jurisdiction because by a general order the Registrar had appointed a body of Nominees for a period of one year and that the term expired on June 30, 1966. It was argued that as the award was made after this date, the award was a nullity. This contention found favour with the Tribunal with the result that it set aside the award and referred the matter back to the Registrar for reference to any other Nominee for disposal or to try it himself. The petitioner, who is the owner of the flat, seeks to challenge this decision.

2. Section 91 of the Maharashtra Co-operative Societies Act 1960 requires that all disputes touching the business of a Society shall be referred to the Registrar. Under Sec. 93 after being satisfied that the matter referred to him is a dispute within the meaning of S. 91, the Registrar may decide the dispute (a) himself, or (b) refer it for disposal to a nominee, or (c) a board of nominees, appointed by the Registrar, sub-sections (2) and (3) of section 93 are procedural sections. Sub-section (2) gives the Registrar the power to withdraw for reasons to be recorded in writing a dispute referred by him to the nominee or board of nominees and to decide it himself or to refer it for decision to any other nominee or board of nominees. Sub-section (3) gives him power to suspend the proceedings under certain circumstances with which we are not concerned. Sections 94 and 95 are procedural sections and do not concern us. Section 96 requires the Registrar or his nominee or board of nominees to make an award on the dispute, on the expenses incurred by the parties to the dispute in connection with the proceedings and the fees and expenses payable to the Registrar or his nominee or board of nominees. The section further protects the award and says that it would not be invalid merely because it has been

made after the expiry of the period fixed for deciding the dispute by the Registrar and shall subject to an appeal or review or revision be binding on the parties to the dispute.

3. The present argument has arisen because of the Rules made by the State Government by virtue of its rule-making powers under S. 165 of the Act of 1960. Rule 76 of the Co-operative Societies Rules, 1961 empowers the Registrar by a general or special order notified in the official gazette, to appoint any person to be his nominee for deciding disputes arising in any one or more societies situated in a particular area and for such period as may be specified. Similarly, he is also entitled to appoint a board of nominees for the same purpose. In the present case, these nominees were appointed by the Registrar, under Rule 76 in the following terms:

"Under Rule 76 of the Maharashtra Co-operative Societies Rules 1961 the Divisional Joint Registrar, Co-operative Societies is pleased to appoint the persons shown in the list enclosed to perform the duties as the Registrar's nominees for deciding disputes arising in any of the co-operative societies within the year specified against the respective names for the period from July 1, 1965 to June 30, 1966".

For Bombay and Bombay Suburban District as many as fifty-six gentlemen have been named as nominees.

4. The Tribunal holds that as soon as the year ended on June 30, 1966, the jurisdiction of the nominee ended and his award became a nullity. In our view, there are two answers to this conclusion.

5. A plain reading of the notification shows that the appointment of the nominees is not for a period of a year as is erroneously supposed by the Tribunal. The appointment is "..... for deciding disputes arising within the year specified". Clearly the appointment is for disputes that arise during the year. The dispute in the present case arose at the latest on December 17, 1965 when the Registrar referred the same to the nominee. He had, therefore, jurisdiction to decide the dispute which had arisen within the year. Unfortunately, this wording of the notification has not been noticed by the Tribunal and hence the error.

6. Secondly, it is obvious from a reading of the notification that these nominees are not the servants of the Registrar's Office or of the Government nor are they supposed to do the duties of a Court as a Court is supposed to do, to decide every matter that is brought before the person concerned. A dispute cannot be referred to fifty-six persons simultaneously. They are not constituted a body corporate in

the sense of a specific office where all the disputes are to be lodged. The only function of the notification or appointment is that it serves as a tentative list of nominees prepared by the Registrar and whenever a dispute arises and is required to be referred to a nominee under Section 91, the Registrar or the officer concerned chooses a particular nominee from amongst the list and refers the matter to the nominee. The result is that the reference is not to someone who holds an office. It is to the nominee as such named in the order of reference regarding a particular dispute. The Co-operative Societies Act does not contemplate the appointment of a nominee for a particular period. The Act contemplates the appointment of a nominee for a particular dispute and under S. 91 of the Act this is what the Registrar purported to do in his order dated December 17, 1965. There is no limit on the power of the nominee to decide the dispute within a particular time. Nor does it say that after the year of the office is over, he would cease to be a nominee of the Registrar. Rule 76, which permits the Registrar to make these appointments, does not say that immediately after the so-called term of the nominee ends, he shall cease to function as a nominee. Even if the Rule had so provided, we doubt very much whether the Rule could be a valid one.

7. Reliance was placed on Rule 77 which apparently expects the nominee to dispose of the matter within two months. Even this Rule is not a peremptory Rule. It merely provides that when a dispute is not decided by the nominee within two months, the Registrar may withdraw the dispute from the nominee or from the board of nominees as the case may be and decide the dispute himself or refer it again to any other nominee or a board of nominees for decision. This Rule is a permissive Rule and it merely enables the Registrar in a case where the nominee does not decide the dispute within two months to withdraw the case and proceed with it as mentioned in the said Rule. It does not say that the nominee's power comes to an end if the nominee does not decide the dispute within two months. That this could never be intended either by the Legislature or the rule-making authority is obvious. Though this Act is supposed to be in the interest of the Co-operative Societies and its members and is made with the intention that all these disputes should be speedily decided, unfortunately, as it may seem, it has provided a large number of loopholes which enable the parties to prolong the proceedings as much as they desire. Curiously enough, even though under S. 91 the Registrar has to decide whether a dispute has been made out

prima facie or not, it is made an appealable order. From the decision in appeal there is a further revisional application as decided by this court in another matter. Thereafter, there is still the remedy of the writ open to the party and all this only because a decision has been given whether a dispute exists and whether the matter should be referred to arbitration. After all, whether there is any merit in it has to be decided by the nominee when the matter is actually heard by him. If the contentions raised by the petitioner or the applicant are frivolous, the other side can be adequately protected by an order of costs in ordinary litigation. Be that as it may, having regard to the course these things take at the moment, no matter which is referred to the nominee may possibly be finished within a period of two months referred to in Rule 77 and it is for this reason that the Rules in the said Act do not make a provision that if the nominee does not render his award within two months, the nomination ends. For the reasons stated above, the decision of the Tribunal cannot be upheld. In our view, it is clearly erroneous.

8. We, therefore, set aside the decision of the Tribunal and direct that the matter shall be heard on merits. The petitioner will get his costs from respondent No. 1. The Tribunal to decide the matter within a month from the date of the record and the order reaching it.

HGP/D.V.C.

Order accordingly.

AIR 1969 BOMBAY 56 (V 56 C 9)

NAGPUR BENCH

ABHYANKAR AND PADHYE, JJ.

M/s. Chhotabhai Jethabhai Patel & Co., by its Manager, Petitioners v. Industrial Court, Nagpur and others, Respondents.

Special Civil Appln. No. 812 of 1966, D/- 12-4-1967.

Bombay Industrial Relations Act (11 of 1947), Ss. 78 (1) D (i), (ii) and (iii) (as introduced by Act 22 of 1965) and 42 (4) — Relief under S. 78 (1) D — Compliance with S. 42(4) not a condition precedent.

Where an employee claims reinstatement and payment of back wages and the Labour Court finds that the order of dismissal, discharge, removal or retrenchment from service made by the employer was vitiated on account of any of the three clauses (i), (ii) and (iii) of section 78 (1) D of the Bombay Industrial Relations Act, the Labour Court does not act without jurisdiction if the employee concerned approaches that Court for the relief of reinstatement and payment of back wages without complying with the provi-

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sions of Section 42 (4) of the Bombay Industrial Relations Act. Spl. Civil Appns. 345 of 1966 and 575 of 1966 D/- 11-3-67, Dist. (Paras 26, 21, 14)

Cases Referred: Chronological Paras (1967) Spl. Civil Appn. Nos. 345 of

1966 and 575 of 1966 D/- 11-3-1967 (Bom.) 23

(1955) AIR 1955 Bom 463 (V 42)=
ILR (1955) Bom 921, Lalbhai Tricumlal Mills Ltd. v. Dhanubhai Motilal 9A

Phadke and M. W. Puranik, for Petitioners; S. G. Kukday and N. H. Kumbhare, for Respondent No. 3.

ABHYANKAR J.: This is a petition under Art. 227 of the Constitution filed by Chotabhai Jethabhai, a bidi merchant. The third respondent Nathu Janu Ukey was employed as a Zai counting Munshi in the petitioner's factory at Bhandara. The petitioner contended that the third respondent had committed acts of misconduct, gross negligence of duty, insubordination and similar offences. A charge-sheet was therefore framed against him on 13-5-1965 and he was given notice to show cause in respect of these charges. The third respondent filed a written statement on 13-5-1965. He was informed that an enquiry would be held on 15-5-1965 at Bhandara. At the enquiry the enquiry officer ordered proceedings to be taken against the third respondent; he put questions to him and recorded his answers, and on considering those statements he held that the charges were proved and the third respondent was dismissed by the order of dismissal to be effective from 1-8-1965.

2. The third respondent filed an application challenging the order of dismissal before the Labour Court at Nagpur under Section 78 of the Bombay Industrial Relations Act, 1946. The application was filed on or about 5th August 1965. The third respondent raised several contentions in this application. He complained that the charge sheet was not proper, that the present head office had no authority to deal with the case of the third respondent under the standing orders, that no evidence was led and was filed on behalf of the employer, that the finding is based only on the statement made by the third respondent who was subjected to cross-examination, that the third respondent was forced to append his signature to the paper without reading it over to him.

3. In his written statement the petitioner traversed several allegations and supported the order. The Labour Court after a thorough enquiry held that the findings of the enquiry officer were perverse, that the order of dismissal was passed by a person not authorised to exercise the power, that the dismissal was

illegal and therefore the Labour Court directed that the third respondent should be reinstated and that all the back wages should be paid to him from the date of dismissal to the date of the order.

4. Against this order the petitioner preferred an appeal to the State Industrial Court. Among other grounds, the petitioner contended in ground No. 3 that the third respondent had failed to comply with the provisions of law by not making an application to the petitioner under Section 42(4) of the Bombay Industrial Relations Act which was a condition precedent to the making of an application by the worker to the Labour Court, and the order of the Labour Court was liable to be set aside on this ground.

5. The State Industrial Court upheld the order of the Labour Court. As regards challenge to the jurisdiction of the Labour Court based on the provisions of Section 42(4) of the Bombay Industrial Relations Act, the appellate Court held that the challenge involved a question of fact whether or not the respondent has complied with the provisions of Section 42(4) of the Act. The Court held that there is no material on record to justify the presumption that the respondent had not complied with the provisions of Section 42(4) and the challenge to the jurisdiction based on this objection was not tenable. As the objection raised, according to the State Industrial Tribunal, a mixed question of fact and law, the Court declined to interfere with the order of the Labour Court. In the result, the appeal failed and the order of the Labour Court was confirmed.

6. The petitioner challenges the order of the Labour Court as well as the State Industrial Court, but the only contention pressed before us was the one relating to Section 42(4) of the Bombay Industrial Relations Act. No arguments were addressed to us as regards the finding of the Labour Court that the order of dismissal was illegal or that the direction for reinstatement and payment of back wages to the third respondent was bad on any other ground. We are therefore required to determine a narrow question of law arising in the case and that question is where an employee claims reinstatement and payment of back wages and the Labour Court finds that the order of dismissal, discharge, removal or retrenchment from service made by the employer was vitiated on account of any of the three clauses (i), (ii) and (iii) of Section 78 (1) D of the Bombay Industrial Relations Act, whether the Labour Court acts without jurisdiction if the employee concerned approaches that Court for the relief of reinstatement and payment of back wages without complying with the provisions of

S. 42(4) of the Bombay Industrial Relations Act.

7. In resisting the contention it is urged on behalf of the third respondent that the right and remedy given under Section 78(1) D of the Bombay Industrial Relations Act is an independent remedy providing a complete code for its enforcement and is not controlled either by the provisions of Section 78 (1) A (a) (i) or Section 42(4) of the Bombay Industrial Relations Act.

8. Section 78(1) D has been introduced for the first time in the Bombay Industrial Relations Act, 1946, by Section 31 of the Maharashtra Act No. 22 of 1965. This Maharashtra Act 22 of 1965, which came into force in the whole of the State of Maharashtra from 1st of May 1965, made various amendments to Bombay Industrial Relations Act, 1946, which was in force in areas other than Vidarbha in the Maharashtra State till 1-5-1965. The preamble to Act 22 of 1965 shows that the Act made various amendments or additions and alterations to the Bombay Industrial Relations Act, 1946, because it was considered expedient to extend the Bombay Industrial Relations Act, 1946, as amended, throughout the State of Maharashtra and to repeal the corresponding laws in force in other parts of the State of Maharashtra, such as Vidarbha. Actually, the only other statute operating was the C. P. and Berar Industrial Disputes Settlement Act, 1947, which was in force in the Vidarbha region of Maharashtra. The Maharashtra Act 22 of 1965 amended the Bombay Industrial Relations Act and brought it in force in this region. In other words, this piece of legislation was undertaken by the State of Maharashtra Legislature to provide for a uniform law governing the relations between the employees and employers in the matter of industrial disputes and industrial adjudication and all other cognate and relevant matters. We must remember this background when interpreting the various provisions of the Bombay Industrial Relations Act, 1946, as amended and which is operating from 1st of May 1965 in the whole of Maharashtra.

9. The Legislative Assembly Bill No. 66 of 1964 is the genesis of the Maharashtra Act 22 of 1965. Section 31 of that bill recommended addition of a new paragraph in sub-section (1) of Section 78 of the Bombay Industrial Relations Act, 1946, and with reference to this paragraph and other changes recommended in Section 78(1) of the Act the statement of objects and reasons indicated that the new clause D was added to Section 78(1) of the Bombay Industrial Relations Act, in order to enlarge the powers of the Labour Court, to require an employer to

reinstate an employee with full back wages payable to him and compensation not exceeding Rs. 1500 and possibility of getting suitable employment more than six months prior to the action if such action is out of non-compliance with any standing order applicable to the employee. It will be seen that the third ground, namely, that the order of dismissal, discharge, removal or retrenchment, termination of service or suspension of an employee being found otherwise not proper or illegal was not in the original draft bill but was added to the statute when the Act was finally passed. It will thus be seen that clause D of section 78 (1) enables the Labour Court to require the employee to reinstate the employee either forthwith or by a specified date and requires that the employer shall pay back wages from the date of termination of service or suspension, and ending on the date on which the Labour Court ordered reinstatement or the date of reinstatement whichever is later. Several contingencies have been enumerated to enable the Labour Court to exercise its power and these contingencies are that the order of dismissal, discharge, removal, termination of service or suspension of an employee is made under one or the other of the following circumstances:

(1) That the order was passed more than six months after the default or misconduct came to the notice of the employer.

(2) That the order was in contravention of the provisions of any law.

(3) That the order was in contravention of any standing order in force applicable to such employee.

(4) That the order was otherwise improper.

(5) That the order was otherwise illegal.

9A. There was no similar power both to order reinstatement as well as payment of back wages in the Labour Court prior to the introduction of clause D to Section 78(1) of the Bombay Industrial Relations Act, 1946. It is true, by judicial interpretation a power was claimed in the Labour Court to order reinstatement of an employee who is dismissed or discharged or whose services are terminated if a dispute arises regarding propriety or legality of such an order passed by an employer acting or purporting to act under the standing orders. In other words, if the order was not made under standing orders but was otherwise illegal or improper or against the provisions of any law, or for default or misconduct more than six months prior to the date of such order, it does not appear that the Labour Court had any power to give relief to such an employee under the Bombay Industrial Relations Act as it existed prior

to its amendment by Maharashtra Act 22 of 1965. A reference was made to a Division Bench decision of this Court in *Lalbhai Tricumal Mills Ltd v. Dhanubhai Motilal*, AIR 1955 Bom 463. In that case the real issue seems to be one of jurisdiction of appropriate Labour Court. What seems to have been contended on behalf of the petitioner employer was that the Labour Court at Bombay was not the appropriate Tribunal to take cognizance of the illegal dismissal, but it was the labour Court at Ahmedabad, and this was so because, according to the petitioner, it was to the Labour Court at Ahmedabad that the employee concerned had made an application under Section 42(4) of the Act. The issue that arises before this Court, namely, ambit of requirement of either Section 42(4) or read with Section 78(1)A(a)(i) was not adjudicable in that case. We rely on it only for the purpose of showing that the Labour Court under Section 78(1) A(a)(i) of the Bombay Industrial Relations Act could take cognizance of the order of dismissal of an employee under the standing orders, and that before approaching the Labour Court the employee had to make an application to his employer as per proviso to Section 42(4) of the Bombay Industrial Relations Act.

10. Inasmuch as the principal argument in this case is founded on the provisions of Section 42(4) of the Bombay Industrial Relations Act and the addition made to Section 78 of the Act, it is necessary to understand the scheme of Chapter VIII in which the sections find place. Section 42 is as follows:

"42. (1) Any employer intending to effect any change in respect of an industrial matter specified in Schedule II shall give notice of such intention in the prescribed form, to the representative of employees. He shall send a copy of such notice to the Chief Conciliator, the Conciliator for the industry concerned for the local area, the Registrar, the Labour Officer and such other person as may be prescribed. He shall also affix a copy of such notice at a conspicuous place on the premises where the employees affected by the change are employed for work and at such other places as may be directed by the Chief Conciliator in any particular case.

(2) An employee desiring a change in respect of an industrial matter not specified in Schedule I or III shall give notice in the prescribed form to the employer through the representative of employees, who shall forward a copy of the notice to the Chief Conciliator, the Conciliator for the industry concerned for the local area, the Registrar, the Labour Officer and such other person as may be prescribed.

(3) When no settlement is arrived at in any conciliation proceeding in regard

to any industrial dispute which has arisen in consequence of a notice relating to any change given under sub-section (1) or sub-section (2), no fresh notice with regard to the same change or a change similar in all material particulars shall be given before the expiry of two months from the date of the completion of the proceeding within the meaning of Section 63. If, at any time after the expiry of the said period of two months, any employer or employee again desires the same change or a change similar in all material particulars, he shall give fresh notice in the manner provided in sub-section (1) or (2), as the case may be.

(4) Any employee or a representative union desiring a change in respect of (i) any order passed by the employer under standing orders, or (ii) any industrial matter arising out of the application or interpretation of standing orders, or, (iii) an industrial matter specified in Schedule III (except item (5) thereof), shall make an application to the Labour Court and as respects change desired in any industrial matter in item (5) of Schedule III, to the Industrial Court. Provided that no such application shall lie unless the employee or a representative union has in the prescribed manner approached the employer with a request for the change and no agreement has been arrived at in respect of the change within the prescribed period".

11. We may observe that there is a slight change effected in Section 42(4) by Maharashtra Act 22 of 1965, and that change is in sub-section (4) which now requires an employee desiring a change in respect of item (5) in Schedule III to make an application to the Industrial Court and not to the Labour Court as previously permissible. According to Mr. Phadke, the Learned Counsel for the petitioner, in substance the complaint of the third respondent raises a dispute falling under clause (a) (i) of paragraph A of sub-section (1) of Section 78. But such a dispute cannot be deemed to arise until the third respondent had made an application as required by the proviso to sub-section (4) of Section 42 to the employer requesting for a change. The change requested is a change in respect of the order of the employer under the standing order which in this case would mean the order of dismissal of the third respondent under the standing orders applicable to the third respondent. The argument is that inasmuch as the petitioner had passed the impugned order dismissing the employee, acting or purporting to act under the standing orders, and inasmuch as the propriety or the legality of that order is challenged, the case of the third respondent is covered by S. 78(1) A(a) (i), and therefore must attract the condition precedent for exercise of any right of seeking

a change in that order as per proviso to sub-section (4) of Section 42 of the Bombay Industrial Relations Act, 1946.

12. In fact, the learned counsel's contention could not have been wider so far as the impact of Section 78(1)A vis-a-vis the new paragraph D to Section 78(1) is concerned. According to him, whenever an order of dismissal, discharge, removal, termination of service or suspension of an employee has come to be passed by an employer, it is ordinarily referable to a standing order. But the ground of attacking the order of dismissal, discharge etc. may be one of the several of the grounds enumerated in the new paragraph D of Section 78(1); the source of authority for passing such an order is the standing orders, and if the order is referable to the standing orders, it must be held to be an order passed under Section 78(1)A (a)(i), and if a dispute arises in respect of such order, the requirements of Section 42(4) and the proviso must be complied with. In this connection our attention was invited to Section 78 of the Act. Under the definition a dispute falling in paragraph A of sub-section (1) shall be deemed to have arisen if within the period prescribed under the proviso to section 42 (4) any agreement is arrived at in respect of the order, matter or change referred to in the said provision.

13. Now, it will be seen that sub-section (1) of Section 78 enumerates various and different powers of a Labour Court under several paragraphs. Indicated by capital letters. Under paragraph A the Labour Court has power to decide a dispute. Under paragraph B the Labour Court is empowered to try offences punishable under the Act and also to order payment of compensation as provided for or determine compensation or its payment. Under paragraph C the Labour Court is empowered to require an employer to withdraw any change held to be illegal or to withdraw temporarily any change, the legality of which is a matter of issue in any proceeding pending final decision, or to require the employer by a mandatory order to provide any change provided such a matter was in issue before the Court. A new paragraph D is added to S. 78(1) and that paragraph requires the employer to reinstate an employee and also to pay any back wages for the period between the date of termination of his services and order of reinstatement or actual reinstatement whichever is later.

13A. According to the learned counsel, whenever jurisdiction of the Labour Court is invoked under Section 78(1), it must be by an application, and if application is required to be made by invoking the jurisdiction of the Labour Court at the instance of an employee, then, according to the petitioner, such an application

is not tenable unless the employee or the representative union on his behalf has approached the employer with a request for a change. How the employer is to be approached with a request for a change is provided in Rule 53 of the Rules framed under the Bombay Industrial Relations Act. The application for approaching the employer with a request for change is to be made in writing. Rule 53 itself provided a period of six months (now three months) for making an application for change in respect of orders passed under standing orders. It appears that there is no period of limitation fixed for an application. If the change is of other categories, namely, in respect of industrial matter arising out of the application specified in Schedule III, other than Item 5. Section 79 makes a special provision in respect of disputes falling under clause (a) of paragraph A of sub-section (1) of Section 78. According to the petitioner, paragraph D which is added by Maharashtra Act 22 of 1965 does not curtail the controlling position of Section 68(1) A, and therefore, even if an application is for relief of reinstatement and payment of back wages under paragraph D of Section 78(1), the procedure must be by an application to the Labour Court, and if the application is to be made in writing to the Labour Court, the condition precedent for making such an application is approach to the employer with a request for a change in the order passed by him.

14. In our opinion, the restrictions of Section 78(1)A(a)(i) cannot control the procedure or powers of the Labour Court independently conferred for the first time on the Labour Court by Maharashtra Act 22 of 1965. It may be pointed out during the course of arguments that even though section 73 (1) A (a) (i) refers to disputes regarding propriety or legality of an order passed by an employer acting or purporting to act under standing orders, the ambit of enquiry and the power to grant relief invested in the Labour Court under the new paragraph D covered a much wider field. It could not be reasonably contended that if an order of dismissal, discharge, removal, retrenchment, termination of service, or suspension of an employee is made by an employer because (a) it was for a fault or misconduct of an employee which came to the notice of the employer within six months prior to the date of the order, or (b) the order was in contravention of any law, (c) the order was otherwise improper, and (d) the order was otherwise illegal, in any of the above cases there was no power in the Labour Court to give relief unless it could be shown that the order was referable to standing orders, or was purporting to have been passed under the stand-

ing orders. The legislature has added a new paragraph D to Section 78(1) to give additional powers to the Labour Court in respect of certain matters of dismissal, discharge, removal, retrenchment, termination of service or suspension of an employee. A Labour Court is now empowered to order reinstatement and payment of back wages if it finds that the employee is dismissed, discharged, removed, is under suspension for one or the other of the acts enumerated in paragraph D, sub-clauses (i), (ii) and (iii). Each of the paragraphs of Section 78 (1), A, B, C and D speak of distinct and different powers vested in the Labour Court. It may be that in the absence of any specific provision, dismissal of an employee could be considered by the Labour Court is a change, and if that was a change, then a request for revoking the order of dismissal might amount to a change in respect of an order passed by the employer under the standing orders. If it was really intended that the procedure to be followed by an employee in challenging the order of dismissal, discharge, removal, retrenchment, termination of service or suspension under one or the other of the circumstances enumerated in the new paragraph D should be controlled by the procedure in Section 78(1)A, there is no reason why it should not have appeared as an addition to that paragraph. Instead, the Legislature has thought fit to make a separate provision to invest a distinct and additional power in the Labour Court to give relief of reinstatement and payment of back wages to an employee dismissed, discharged, removed from service or suspension if such dismissal etc. is found to be contrary to the provisions of any law or otherwise improperly made or is for the fault or misconduct committed by the employee which came to the notice of the employer six months prior to the date of such dismissal, and also in contravention of the standing orders. There is no doubt, therefore, that the ambit of enquiry under paragraph D is much wider, coupled with express powers given to the Labour Court to order reinstatement and payment of back wages.

15. It will thus be seen that the whole argument is founded on a supposition that the power to decide a dispute regarding the propriety or legality of an order passed by an employer, acting or purporting to act under the standing orders, necessarily covers adjudication of an order of dismissal, discharge, removal, retrenchment, termination of service or suspension of an employee made by the employer in contravention of the provisions of the standing orders. Whether or not this was so under the unamended provisions of Section 78(1)A(a)(i), we are clear that there are specific powers to

deal with contingencies which are now expressly vested in the Labour Court under paragraph D, and it is not permissible to import by implication powers of the Labour Court dealing with a matter under paragraph D to S. 78(1)A(a)(i) merely to require that an employee must also comply with the provisions of Section 42(4) and its proviso of the Bombay Industrial Relations Act. We prefer to construe the effect of introduction of new paragraph D to Section 78(1) as creating an additional jurisdiction in the Labour Court to entertain applications challenging dismissal, discharge, removal, retrenchment, termination of service or suspension of an employee made by employees under one or the other of the circumstances enumerated in clauses (i) to (iii) of paragraph D, and that power is coupled with a further power to grant reinstatement and back wages if it is found that the order is illegal or improper either because it contravenes any law or any standing order or is otherwise found to be illegal or improper. A power to find dismissal or discharge as improper is a much wider power than the power to adjudicate a dispute regarding the propriety or illegality of the order passed by an employer acting or purporting to act under the standing orders.

16. There are numerous instances where an undertaking or an industry may not have standing orders, and yet the termination of service may be against the provision of law or may be otherwise improper or illegal. A vested right is given to the employee to challenge his dismissal, discharge, suspension etc. if it was for a fault or misconduct committed by the employee more than six months prior to the date of the order. This is a new ground which has been made available to the employee to challenge an order of dismissal, discharge etc. The Legislature thought fit to make a provision indicating as to when a dispute shall be deemed to arise, and that fictional deeming of a dispute to have arisen is provided for in the Explanation. Under the Explanation, read with Section 42(4) proviso, a dispute is said to arise if the employer is finally approached by the employee in the prescribed manner and no agreement is arrived at during the period prescribed, which is a fortnight from the date of presentation of the request in writing by the employee to the employer. On the other hand, the ambit of jurisdiction of the Labour Court under the new paragraph D is not fettered by any such requirement regarding such disputes. If the employer has taken his action, which so far as the employee is concerned puts an end to the relationship between himself and his employer on account of the order of dismissal, discharge, removal, termination of service etc., the Legislature seems

to have thought fit to provide a direct remedy to such an employee to approach the Labour Court and challenge his dismissal, discharge etc.

16A. It is urged that every request for relief to the Labour Court must commence by an application, though there is no specific provision in paragraph D that an employee shall make an application. The very wording of the paragraph shows that the Labour Court is required to record a finding whether the order of dismissal, discharge, removal etc. is in contravention of the provision of law or standing order, or is otherwise illegal or irregular, etc. This postulates enquiry and finding and it is only after a finding in favour of the employee is recorded that the Labour Court is empowered to give consequential relief of reinstatement and payment of back wages. Paragraphs B and C of Section 78(1) also enumerate some of the powers of the Labour Court. In neither of these paragraphs is there any reference to an application being made and yet it is not conceivable that powers under either paragraph B or paragraph C could be exercised by the Labour Court without proceeding having been commenced before it by an application. It may be a complaint as mentioned in paragraph B or it may be an application under paragraph C. Nothing therefore turns on whether or not there is an express provision for making of an application in paragraph D.

17. Even paragraph A does not speak of an application. But so far as paragraph A of Section 78 (1) is concerned, it is related back to sub-section (4) of section 42. It will be observed that the three categories in which the application to the Labour Court is provided in section 78 (1) A (a) are precisely the categories referred to in section 42 (4) of the Act, and sub-section (4) of section 42 in turn states that the application in one or the other of the matters failing, the employee shall make an application to the Labour Court. But the requirement of making an application to the Labour Court seems to have been expressly made in sub-section (4) of section 42 because of what follows in the proviso. Under the proviso a duty is cast on an employee as well as the representative union to approach the employer with a request for change. It is only when no agreement is arrived at during the period prescribed that an application is permissible to be made to the Labour Court, raising a dispute regarding any of the matters mentioned in Section 78 (1) A(a) (i), (ii) and (iii). In none of the further paragraphs it seems to be necessary to follow this procedure. We are not prepared to hold that merely because Section 78(1)A(a) speaks of propriety or legality of an order passed by an employer acting or purport-

ing to act under standing orders, the same restriction should be read in working out the rights under new paragraph D added by the Maharashtra Act 22 of 1965. In this context, it is relevant to see the legislative history of this provision.

18. We have already pointed out that the amendments effected in the Bombay Industrial Relations Act, 1946, by Maharashtra Act 22 of 1965 were largely made to bring out a uniform piece of legislation for adjudication and settlement of industrial disputes in the whole of the State of Maharashtra. Section 123A repeals the C. P. and Berar Industrial Disputes Settlement Act 1947, which was the principal State legislation governing relations between the employees and the employers in the industries in Vidarbha region. Under Section 16 of the C. P. and Berar Industrial Disputes Settlement Act, 1947, an express right was conferred on any employee working in an industry to make an application within six months from the date of his dismissal or discharge, to the Labour Commissioner. On receipt of such an application, if the Labour Commissioner found that the dismissal or discharge was in contravention of any provisions of the Act or in contravention of standing orders made or sanctioned under the Act and was more than six months prior to the date of discharge or removal, the Labour Commissioner was empowered to order that the employee may be reinstated or he may be given compensation and in addition, to order payment of back wages. No similar provision appeared to exist in express form in the Bombay Industrial Relations Act, 1946. Inasmuch as this valuable right which was available to the workers under the C. P. and Berar Act was required to be preserved in appropriate form, it seems to us paragraph D was specifically added to Section 78(1) of the Bombay Industrial Relations Act. Now, there was no such restriction on an employee under Section 16 of the C. P. and Berar Industrial Disputes Settlement Act, 1947, that such an employee must first approach the employer with a request to make change, or in other words, to withdraw the order of dismissal, discharge, retrenchment or suspension. In our opinion, therefore, it is unlikely that while incorporating a provision in the Bombay Industrial Relations Act in the form of paragraph D to Section 78(1) of the Act, the Legislature could have intended that the same right which was now made available to the employees in the whole of the State of Maharashtra, should be fettered by the requirements of Section 42(4) and its proviso. The Legislature has conferred a new right to the employee in the areas of State of Maharashtra other than Vidarbha region and has preserved the rights of the employee in the Vidarbha region

in the Act by incorporating paragraph D in Section 78(1) of the Bombay Industrial Relations Act, which was amended in 1965. If the legislative intent is to be gathered from requirements of conditions to be satisfied by an employee who has been given a right to challenge his dismissal, discharge etc. in paragraph D, we do not find any implication in the amendment or in the manner in which the new paragraph D is added to Section 78(1) that it was intended to be controlled by the provisions of Section 78(1)A or by Section 42(4) of the Bombay Industrial Relations Act.

19. It is true that sub-section (4) of Section 42 enjoins that an employee or a representative union on his behalf, desiring a change, has to make an application to the Labour Court, and if the application is under clause (a) (ii) of paragraph A of Section 78(1), then that application is to be preceded by action prescribed in the proviso to sub-section (4) of Section 42. Even assuming that an order of dismissal under standing orders would fall for adjudication of any dispute under Section 78(1)A(a)(i), it cannot be disputed that several kinds of orders other than orders of dismissal or discharge come to be passed under standing orders, and thus the ambit of enquiry and the nature of disputes when the dispute arose out of orders under standing orders, is very wide. But so far as paragraph D is concerned, the Legislature is making a special provision only for orders of dismissal, discharge, removal etc. though also under standing orders as well as similar orders which are challengeable as improper relief. Thus, there is a special provision made by the Legislature for reinstatement or payment of back wages, if they have lost their service on account of the order of dismissal, discharge etc. under the circumstances described in paragraph D. For the purposes of giving speedy relief in respect of such employees, in our opinion, the Legislature has provided a direct remedy by way of approach to the Labour Court, and the Labour Court has been specifically empowered to give relief of reinstatement and payment of back wages which were not expressly provided for until an amendment was effected in 1966. Thus, the scheme of Chapter XII, and especially Section 78, would suggest that by addition of paragraph D an additional power is created in the Labour Court and specific remedy is provided to the employee which is not conditioned by the provisions of Section 42(4) of the Bombay Industrial Relations Act, 1946. The object of creating an additional power necessarily implies duty to exercise the power when the tribunal is approached with a grievance which squarely falls within the ambit of the provisions of paragraph D.

20. But, it is urged, the moment it is found that even for a relief which can be granted under paragraph D by the Labour Court, the occasion for demanding such a relief in order of dismissal under a standing order, the provisions of sub-section (4) of Section 42 are immediately attracted, and if Section 42(4) controlled applications for challenge to an order of dismissal under a standing order, the further requirement of the proviso must be complied with. We are unable to accept this contention. It is not disputed that under the scheme of sub-section (4) of Section 42, an employee or a representative union desiring a change is allowed to make an application in respect of orders passed by an employer under the standing orders. A large variety of orders can be conceived under standing orders, including an order of dismissal under the appropriate provisions of the standing orders.

21. Thus, the order passed by an employer under a standing order is a genus and an order of dismissal under the standing order may be a specie. Even though, therefore, sub-section (4) of Section 42 makes a proviso requiring an employee desiring a change in respect of an order passed by the employer under standing orders to make an application, and further requiring that prior to making such an application the employee should approach his employer as prescribed by the proviso, we are unable to hold that so far as relief in respect of order of dismissal etc. provided for in paragraph D is concerned, such order of dismissal though passed under the standing order, is governed by the provisions of Section 42(4). We have already pointed out that paragraph D of Section 78(1) is an independent provision, and if this is so, it must also be held that so far as challenge to order of dismissal, discharge etc. passed under the standing order is concerned, they are also excluded from the operation of sub-section (4) of Section 42. But it has been contended that the Legislature was fully aware of other provisions in the Act like Section 42(4), when various amendments were effected including addition of paragraph D to section 78(1). Section 42(4) itself has been slightly amended by making a separate provision for an application by an employee desiring a change in respect of an industrial matter covered by item 5 in Schedule C. Whereas previously such an application could be made to the Labour Court, the amendment provides that such an application henceforward would lie to the Industrial Court. The Legislature did not think it fit or necessary to effect any other change in sub-section (4) of Section 42. Sub-section (4) of Section 42 as it originally stood before para-

graph D was added to Section 78 (1), necessarily controlled the procedure required to be undertaken in respect of disputes referred to in Section 78(1)A(a) of the Act. If the Legislature had intended that the same procedure prescribed by sub-section (4) of Section 42 should also be followed in respect of orders of dismissal, discharge, retrenchment, termination of service or suspension of an employee when such an order comes to be passed under a standing order, no good reason is shown why adjudication and relief in respect of such orders made by an employer under a standing order have been included in paragraph D along with similar orders in respect of which relief can be granted if other conditions enumerated in paragraph D are satisfied. The very fact that the legislature did not think it necessary to make any amendment of Section 42(4) which previously governed only paragraph A of Section 78(1) of the Act, would show that the scheme of Section 42(4) was not intended to be altered by addition of paragraph D to Section 78(1) of the Bombay Industrial Relations Act. We have already pointed out that paragraph D represents a separate and self-contained scheme investing the Labour Court with additional powers to give relief to an employee in the matter of reinstatement and payment of back wages if it finds that such employee is dismissed, discharged, removed, retrenched, or suspended on one of the enumerated grounds. This is a special provision, and if in making such a special provision it is also intended to include relief in respect of order of dismissal, discharge etc. passed under a standing order, we do not see why only in respect of that specie of order the requirement of Section 42(4) and its proviso should be attracted. Section 42(4), so far as orders passed by the employer under a standing order and challenge to the order of dismissal or discharge etc. by the employee are concerned, is a general provision, but so far as challenge to orders of dismissal, discharge, removal, albeit under standing orders is concerned, paragraph D represents a special provision. Therefore, we are unable to hold that in respect of orders of dismissal under standing orders the worker is hampered by the pre-conditions of Section 42(4) and the proviso before he can get relief, when an application is made under Section 78(1) D of the Bombay Industrial Relations Act.

22. There is yet another contention raised on behalf of the petitioner which remains now to be considered and disposed of. It is urged that powers under paragraph D can be exercised only in respect of an employee because it is dismissal, discharge, removal, retrenchment, suspension of an "employee" that furnishes occasion for adjudication and relief by a

Labour Court. What is urged is that unless it is proved that for grant of such a relief a person is an "employee" within the meaning of the Bombay Industrial Relations Act, 1946, no application is tenable. Our attention was invited to the definition of 'employee' in the Bombay Industrial Relations Act, in Section 2(13). That definition is as follows:

"(13) 'employee' means any person employed to do any skilled or unskilled work for hire or reward in any industry, and includes—

(a) a person employed by a contractor do any work for him in the execution of a contract and an employer within the meaning of sub-clause (c) of clause 4;

(b) a person who has been dismissed, discharged or retrenched or whose services have been terminated from employment on account of any dispute relating to change in respect of which a notice is given or an application made under Section 42 whether before or after his dismissal, discharge, retrenchment, or, as the case may be, termination from employment; but does not include—

(i) a person employed primarily in a managerial, administrative, supervisory or technical capacity, drawing basic pay (excluding allowances) exceeding five hundred and fifty rupees per month;

(ii) any other person or class of persons employed in the same capacity as those specified in clause (i) above irrespective of the amount of the pay drawn by such persons which the State Government may, by notification in the Official Gazette, specify in this behalf."

According to the learned counsel for the petitioner clause (a) of the definition clause is the governing clause of the definition. Unless, therefore, it is shown that the claimant is an employee who was a person who has been dismissed, discharged or retrenched, or whose services have been terminated on account of any change in respect of which notice is given or an application is made under Section 42, an ex-employee, merely because he was dismissed, discharged or retrenched, cannot make an application for relief under paragraph D of Section 78 (1) of the Act.

23. In this connection reliance was placed on another Division Bench decision of this Court in Special Civil Appns. Nos. 345 of 1966 and 575 of 1966, disposed of by a common order dated 11th March 1967 (Bom). One of the questions raised in that case was the interpretation of the definition clause of the term 'employ' in section 2(1) of the C. P. and Berar Industrial Disputes Settlement Act, 1947. The definition in S. 2 (10) of the C.P. Act is as follows:

"(10) 'employee' means any person employed by an employer to do any skilled or unskilled manual or clerical

work for contract or hire or reward in any industry and includes an employee dismissed, discharged, or removed on account of any industrial dispute;"

The case arose out of an application by one Laxman who was served with a notice terminating his services in exercise of a contractual option and the contention that appears to have been raised was that Laxman was not an employee who was dismissed, discharged, or removed on account of any industrial dispute. Accepting this contention the Division Bench observed as follows:

"A plain reading of the definition of the term 'employee' in S. 2(1) as it now stands, shows that the only category of persons who, though not in actual employment at the date of the application, is included within that term is of persons who are ex-employees and were dismissed, discharged or removed on account of any industrial dispute. The disputes must precede the dismissal, discharge or removal and the dismissal, discharge or removal must be the result of such dispute."

Even a cursory comparison of the two definitions would show that they are not *pari materia* and no assistance, in our opinion, can be derived by the petitioner in relying on the decision in that case.

24. It is necessary to scrutinise the definition in Section 2(13) of the Bombay Industrial Relations Act before the contention can be accepted in the form it is raised. According to the learned counsel for the petitioner even under the provisions of paragraph D of Section 78(1) of the Act a Labour Court will be powerless to order reinstatement and payment of back wages on account of the dismissal, discharge etc. which is found to be in contravention of a standing order, unless such a person has been dismissed from employment on account of any dispute relating to a change in respect of which notice is given or an application is made under Section 42. It was also contended that the earlier part of the definition which defines an "employee" meaning any person employed to do skilled work for hire or reward is to be ignored and the words which follow, namely, "and includes" are to be construed as words of limitation rather than words of extension of the definition. We are unable to accept this construction either. Moreover, the definition given in Section 2(13) cannot be rigidly applied if it is repugnant to the context or subject.

25. Now, the subject of paragraph D of Section 78(1) is empowering a Labour Court to give relief of reinstatement and payment of back wages to an employee who has been dismissed, discharged, or whose services have been terminated or suspended for one or the other of the causes given in that paragraph. We fail

to see how such an employee could have satisfied the definition in clause (b) of Section 2(13) in order to get relief under paragraph D of Section 18(1). That definition postulates a dismissal on account of a dispute relating to a change in respect of which a notice is given or on account of a change or on account of any dispute relating to any change in respect of which an application is made under Section 42. In other words, the dismissal etc. must follow a dispute and that dispute must arise on account of a notice relating to a change having been given or an application having been made under Section 42 relating to such a change. Surely, a dismissal order may be made not only on account of a dispute having arisen, but even in other circumstances. It could hardly have been intended by the Legislature (if we are to accept the interpretation put on the definition clause on behalf of the petitioner) that almost no employee will be entitled to get relief unless such an employee is first dismissed, retrenched or his services have been terminated, and such a dismissal, discharge, or retrenchment or termination is on account of a dispute relating to a change in respect of which a notice is given or an application is made under Section 42. We are satisfied that no such startling result was contemplated or intended by the Legislature in adding clause (b) to the definition section, as including an employee in the general definition earlier given in the opening part of Section 2(13). Even the definition section is to be so construed as to be reconciled with the scheme and provisions of the Act and not as to abridge the benefits of the Act in the case of persons who otherwise are employees but who cannot satisfy the test of being an employee within the meaning of artificial definition in clause (b) of Section 2(13). If the contention is taken to its extreme logic, it would mean that the provisions of the Act are not available to any employee unless he satisfies the condition of clause 2(13) of the Act. We are unable to hold that such was the intention of the Legislature or that the word "employee" in paragraph D of Section 78(1) should be construed with reference to this definition. Such a construction would be wholly repugnant to the subject or context for which provision is made in paragraph D of Section 78(1) and we must reject this contention.

26. There is an allegation in the return filed on behalf of Nathu (third respondent) that he had approached the employer before making an application to the Labour Court. It is not necessary that any enquiry should be made into that averment now as we have come to the conclusion that so far as working out of the rights under paragraph D of Sec-

tion 78(1) of the Bombay Industrial Relations Act, 1946, is concerned, it is not necessary for an employee first to approach an employer or to follow the procedure under Section 12(4) and its proviso of the Act.

27. Thus, the result is that the petition fails and is dismissed with costs.

GGM/D.V.C.

Petition dismissed.

AIR 1969 BOMBAY 66 (V 56 C 10)

VIMADALLAL, J.

Jafferli Alibhai and another, Plaintiffs v. S. R. Dossa & Co. and another, Defendants.

Suit No. 458 of 1966 D/- 28-9-1967.

(A) Court-fees and Suits Valuations — Bombay Court Fees Act (36 of 1959) S. 6(iv)(j), Sch. I Arts. 1 and 7 — Declaratory suit by creditor under S. 53 T. P. Act — Declaration that deed of assignment executed by defendant was void — Proper Court-fee would be under Section 6(iv)(j).

Where a creditor files a suit under Section 53 of the T. P. Act seeking a declaration that a deed of assignment executed by the defendant is void against the plaintiff the subject matter of the suit as framed is not the property comprised in the Deed of Assignment which was sought to be set aside, but is the relief by way of declaration itself, namely, the declaration that the Deed of Assignment was void as against the plaintiff, and the same is not susceptible of monetary evaluation and is governed by Section 6 (iv)(j) of the Bombay Court Fees Act. AIR 1959 Bom 517, Foll. (1965) 67 Bom LR 210 and AIR 1948 Bom 265 and AIR 1947 Bom 482, Ref. (Para 7)

Such a suit is also not one which is otherwise provided for by the Bombay Court-fees Act. Articles 1 and 7 of Sch. I are themselves articles of a residuary nature, it being stated in Article 1 of Schedule I that it applies to cases of plaint or memorandum of appeal "not otherwise provided for in this Act" and in Article 7 that it applies to any other plaint etc. Moreover, the suit, falls specifically within the terms of Section 6(iv) (j) of the said Act, and, under the circumstances there is no question of its being governed by any other provision of that Act. (Para 8)

(B) Court Fees and Suits Valuations — Court Fees Act (1870) S. 1 — Court Fees Act is a taxing statute and its provisions are to be strictly construed in favour of subject litigant. AIR 1964 SC 457, Rel. on. (Para 7)

Cases Referred: Chronological Paras
(1965) 67 Bom LR 210=ILR (1966)
Bom 84, Society of Servants of
God v. Hanmantrao Narayanrao 6
(1964) AIR 1964 SC 457 (V 51)=66
Bom LR 254, State of Maharashtra
v. Mishrilal Tarachand 7
(1959) AIR 1959 Bom 517 (V 46)=60
Bom LR 587, Chhotalal Kalidas v.
Laxmidas Mayaram 7
(1948) AIR 1948 Bom 265 (V 35)=49
Bom LR 875, Adbullakhan Darya-
khan v. Purshottam Damodar 6
(1947) AIR 1947 Bom 482 (V 34)=49
Bom LR 552, Ratilal Manilal v
Chandulal 4, 5
(1944) AIR 1944 Bom 267 (V 31)=46
Bom LR 613, Abdullakhan
Daryakhan v. Purshottam
Damodar 6

B. R. Zaiwalla, for Plaintiffs; M. S. Sanghavi, for the State of Maharashtra (with permission) to show cause.

ORDER: This is a Chamber Summons taken out by the plaintiffs to review and set aside an order of the Taxing Master with regard to the valuation of the suit for the purpose of Court-fees.

2. The suit, as framed, is a representative suit under Section 53 of the Transfer of Property Act by the creditors of the 1st defendant-firm to avoid the Deed of Assignment of moveable and immovable properties by that firm in favour of the 2nd defendant which was dated 21st February 1966. The properties which are the subject-matter of the said Deed of Assignment are of the value of Rs. 7½ lacs. The plaintiffs have, in paragraph 17 of the plaint, valued the suit for the purpose of Court-fees under S. 6(iv)(j) of the Bombay Court-fees Act, 1959, and they paid a fixed court-fee of Rs. 30 under the said section. On a reference to the Taxing Master under Section 5 of the said Act to determine the correct amount of Court-fees payable in respect of the suit as framed, he came to the conclusion that Court-fees would be payable by the plaintiffs on the aggregate sum of Rs. 2,26,998.14, being the total of the claims of the creditors set out in annexure "C" to the plaint, including the claims of the two plaintiffs. In arriving at that conclusion, the Taxing Master has proceeded on the footing that, since this is a representative suit, as required by Section 53 of the Transfer of Property Act, all the creditors mentioned in the list must be considered to be parties to this suit. It may be mentioned that the Taxing Master had, before proceeding with the reference, directed a notice to be given to the State of Maharashtra, and the State was represented by attorneys in the course of the hearing of the reference before the Taxing Master. Mr. Sanghavi who appeared on behalf of the

State before me, sought my permission to appear at the hearing of this Chamber Summons, and I have permitted him to do so. It may further be mentioned that the State itself has taken out a Chamber Summons dated 21st August 1967 for a review of the valuation arrived at by the Taxing Master, contending that the same should be enhanced to Rs. 7,50,000 which was the value of the property involved in the suit. I am, however, for the present, considering the plaintiffs' Chamber Summons, and will pass orders in regard to the Chamber Summons taken out by the State separately hereafter.

2A. It would be convenient to refer at the very outset to the terms of Section 6(iv)(j) of the Bombay Court-fees Act, 1959. Clause (iv) of the said section deals with various types of declaratory suits and in sub-clause (j) thereof, it is provided that, in suits where a declaration is sought and "the subject-matter in dispute is not susceptible of monetary evaluation and which are not otherwise provided for" by the said Act, the Court-fee payable would be a fixed fee of Rs. 30. The questions that arise before me are, therefore, three, namely, (1) what is the subject-matter of the present suit as framed, (2) is that subject-matter susceptible of monetary evaluation, and (3) whether it is a suit which is otherwise provided for by the said Act.

3. Mr. Zaiwalla has, in the course of his argument, stated that four views are possible, namely, (1) that the subject matter is the claim of the two plaintiffs aggregating to about Rs. 18,000/- (2) that the subject-matter is the aggregate claim of all the creditors on whose behalf the suit is filed as a representative suit aggregating to Rs. 2,26,998.14, (3) that the subject-matter is the value of the property comprised in the Deed of Assignment which is sought to be avoided by the present suit under S. 53 of the Transfer of Property Act, and (4) that the subject-matter is merely the relief, namely, the declaration that the Deed of Assignment in question is void as against the creditors of the 1st defendants.

4. In the case of Ratilal Manilal v. Chandulal Chhotalal, 49 Bom LR 552= (AIR 1947 Bom 482) which was a suit for possession of a house in which the plaintiff claimed that the defendant was in possession as his licensee, in holding that court-fee was payable according to the market-value of the house, it was observed by Macklin, J. in the judgment of the Division Bench at p. 554 (of Bom LR)= (at p. 483 of AIR) that, in plain English, the subject-matter of a suit is what the suit is about and that it is not the same thing as the object of the suit. The learned Judge then proceeded to state

that the object of the suit before him was the claim, or, in other words, possession of the house, but the subject of the suit was the house itself. On a consideration of the various clauses and sub-clauses of Section 7 of the Court-fees Act, 1870, the learned Judge came to the conclusion that the said section contemplated the subject-matter of a suit for the possession of land as being the land, the subject-matter of a suit for the possession of a garden as being the garden and the subject-matter of a suit for the possession of a house as being the house, and there was no suggestion anywhere that the subject-matter ought to be taken to mean anything else.

5. Turning to the present suit, as framed, in the light of the decision in Ratilal Manilal's case, 49 Bom LR 552= (AIR 1947 Bom 482) just cited by me, in my opinion, as a matter of plain language, the claim of the two plaintiffs aggregating to Rs. 18,000 cannot, therefore, be said to be the subject-matter of the suit. On parity of reasoning, the claim of all the creditors, on whose behalf this representative suit is filed by the plaintiffs, cannot be said to be the subject-matter of the suit. Moreover, it would be impossible in any given case for the plaintiffs to be able to say what is the aggregate value of the claims of all the creditors, some of whom may even be unknown to the plaintiffs. From the practical point of view also, therefore, it would be impossible to compute Court-fees on that footing. The first two of the four possible views in regard to this listed by Mr. Zaiwalla must, therefore, be rejected, and the question resolves itself into this, namely, whether the subject-matter of the suit can be said to be the property comprised in the Deed of Assignment which is sought to be declared void and not binding on the creditors by the present suit.

6. In order to decide the question, it is necessary for me to refer to the frame of the present suit. It is quite clear that prayer (a) of the suit does not seek to set aside the Deed of Assignment, but merely seeks a declaration that the same is void as against the plaintiffs and the other creditors of the 1st defendants, and that is also the averment in the body of the plaint in paragraph 13. In the case of Abdullakhan Daryakhan v. Purshottam Damodar, 49 Bom LR 875= (AIR 1948 Bom 265) which was a decision in appeal from the decision of Lokur, J. reported in 46 Bom LR 613= (AIR 1944 Bom 267) one of the questions which arose was what was the Article of the Limitation Act which would govern a suit by a creditor under Section 53 of the Transfer of Property Act. In considering the applicability of Article 91 of the Limitation Act, 1908, which applies to suits to can-

cancel or set aside instruments, it was observed in the judgment of the Division Bench delivered by Gajendragadkar, J. that, prima facie, suits to set aside instruments can be filed only by persons who are parties to the instruments in question, and the object of such suits is, as the Article itself expressly states, to cancel or set aside instruments. The learned Judge then went on to observe (at p. 877 of Bom LR=(at p. 268 of AIR) as follows:

"On the other hand, suits under S. 53 of the Transfer of Property Act are instituted by creditors who are not parties to the transactions impeached and the claim made in such suits is not to cancel or set aside such transfers, but to obtain a declaration that such transfers do not bind the creditors on whose behalf such suits are filed. Even if such suits are decreed, the instruments evidencing the transfers in question are not cancelled or set aside but are only held to be not binding on the creditors of the transferors. The nature of such suits is, in our opinion, substantially different from that of the suits referred to by Art. 91. In that view we are not prepared to hold the suits brought by creditors under S. 53 of the Transfer of Property Act are governed by Art. 91. In our opinion, such suits would be governed by Art. 120 of the Indian Limitation Act."

I am not concerned, on the present application, with the rest of the judgment in the said case. If the present suit, which is admittedly a suit under Section 53 of the Transfer of Property Act, is construed in the manner stated by Gajendragadkar, J. in Abdullah Khan's case 49 Bom LR 875=(AIR 1948 Bom 265) as not being a suit to set aside the Deed of Assignment, I fail to see how it can be said that this suit is about the property comprised in the deed of assignment. As Mr. Zaiwalla has rightly pointed out, even if the plaintiffs succeed in the present suit, they do not get that property, or any part of it. It does not become available to the plaintiffs until they have proved their respective claims in independent litigations and perhaps, not even then. Reference may also be made in this connection to the decision of V. S. Desai, J. in the case of Society of Servants of God v. Major Hanmantrao Narayanrao, (1965) 67 Bom LR 210 in which the question which arose was, what was the provision of the Court-fees Act which would be applicable to a suit by a sub-tenant of the original tenant claiming that he was entitled to become the direct statutory tenant of the landlord on the termination of the tenancy of the head tenant by reason of the provisions of Section 14 of the Bombay Rent Act. In holding (at p. 213) that the suit would be governed by Section 6(iv) (i) of the Bombay Court-

fees Act, 1959, the learned Judge stated that, since what the plaintiffs sought was a declaration relating to statutory tenancy, it could not be said to be a declaration in respect of the nature of their tenancy of any immovable property. It is pertinent to note that it was not held that the suit was "about" the immovable property, and even the contention that it would be governed by S. 6(iv)(d) was rejected by the learned Judge. This decision provides an answer to the argument of Mr. Sanghavi that, where it is possible to relate the relief claimed to some property and to value that property, even approximately, the provisions of Section 6(iv)(j) cannot be invoked.

7. Reliance was placed by Mr. Zaiwalla on the decision of a Division Bench of our High Court in the case of Chhotalal Kalidas v. Laxmidas Mayaram, 60 Bom LR 587=(AIR 1959 Bom 517). The reliefs claimed by the plaintiffs in that suit who were the mortgagors were a claim for a declaration that a certain sale effected by defendant No. 1 who was the mortgagee, in favour of defendant No. 2 was illegal, void, invalid, ineffective and bad in law and the same be set aside, and for an injunction against the two defendants restraining them from proceeding further with the completion of the sale. The plaintiffs had valued the claim for Court-fee and jurisdiction at Rs. 420, but the defendants contended that the value of the suit properties being above Rupees 25000 the suit was beyond the jurisdiction of the City Civil Court in which it was instituted, and the said Court was, therefore, incompetent to entertain the suit. That case fell to be decided under the provisions of the Court-fees Act, 1870. The trial Judge upheld the contention of the defendants and ordered that the plaint be returned for presentation to the proper Court. On appeal, Bavdekar, J. held that the City Civil Court had jurisdiction to entertain the suit and reversed the order passed by the trial Court, directing the trial Court to proceed with the suit according to law. It may be mentioned that under Section 7(iv)(c) of the Court-fees Act, 1870, in a suit to obtain a declaratory decree or order, where consequential relief was prayed for, the plaintiff was entitled to pay court-fees according to the amount at which the relief was valued by him in the plaint, but Section 8A of the same Act provided that if the Court was of opinion that the subject-matter of a suit had been wrongly valued, it could revise the valuation and determine the correct valuation by holding the necessary inquiry for that purpose. The plaintiffs put their own valuation on the said suit under the provisions of S. 7(iv)(c), and the Division Bench, in considering the question as to whether the valuation put

by the plaintiffs should be accepted, or an inquiry ordered under the provisions of Section 8A, observed that though the right of the plaintiff under S. 7(iv)(c) to put his own valuation was indisputably subject to the provisions of S. 8A, it was only if there was some standard by reference to which it would be possible to value the subject-matter of a suit and the Court could come to the conclusion that the valuation made by the plaintiff was wrong, that it was open to the Court to revise the valuation under S. 8A. It was then observed in the judgment in the said case (at p. 593 of Bom LR)=(at p. 518 of AIR) as follows:

"But in this case it cannot be said that there was a standard by reference to which the valuation made by the plaintiffs of the subject-matter of the suit can be demonstrated to be wrong. The claim made by the plaintiffs is a claim for a declaration that a certain sale effected by defendant No. 1 in favour of defendant No. 2 was 'illegal, void, invalid, ineffective and bad in law' and for an injunction against the two defendants; and we are unable to appreciate by reference to what standard the valuation of the subject-matter by the plaintiffs of a suit for a declaration that a particular sale is 'invalid, ineffective and bad in law' can be rectified".

The learned Judges, therefore, agreed with the decision of Bavdekar, J. that the valuation made by the plaintiffs not being shown to be wrong, the Court was incompetent to revise it. It was further observed that a suit for a declaration that a sale is 'invalid and ineffective' was not a suit to set aside an alienation. In the next paragraph of the judgment in the said case, dealing with the argument of Mr. Trivedi that the suit fell within the provisions of Article 17(iv) or (vii) of Schedule II to the Court-fees Act, 1870, it was observed that the said suit could not be said to be a suit where it was not possible to estimate at a money value the subject-matter in dispute and which is not otherwise provided for by the Act. Mr. Sanghavi contended that this decision is of no assistance to the plaintiffs, because, though the valuation of the plaintiffs to the said suit was accepted, this was a case in which ad-valorem Court-fees were computed on that valuation. These matters, however, do not, in my opinion, affect the points on which Mr. Zaiwalla has relied as far as this decision is concerned, and they are that, in a case in which a declaration was sought that a sale was ineffective and invalid, the view taken was that there was no standard by reference to which the valuation which the plaintiffs had themselves put on the subject-matter of the suit could be said to be wrong. That could

only be on the footing that the subject-matter in a suit framed as a suit for a declaration that a sale of certain property is ineffective, is not the property itself. It also supports Mr. Zaiwalla's second contention that such a suit is not susceptible of monetary evaluation. In my opinion, there is no difference between saying, as was said in the judgment in Chhotalal's case, 60 Bom LR 587=(AIR 1959 Bom 517) that there was no standard by which the suit could be valued otherwise than by the plaintiffs' own valuation, and saying that the suit was not susceptible of monetary evaluation within the terms of Section 6(iv)(j) of the Bombay Court-fees Act, 1959, as the two expressions mean much the same thing. In the result, I hold that the subject-matter of the present suit, as framed is not the property comprised in the Deed of Assignment which was sought to be set aside, but is the relief by way of declaration itself, namely, the declaration that the Deed of Assignment was void as against the plaintiffs, as Mr. Zaiwalla has rightly contended, and that the same is not susceptible of monetary evaluation and is governed by Section 6(iv)(j) of the Bombay Court-fees Act, 1959. Some other decisions were also referred to in the course of the arguments before me in this case, but it is unnecessary for me to deal with any of them, except the decision of the Supreme Court in the case of State of Maharashtra v. Mishrilal Tarachand, AIR 1964 SC 457 in which it has been laid down (para 9) that the Court-fees Act is a taxing statute and its provisions, therefore, have to be construed strictly in favour of the subject-litigant.

8. That leaves for my consideration only the question as to whether this is a suit which is otherwise provided for by the Bombay Court-fees Act, 1959. It was sought to be argued by Mr. Sanghavi for the State that this suit is expressly provided for by Article 1 or 7 of Schedule I to the said Act, but, I am afraid, there is no substance in that contention of Mr. Sanghavi, for the simple reason that both those Articles are themselves Articles of a residuary nature, it being stated in Article 1 of Schedule I that it applies to cases of plaint or memorandum of appeal "not otherwise provided for in this Act", and in Article 7 that it applies to any "other" plaint etc. Moreover, as Mr. Zaiwalla has contended the present suit, as framed, falls specifically within the terms of Section 6(iv)(j) of the said Act, and, under the circumstances, there is no question of its being governed by any other provision of that Act.

9. In the result, I make this Chamber Summons absolute in terms of prayers (a) and (b). The State must pay the

plaintiffs' costs of this Chamber Summons. Counsel certified.

GGM/D.V.C.

Order accordingly.

AIR 1969 BOMBAY 70 (V 56 C 11)

(AT NAGPUR)

CHANDURKAR J.

Khushalchand Bhayyalal Jain, Applicant
v. State of Maharashtra, Opponent.

Criminal Revn. Appln. No. 347 of 1967,
D/- 12-6-1968.

Maharashtra Foodgrains Dealers Licensing Order, 1963 Cl. 3 — Breach of condition No. 7A of Licence requiring wholesaler who sells food grains to retailers to maintain register in form D — Before such breach is established, prosecution has to prove that the wholesaler was in fact selling to retailers — Unless it is so established, it is not obligatory on the part of dealer to maintain register in form D — Criminal Ref. No. 36 of 1967 D/- 17-10-1967 (Bom.) Rel. on.

(Paras 3 and 4)

Cases Referred: Chronological Paras
(1967) Criminal Reference No. 36 of
1967 D/- 17-10-1967 (Bom), State v.
Shankarlal

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V. R. Manohar, for Applicant; P. G.
Palshikar Asst. Govt. Pleader, for State.

ORDER: The short question in this revision application is whether the conviction of the accused-applicant under Section 7(1)(a)(1) of the Essential Commodities Act for his failure to maintain a register of retailers in Form D as required by Clause 7(A) of the licence given under the Maharashtra Foodgrains Dealers Licensing Order 1963, is proper. The applicant is a dealer who admittedly holds a licence issued under the Maharashtra Foodgrains Dealers Licensing Order 1963. Clause 3 of the Order provides that no person shall carry on business as a dealer except under and in accordance with the terms and conditions of a licence issued in this behalf by the licensing authority. Clause 4 of this Order provides for a form in which a licence is granted. It is granted in Form B and condition No. 7 of this licence requires that a licensee, if he is a wholesaler, shall sell such foodgrains only to retailers (including himself if he also sells in retail) who are registered with him and in accordance with such directions as the Licensing Authority or any officer authorised by that authority in this behalf, may give from time to time. This condition also requires that the register of retailers shall be in Form D. It is the breach of this condition for which the accused was

prosecuted because when his shop was raided on 4-11-1965 no such register of retailers in Form D was found. He was, therefore, prosecuted and the trying Magistrate found that the accused had failed to maintain the register in Form D and had committed a breach of the condition of the licence which made him liable under Section 7(1)(a)(1) of the Essential Commodities Act. He was also prosecuted for other breaches with which we are not concerned in this case. The Magistrate convicted him and sentenced him to suffer imprisonment till the rising of Court and to pay a fine of Rs. 500.

2. This conviction was challenged by him by a revision application, but the learned Sessions Judge also found that a failure to maintain a register in Form D amounted to a breach of the condition of the licence. The learned Sessions Judge further found that such a register must be maintained irrespective of the fact that there were no dealings with retail dealers and merely because there were no dealings that does not exonerate the licensee from having a register. It is this conviction which is now challenged by this revision application.

3. The learned counsel for the applicant accepted the finding that no register in Form D was maintained by the applicant, but he contended that the prosecution had failed to establish that the applicant in fact dealt with any retail dealers or sold any grain to them and unless it was shown that there was a dealing with retail dealers it was not obligatory on the applicant to maintain a register of retail dealers as required by the conditions of the licence. In order to appreciate this contention it is necessary to reproduce condition No. 7-A of the licence which is as follows:

"7-A (1) The licensee if he is a wholesaler shall sell foodgrains only to retailers (including himself if he also sells in retail) who are registered with him and in accordance with such directions as the Licensing Authority or any Officer authorised by that authority in this behalf, may give from time to time. The register of retailers shall be in Form "D".

(2) The licensee who is a wholesaler may sell foodgrains direct to consumers at wholesale rates in quantities of bag or more. Such sales shall be entered in a separate register showing the correct names, addresses and other details of the consumers, to prove their identity."

The condition No. 7-A which is reproduced above is in two parts. The first relates to a sale to retailers and second relates to a sale to consumers at wholesale rates in quantities of a bag or more and the scheme is that the persons to whom sales are made by the wholesaler must be capable of being ascertained because he is re-

quired to sell only to those retailers who are registered with him. It is the names of those retailers who are registered as persons to whom the wholesaler is entitled to sell that are required to be entered in the register of retailers. Thus before a person is said to have contravened this provision, it must be shown that there were some retailers to whom the wholesaler sold foodgrains and if, in fact, there were no retailers who purchased grain from him, there would be no name to be included in the register. If there were no names to be included in the register there is really no necessity to maintain a register. Maintenance of register clearly implies that there is some information which is required to be incorporated in the register and this information in terms of condition No. 7-A(1) of the licence is the names of the retailers to whom the wholesaler has sold foodgrains.

4. The facts in the instant case will show that the prosecution has completely failed to establish that the wholesaler has sold foodgrains to any retailer. The prosecution evidence does not even go so far as to show that at any time the foodgrains were purchased by any retailer from the applicant. On the other hand, there is an admission of P. W. 2 Madhao-rao Patil, who is a Police Inspector, that he did not make inquiry with a view to ascertain the fact whether the accused had sold wheat by wholesale to retail licence dealers or otherwise. Thus, there is no evidence to show that the petitioner had sold any foodgrains to any retailer and if that was so, I fail to see why a register of non-existent retail dealers was required to be maintained by the applicant. The learned Sessions Judge was therefore not right in holding that even if there are no dealings the wholesale dealer is not exonerated from maintaining a register in Form D. A similar view has been taken by this Court in Criminal Reference No. 36 of 1967, D/- 17-10-1967 (Bom), State v. Shankarlal. The applicant, therefore, could not be said to have committed any breach of the condition No. 7-A of the licence issued to him under the Foodgrains Dealers licensing Order, 1963. He has, therefore, not committed a breach of the provisions of Section 7(1)(a)(1) of the Essential Commodities Act.

5. The revision application is allowed. The conviction and sentence passed against the accused is set aside. The fine paid by the accused be refunded to him.

GGM/D.V.C. Petition allowed.

AIR 1969 BOMBAY 71 (V 56 C 12)

VAIDYA J.

State, Appellant v. Vithal Hari Nikate, Respondent.

Criminal Appeal No 1181 of 1966, D/- 10-4-1968.

Maharashtra Foodgrains Dealers Licensing Order (1963), Cl. 3(2)—Presumption under—Sub-cl. (2) raises a limited presumption as to the purpose for which foodgrains are stored namely that the stock found with a dealer was stored by him for sale — Prosecution is still required to prove that store of foodgrains was made for purpose of carrying on business of storing for sale. AIR 1964 SC 1533 Rel. on. (Para 3)

Cases Referred: Chronological Paras (1964) AIR 1964 SC 1533 (V 51)=

1964 (2) Cri LJ 465, Manipur Administration v. Nila Chandra Singh

V. T. Gambhirwala Asst. Govt. Pleader, for the State.

JUDGMENT: This appeal is filed by the State against an order of acquittal passed by the learned Sessions Judge, Thana setting aside the order of conviction and sentence passed by the Judicial Magistrate, First Class at Wada under Section 7 of the Essential Commodities Act, 1955 read with clause 3 of Maharashtra Foodgrains Dealers' Licensing Order of 1963 relying on a decision of the Supreme Court in Manipur Administration v. M. Nila Chandra Singh, AIR 1964 SC 1533.

2. It is necessary at the outset to state the relevant provisions of the Essential Commodities Act and the Maharashtra Foodgrains Dealers' Licensing Order of 1963. Section 7 of the Essential Commodities Act, in so far as it is relevant reads as follows:

7. "Penalties — (1) If any person contravenes any order made under Section 3 (a) he shall be punishable—

(i)

(ii) in the case of any other order, with imprisonment for a term which may extend to three years and shall also be liable to fine:

Provided that if the Court is of opinion that a sentence of fine only will meet the ends of justice, it may, for reasons to be recorded, refrain from imposing a sentence of imprisonment....." Section 3 of the Act enables the Central Government to promulgate orders for the purpose of control, production, supply, distribution, etc. of essential commodities. In exercise of the powers conferred by Section 3 of the Essential Commodities Act, 1955 read with the Notification of the Government of India in the

Ministry of Food and Agriculture (Department of Food) published under G. S. R. 888 dated 28th June 1961 in the Gazette of India Part II Section 3 sub-section (i) dated 8th July 1961 and in supersession of the Bombay Foodgrains Dealers' Licensing Order, 1958 and with the prior concurrence of the Central Government, the Government of Maharashtra passed the Maharashtra Foodgrains Dealers' Licensing Order, 1963 which came into force on 1st March 1963. Clause 3 of the said order is as follows:

"3. Licensing of Dealers: (1) No person shall carry on business as a dealer except under and in accordance with the terms and conditions of a licence issued in this behalf by the licensing authority.

(2) For the purpose of this clause, any person who stores foodgrains in quantity of ten quintals or more at any one time shall, unless the contrary is proved, be deemed to store the foodgrains for the purposes of sale."

Clause 2(a) defines the word 'dealer' as a person engaged in the business of purchase, sale or storage for sale, of any one or more of the foodgrains in quantity of ten quintals or more at any one time. The plain reading of these clauses shows that clause 3 will be attracted only if a person carries on business as a 'dealer' and a person will be a 'dealer' if he is engaged in the business of purchase, sale or storage for sale of one or more of the foodgrains in quantity of ten quintals or more at any one time. Sub-clause (2) of clause 3 referred to above raises a limited presumption. In the aforesaid case, the Supreme Court was concerned with the effect of similar clauses under the Manipur Foodgrains Dealers' Licensing Order, 1958 and the Supreme Court has laid down as under:

"The statutory presumption raised by Cl. 3(2) is a rebuttable presumption and only amounts to this and nothing more, that the stock found with a given individual of 100 or more maunds of the specified foodgrains had been stored by him for the purpose of sale. Having reached this conclusion on the strength of presumption, the prosecution would still have to show that the store of the foodgrains for the purpose of sale thus presumed was made by him for the purpose of carrying on the business of store of the said foodgrains. The element of business which is essential to attract the provisions of Cl. 3(1) is thus not covered by the presumption raised under clause 3(2). That part of the case would still have to be proved by the prosecution by other independent evidence."

In view of this clear authority on the proper effect of the presumption arising under clause 3(2), the contention raised by Mr. Gambhirwala on behalf of the State

that the presumption extends not merely to the purpose for which the foodgrains are stored but also with respect to the carrying on of business, cannot be upheld. The Supreme Court has emphatically indicated the burden which is on the prosecution to establish an offence of contravention of clause 3.

3. That being the position in law, I now proceed to consider briefly the facts which gave rise to the present appeal. One N. M. Hebli who was working as a Supply Inspector at Wada went to the house of the accused on 14th April 1964 and found that the accused had about 60 maunds of paddy of fine quality stored in his godown at Wada. He made enquiries about the stock of paddy found in the possession of the accused and made his report to the Collector of Thana who directed him to lodge a complaint with the police and on 31st August 1964 the paddy was actually attached in the presence of the panchas. The stock of paddy which was seized was kept in the godown and the godown was sealed. After the investigation, the police submitted a chargesheet against the accused for the offence under S. 7 of the Essential Commodities Act, 1955 read with clause 3 of the Maharashtra Foodgrains Dealers' Licensing Order of 1963. The accused pleaded not guilty and stated that he had about 250 quintals of paddy in the godown, that he had no licence but had purchased 100 maunds of paddy and stored that paddy along with 500 maunds of paddy belonging to five other cultivators and, according to the accused, the said five persons were paying him rent at the rate of Rs. 10 per month. The learned Magistrate found him guilty of the offence relying on the presumption under clause 3(2). He held that the presumption was not rebutted and this fact together with the evidence of the accused storing foodgrains on many other occasions goes to show that the accused engaged himself in the business of storing paddy for sale as a dealer. Against the said conviction, the accused filed an appeal in the Court of the learned Sessions Judge at Thana who as stated above relying on the decision of the Supreme Court set aside the order of conviction on the ground that there was no evidence whatsoever on the record to show that the accused was engaged in business and hence the conviction was illegal. Mr. Gambhirwala is not in a position to point out any evidence on record to prove that the accused was engaged in the business of storing for sale. In the absence of such evidence, it must be held that the prosecution has not established that the accused has contravened clause 3 of the said order. Hence the accused is entitled to an acquittal.

4. In the circumstances, the order passed by the learned Sessions Judge, is

legal and proper and this appeal is dismissed.

GGM/D.V.C.

Appeal dismissed.

AIR 1969 BOMBAY 73 (V 56 C 13)

NAIN, J.

Lakhamshi Hiralal and Co. a firm, Applicant v. Damji Khimji and Co. a firm, Opponent.

Civil Revn. Appln. No. 1823 of 1964, D/- 7-12-1967.

Presidency Small Cause Courts Act (1882), S. 41 — "Annual value of rack rent" — Meaning — Such value is to be based on "rent" and not on licence fees— It means only gross rent and not net rent.

The expression "rack rent" means "rent of or approaching to the full annual value of the property out of which it ensues". The annual value at rack-rent is to be based on "rent" even if the rent is controlled by legislature and not on licence fees. The rack-rent has to be "rent" first before it becomes rack-rent. It can only mean gross rent and not net rent. Thus the gross rent payable in respect of the premises by the tenants to their own landlord per annum is the annual value of the premises at a rack-rent. The amount per annum paid by the licensees to the tenants as licence fees is neither rent nor rack-rent and cannot be the annual value at a rack-rent. The jurisdiction of Small Cause Court to entertain a suit for eviction will depend on annual rent and not licence fees. (1952) 2 QB 803, Foll.

(Para 8)

Cases Referred: Chronological Paras
(1952) 1952-2 QB 803, Rawlance v.

Croydon Corporation

7

M. V. Paranjpe with K. R. Bhatt, for Applicant; J. V. Thakar, for Opponent.

ORDER: This is a revision application under the provision of Section 115 of the Code of Civil Procedure against an order dated 30th April 1964 passed by a Judge of the Bombay Small Causes Court dismissing the petitioner's ejectment application filed under the provisions of Section 41 of the Presidency Small Cause Courts Act on the ground that the annual value of the premises at a rack rent exceeds Rs. 3,000 and, therefore, the Bombay Small Causes Court had no jurisdiction to entertain, try and determine the said application.

2. The petitioners are the tenants of a godown on the ground floor of Botawala building at Narshi Natha Street, Bombay 9, at a rental of Rs. 188 per mensem. By an agreement dated 27th October 1960, the petitioners granted leave and licence to the respondents to use and occupy a portion of the said godown at a

licence fee of Rs. 260 per mensem. The petitioners claim to have terminated the said leave and licence and have filed an application under Section 41 of the Presidency Small Cause Courts Act in the Bombay Small Causes Court to evict the respondents from the said portion of their premises.

3. The respondents contended that the Small Causes Court had no jurisdiction to entertain, try and determine the application. It was contended by them that they were in law tenants and were paying Rs. 260 per mensem, i.e. Rs. 3,120 per annum. Under S. 41 of the Presidency Small Cause Courts Act, an application for possession of immoveable property can only be filed in the Small Causes Court when annual value at a rack rent does not exceed Rs. 3,000.

4. The learned Judge held that the expression "rack rent" meant the rent raised to the uttermost or the full annual benefit of the property which, in this case, for the part of the premises in the occupation of the respondents was Rupees 3,120. The learned Judge held that the application was, therefore, not maintainable under Section 41 of the Presidency Small Cause Courts Act and he dismissed the said application. The petitioners have come in revision against the said order.

5. Now, Section 41 of the Presidency Small Cause Courts Act provides as under:

"When any person has had possession of any immoveable property situate within the local limits of the Small Cause Court's jurisdiction and of which the annual value at a rack-rent does not exceed Rs. 3000/-, as the tenant, or by permission, of another person, or of some person through whom such other person claims,

xx such other person (hereinafter called the applicant) may apply to the Small Cause Court for a summons against the occupant, calling upon him to show cause, on a day therein appointed, why he should not be compelled to deliver up the property."

6. Whether the Bombay Small Cause Court would have jurisdiction to entertain this application depends, therefore, upon the interpretation of the expression "annual value at a rack rent" occurring in Section 41 of the Presidency Small Cause Courts Act. No decision of any Indian High Court has been cited before me in which this expression has been interpreted. If what the respondents are paying to the petitioners for the part of the premises in the respondents' occupation is taken into consideration the amount will be Rs. 3,120 and the Small Cause Court will have no jurisdiction, but if what is paid by the petitioners to their

own landlord, who is the owner of the premises, viz. Rs. 188 per mensem in respect of the entire premises in the occupation of the petitioners is taken into consideration, the annual rent will be Rupees 2,256 and if this is the annual value at a rack rent, the Small Cause Court will have jurisdiction. In this case only a part of the premises let to the petitioners having been given to the respondents, the annual rent of the part will be even less than Rs. 2,256. But I am not considering this aspect of the matter, as even the entire rent of Rs. 2,256 is less than Rupees 3,000.

7. The Strouds Judicial Dictionary defines "rack rent" as "rent of or approaching to the full annual value of the property out of which it ensues". In England, the expression "rack rent" occurs or has occurred in Poor Law Amendment Act, 1834 and Towns Improvement (Ireland) Act, 1854 and in certain Public Health Acts. In these Acts, the expression has been variously defined. This expression as occurring in the Housing Act, 1936 came up for interpretation in the case of *Rawlance v. Croydon Corporation*, (1952) 2 QB 803. There in interpreting the expression "rack rent", it has been stated that in ascertaining the full net annual value the fact that the rent of the house is controlled by the Rent Restriction Acts is to be taken into consideration, for they restrict the value of the house to the landlord, and since the standard rent of such a house, plus statutory increases, is the full amount which the landlord can receive from the tenant, that rent is the full net annual value of the house within the meaning of subsection (4) of Section 9 of the Housing Act, 1936. The following passage occurs in the judgment of Lord Justice Denning at pages 812-813:

"If the house is one which is within the Rent Restriction Acts, regard must, I think, be had to that fact. The 'full net annual value of the house' is not to be calculated as if the Rent Acts did not exist. It is the full amount which a landlord can reasonably be expected to get from a tenant. He cannot reasonably be expected to get more than the Rent Restriction Acts permit. If he receives the full permitted amount he is receiving the full annual value. He is receiving a rack rent.....".

8. There is another passage in the judgment of Lord Justice Romer at page 816 which reads as under:

"In my opinion the legislature, in Section 9, was applying itself to a factual and not to a hypothetical position. If the standard rent is the greatest rent that is obtainable in respect of any particular premises then it is the full rent of those premises, the rack rent, notwithstanding that (and indeed because) the owner is

restricted from receiving the higher rent which the premises, if uncontrolled, would command."

This will indicate that the annual value at rack rent is to be based on "rent" even if the rent is controlled by legislature and not on licence fees. The rack rent has to be "rent" first before it becomes rack rent. It can only mean gross rent and not net rent. In this particular case, the gross rent payable in respect of the premises by the petitioners as tenants to their own landlord who is the owner of the premises, is Rs. 2,256 per annum, and this is the annual value of the premises at a rack rent. The amount of Rs. 3,120 per annum paid by the respondents to the petitioners as licence fees is neither rent nor rack rent and cannot be the annual value at a rack rent.

9. In my opinion, the Bombay Small Cause Court had jurisdiction to entertain, try and determine the petitioners' application under Section 41 of the Presidency Small Cause Courts Act in respect of the premises and it has failed to exercise jurisdiction vested in it. The order dismissing the application is, therefore, set aside. The revision application is allowed.

10. There will be no order as to costs.

11. The matter is remanded to the Small Cause Court, Bombay for disposal in accordance with the law.

12. Rule made absolute.

GGM/D.V.C.

Rule made absolute.

AIR 1969 BOMBAY 74 (V 56 C 14)

TARKUNDE AND WAGLE, JJ.

Yadneshwar Madhav Bhawe, Applicant
v. Mango Raoji Patil, Opponent.

Civil Revn. Appln. No. 367 of 1966,
D/- 5-12-1967, from order of Asst. J., Jalgaon D/- 26-7-1965.

(A) Debt Laws — Bombay Agricultural Debtors Relief Act (28 of 1947), Ss. 43, 46 and 38 — Execution of award — Order that satisfaction alleged by debtor was not proved or that execution application is not maintainable is appealable — (1957) 59 Bom LR 610, Overruled.

An order of the Court executing an award holding that the satisfaction alleged by the debtor was not proved or that the application for execution is not maintainable, is appealable, (1957) 59 Bom LR 610, Overruled. (1957) 59 Bom LR 689, Rel. on. (Para 8)

It is clear from Section 46 that an order which is not covered by S. 43 is appealable if an appeal from that order is provided by C. P. C. In view of S. 38 C. P. C. the above mentioned orders are

orders under S. 47 C. P. C. and are therefore decrees being covered by the expression "deemed to include..... the determination of any question within S. 47" under S. 2(2) C. P. C. (Para 8)

(B) Debt Laws — Bombay Agricultural Debtors' Relief Act (28 of 1947), S. 38(3) — Award allowing debtor to make payments by instalments with direction that amount paid by instalments to be first utilised in discharging dues of mortgagees and then for satisfaction of unsecured creditors by rateable distribution of subsequent instalments — Failure by debtor to pay first instalment on stipulated date — Unsecured creditor not disentitled from applying for execution of award merely because mortgagees have not yet recovered amount due to them.

(Para 13)

Cases Referred: Chronological Paras
(1957) 59 Bom LR 610, Jankibai Abaji
v. Bhikaji Raghunath 1, 2, 6, 8, 10
(1957) 59 Bom LR 689, Chaturbhai
Mathubhai v. Ramanlal 11

N. D. Dange, for Applicant; M. R. Kotwal for U. R. Lalit, for Opponent.

TARKUNDE J.: This Revision Application arises from a Darkhast filed by the petitioner for executing an award passed under the Bombay Agricultural Debtors Relief Act. The opponent was the agriculturist debtor in respect of whose debts the award was passed. It was provided in the award that the opponent should deposit in court annual instalments of Rs. 375 each. The amount paid by instalments was to be first utilised in discharging the dues of two mortgagees. After the mortgagees were paid off, the dues of unsecured creditors were to be satisfied by rateable distribution of subsequent instalments. The petitioner was one of the unsecured creditors and was entitled to recover an amount of Rs. 1200 with interest at 4 per cent per annum. The first instalment of Rs. 375 was payable by the opponent on 15th December 1953. The opponent having failed to pay any of the instalments, the petitioner filed on 8th January 1964 a Darkhast for executing the award. The trial Court dismissed the Darkhast on the ground that the dues of the mortgagees had not been paid off by the opponent, that the petitioner was not entitled to recover his debt till the dues of the mortgagees were satisfied and that the Darkhast was, therefore, not maintainable. On an appeal filed by the petitioner, the Assistant Judge of Jalgaon expressed the view that the petitioner's Darkhast was maintainable and was wrongly dismissed by the trial Court. The learned Assistant Judge, however, dismissed the petitioner's appeal because he held, following the decision by Mr. Justice Gokhale in Jankibai Abaji v. Bhikaji Raghunath, (1957) 59

Bom LR 610 that no appeal was maintainable from the order of the trial Court. The petitioner has filed this revision application from the decision of the learned Assistant Judge.

2. Initially this Revision Application came for hearing before Mr. Justice Patel. The learned Judge referred it to a Division Bench because he found it difficult to accept the view expressed in (1957) 59 Bom LR 610. Thus the question which we have to decide is, whether an order dismissing an application for executing an award passed under the B. A. D. R. Act is appealable and whether the view to the contrary expressed in Jankibai Abaji's case, (1957) 59 Bom LR 610 is correct.

3. Sub-section (3) of Section 38 of the B. A. D. R. Act provides for the execution of awards passed under the Act. Clause (i) of that sub-section says that if a debtor makes default in payment of any instalment due under an award to any creditor such creditor may apply in the prescribed form to the court for execution of the award. Clause (ii) lays down that if the court is satisfied that the debtor has made default in the payment of the instalment, the court shall transfer the award for execution to the Collector and thereupon the Collector shall recover the amount of the instalment from the debtor as arrears of land revenue. Clause (iii) provides that if the court has passed an order for the delivery of possession of any property under clause (v) of sub-section (2) of Section 32, such order shall be executed by the Court "as if it were a decree passed by it."

4. Section 43 of the Act lays down that "notwithstanding anything contained in any other law" an appeal shall lie from certain orders passed under the Act and also from awards made under the Act. Section 43 does not provide for an appeal from an order of the executing Court passed under sub-section (3) of Section 38.

5. It is, however, established by several decisions of this Court that Section 43 of the B. A. D. R. Act is not exhaustive of the orders under the Act from which appeals can be filed. The object of Section 43 was to provide for appeals from orders which were apparently not appealable under the Civil Procedure Code and which the Legislature intended to be appealable. Section 46 of the Act lays down that, save as otherwise expressly provided by the Act, the provisions of the Code of Civil Procedure shall apply to all proceedings for the adjustment of debts. It follows that an order which is not covered by Section 43 is appealable if an appeal from that order is provided by the Civil Procedure Code.

6. In Jankibai Abaji's case, (1957) 59 Bom LR 610 decided by Mr. Justice

Gokhale, the facts were that a creditor filed an application for executing an award made under the B. A. D. R. Act and the debtor pleaded before the executing court that the award was satisfied. The executing Court rejected the contention and held that the alleged satisfaction was not proved. The debtor appealed from this decision to the District Court, but the District Court dismissed the appeal as being incompetent. The decision of the District Court was upheld by Mr. Justice Gokhale.

7. In the course of his judgment Mr. Justice Gokhale accepted the position that an order passed under the B. A. D. R. Act, which is not covered by Section 43 of the Act, is appealable if an appeal from such order is provided by the Code of Civil Procedure. It was argued before the learned Judge that the order of the executing court rejecting the plea of satisfaction raised by the debtor was an order under Section 47 of the Civil Procedure Code and was, therefore, appealable as a "decree" as defined by Section 2(2) of the Code. This contention was rejected by the learned Judge. For appreciating the reasons why this contention was rejected, it is necessary to examine the terms of sub-section (1) of Section 47 of the Civil Procedure Code, which runs thus:

"All questions arising between the parties to the suit in which the decree was passed or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit."

The learned Judge held that Section 47 of the Civil Procedure Code has no application to the determination of any question in the execution of an award under the B. A. D. R. Act, because a proceeding for the adjustment of debts under the B. A. D. R. Act is not a suit and an award passed in such proceeding is not a decree. The learned Judge observed in this connection:

"Now, it cannot be held in the first instance that the parties in these darkhasts were parties to any suit. Nor can the awards passed against the petitioner be regarded as decrees. Prima facie, therefore, S. 47 of the Civil Procedure Code would not apply".

The learned Judge further observed that the provisions contained in Section 38 of the B. A. D. R. Act themselves showed that an award passed under the Act was not executable under the provisions of the Code of Civil Procedure.

8. It appears to us, with great respect, that the question whether an order passed during the execution of an award is or is not appealable, does not depend on whether the award amounts to a "decree",

as defined in the Civil Procedure Code. If the award is not a decree, as held by the learned Judge, it is an "order" as defined in Section 2(14) of the Civil Procedure Code. Under Section 2(14) an "order" means "the formal expression of any decision of a Civil Court which is not a decree". An award passed by the court under the B. A. D. R. Act amounts to a formal expression of a decision of a Civil Court and, if it is not a decree, it is an order under the above definition. Now, Part II of the Civil Procedure Code deals with execution, and the first section in that Part is Section 36, which lays down: "The provisions of this Code relating to the execution of decrees shall, so far as they are applicable, be deemed to apply to the execution of orders". Section 47 falls in Part II of the Civil Procedure Code and, since it relates to execution of decrees, is deemed to apply to the execution of orders so far as its provisions are applicable thereto. Under Section 47 of the Civil Procedure Code, all questions arising between the parties to the suit in which the decree was passed or their representatives, and relating to the execution, discharge or satisfaction of the decree, are to be determined by the court executing the decree. In its application to execution of orders, Section 47 must be deemed to provide that all questions arising between the parties to a proceeding in which an order was passed or their representatives, and relating to the execution, discharge or satisfaction of the order, shall be determined by the court executing the order. An order of the Court executing an award holding that the satisfaction alleged by the debtor was not proved (as in *Jankibai Abaji's case*, (1957) 59 Bom LR 610) or that the application for execution is not maintainable (as in the present case) is, therefore, an order under Section 47 of the Civil Procedure Code. It has been laid down in the definition of "decree" in Section 2(2) of the Civil Procedure Code that the word "decree" shall be "deemed to include the determination of any question within Section 47". The orders of the Court executing awards referred to above are, therefore, decrees and are appealable as such.

9. That no distinction has been made in the Civil Procedure Code in the execution of decrees and orders is clear from a number of other provisions. In Section 2(3) of the Civil Procedure Code a "decree-holder" has been defined as "any person in whose favour a decree has been passed or an order capable of execution has been made". Similarly, in Section 2(10) a "judgment-debtor" has been defined as "any person against whom a decree has been passed or an order capable of execution has been made". Then

the whole of order XXI of the Civil Procedure Code bears the heading "Execution of Decrees and Orders". That is why the rules in Order XXI, although they refer in terms to execution of decrees, apply to execution of orders as well.

10. We have noticed above that Mr. Justice Gokhale said in his judgment in Jankibai Abaji's case, (1957) 59 Bom LR 610 that the provisions contained in Section 38 of the B. A. D. R. Act show that an award is not executable under the provisions of the Code of Civil Procedure. Mr. Kotwal, who appeared before us on behalf of the opponent, also urged that Section 38 precludes the application of the provisions of the Civil Procedure Code to the execution of awards. Now, Section 46 of the B. A. D. R. Act lays down that "save as otherwise expressly provided in this Act", the provisions of the Code of Civil Procedure shall apply to all proceedings for the adjustment of debts. We do not find any express provision in Section 38 which prevents the application of the Civil Procedure Code to the execution of awards, except the provision which says that, after an award is transferred to the Collector for execution, the Collector shall recover the amount of the instalment from the debtor as arrears of land revenue. It must follow that the relevant provisions of the Civil Procedure Code apply to the execution of awards except the extent specified above.

11. The observation of Mr. Justice Gokhale in the above case that an award is not executable under the provisions of the Code of Civil Procedure runs counter to the decision by Mr. Justice Bavdekar in Chaturbhai Mathubhai v. Ram-anlal, (1957) 59 Bom LR 689. There an agriculturist debtor had raised a contention during the execution of an award that he had paid the amount of instalments to his creditor. The creditor objected that the alleged payment by the debtor could not be taken notice of by the court in view of the provisions of Order XXI Rule 2 of the Civil Procedure Code. This objection was accepted. Mr. Justice Bavdekar held that Order XXI Rule 2(3) of the Civil Procedure Code applies to payments alleged to have been made towards awards passed under the B. A. D. R. Act.

12. We are accordingly of the view that in the case before us the learned Assistant Judge was wrong in holding that the appeal filed by the petitioner was not maintainable.

13. We agree with the finding of the learned Assistant Judge that the trial court was in error in dismissing the petitioner's Darkhast as being untenable. The mere fact that the mortgagees have not

yet recovered the amounts which were due to them cannot disentitle the petitioner from applying for executing the award. After the award is transferred to the Collector for execution under clause (ii) of Section 38(3) of the B. A. D. R. Act, and after the amount of the instalments in arrears is recovered, the court will decide to which of the creditors the amount is payable and in what proportion.

14. In the result, the revision application is allowed, the orders passed by the trial Court and by the learned Assistant Judge are set aside, the petitioner's Darkhast in the trial court is restored and the trial Court is directed to dispose of it in accordance with law. The opponent will pay the petitioner's costs in this Court and in the lower appellate Court.

CWM/D.V.C.

Appeal allowed.

AIR 1969 BOMBAY 77 (V 56 C 15)
(AT NAGPUR)

ABHYANKAR AND CHANDURKAR, JJ.

Parwati, Appellant v. Janabai, Respondent.

A. F. A. D. No. 301 of 1961, D/- 17-11-67 from appellate decree of Asst. J., Nagpur in Appeal No. 91-A of 1960.

Hindu Women's Rights to Property Act (1937) (as amended in 1938), S. 3 — Scope — Partition of joint Hindu family property — Share of a member continues to be 'interest in joint family property' — Death of such member — Extent of widow's interest — Such interest will be according as whether she is sole claimant or there are other joint coparceners having a right with her — Living separated coparceners are excluded — (Hindu Law — Joint family) — (Hindu Law — Partition) — (Hindu Law — Widow) — Hindu Law — Succession).

The two parts of S. 3 of the Hindu Women's Rights to Property Act cannot be said to be not covering cases of all kinds of property of a Hindu male leaving a widow. There is really no difference in principle whether the property obtained by the Hindu male is as a result of partition between himself and his son or himself and his brothers. There is also no inherent contradiction in saying that a Hindu, who has partitioned his share, dies "having at the time of his death an interest in the Hindu joint family property" and the case of a Hindu male dying in a state of jointness with the other members, whether those members are his sons or his coparceners. The interest of a Hindu male, who has partitioned from either his son or other co-

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parceners can equally be described as "interest in Hindu joint family property" because his branch can itself be considered a Hindu joint family so long as there is a possibility of a son being born or adopted in the family and thus the interest of such a Hindu male is covered by S. 3(2). AIR 1945 FC 25, Foll.

(Paras 17, 18, 19 and 20)

The extent of the interest of the widow of such a Hindu male, however, will be according as either she is a sole claimant or there are other joint coparceners having a right to inherit along with her and living separated coparceners are excluded. AIR 1955 Ori. 160 and AIR 1964 Pat 261 (FB), Foll. AIR 1958 Bom 346, Approved. AIR 1961 Mad 90 and AIR 1964 Mad 58 and AIR 1966 Mad 266, Rel. on; AIR 1949 Nag 108 and AIR 1958 Andh Pra 280 and AIR 1953 Mad 22 and AIR 1957 Mad 456 and AIR 1958 Orissa 160, Ref.

(Para 20)

Cases Referred: Chronological Paras

- (1966) AIR 1966 Mad 266 (V 53)=ILR (1966) 1 Mad 468, Venkatasubramania Iyer v. P. N. Easwara Iyer 18
 (1964) AIR 1964 Mad 58 (V 51)=76 Mad LW 138, Commr. of Income-tax, Madras v. S. S. Thiagarajan 18
 (1964) AIR 1964 Pat 261 (V 51)=ILR 43 Pat 485 (FB), Mt. Khatrani v. Smt. Tapeshwari 18
 (1961) AIR 1961 Mad 90 (V 48)=1961-1 Mad LJ 33, Onnamalai Ammal v. Seethapathi Reddier 18
 (1958) AIR 1958 Andh Pra 280 (V 45)=(1957) 2 Andh WR 287, Chunduru Seshamma v. Chunduru Ramakoteswara Rao 12
 (1958) AIR 1958 Bom 346 (V 45)=60 Bom LR 553=1958 Nag LJ 416, Jana v. Parvati 2, 13, 18
 (1958) AIR 1958 Orissa 160 (V 45), Jogendra Nath Das v. Charan Das 12
 (1957) AIR 1957 Mad 456 (V 44)=ILR (1957) Mad 565, Subramanian v. Kalyanarama Iyer 12, 18
 (1955) AIR 1955 Orissa 160 (V 42)=ILR (1955) Cut 405, Tayi Visalamma v. Tayi Jagannadha Rao 16
 (1953) AIR 1953 Mad 22 (V 40)=1952-2 Mad LJ 575, A. N. Subramanian v. A. S. Kalyanarama Iyer 12, 16
 (1949) AIR 1949 Nag 108 (V 36)=ILR (1948) Nag 465, Bhaoorao v. Chandrabhagabal 11
 (1945) AIR 1945 FC 25 (V 32)=1945 FCR 1, Umayal Achi v. Lakshmi Achi 9, 11, 13, 16, 19

Mr. and Mrs. Chendke, for Appellant; D. R. Bhagade, for Respondent.

ABHYANKAR, J.: The following two questions have been referred to Division Bench by the learned Single Bench Judge:

(1) Whether the share obtained by a member of a joint Hindu family on partition is and continues to be an interest in joint family property?

(2) On the death of such a divided coparcener what is the extent of the interest which his widow would take in that property, if there are other separated coparceners in existence?

2. The questions arise out of a Second Appeal filed by the original defendant Parwati against reversing judgment in the District Court. The facts giving rise to this litigation will be necessary to be detailed to comprehend the nature of the controversy between the parties. One Gadi and his son Santosh formed a joint Hindu family having coparcenary property. That property consisted of land Khasra No. 639, with a total area of 11.40 acres at Katol. It is an admitted position that on 23-5-1946, there was a partition by metes and bounds between Gadi on the one hand and his son Santosh on the other. The property was divided into two shares, an area of 3.80 acres having been allotted to Santosh and the remaining area of 7.60 acres was allotted by Gadi to his share. Parwati, the present appellant, is the wife of Santosh and the respondent Janabai alias Bani was the wife of Gadi. Gadi died on 8-10-1948. It appears, Gadi had acquired one acre of land from one Laxman, who had purchased it out of the land allotted to the share of Santosh. Thus, at the time of his death, Gadi was in possession of 8.60 acres of land. Janabai, his widow, leased out 8.60 acres of land to one Appaji. Santosh filed Civil Suit No. 80-A of 1949 against Janabai and the lessee Appaji claiming an injunction against both of them from trespassing into, or interfering with, the property in dispute, that is, 8 acres and 60 gunthas of land left by Gadi. Apparently Santosh claimed the right to have become the exclusive owner of the property on the death of his father Gadi. That suit was dismissed in the trial Court, that Court holding that both Santosh as well as Gadi's widow Janabai were co-owners of the property. The dismissal was challenged by Santosh in the District Court in Civil Appeal No. 100-A of 1951. The appeal was allowed and Santosh was granted a decree. Against this judgment and decree, Janabai preferred Second Appeal. During pendency of the litigation in the District Court, Santosh died and his widow Parwati, the present appellant, was brought on record. The Second Appeal came to be decided in this Court on 19-11-1957 and that decision is reported in Jana alias Bani v. Parvati, 1958 Nag LJ 416= (AIR 1958 Bom 346). The learned Single Judge, who allowed the appeal, held that the decision of the trial Court holding that the land devolved on the widow of Gadi as well as the son of Gadi in equal shares was not challenged by the appeal filed by the widow. The learned Single Judge took the view that the case

was governed by Section 3(2) of the Hindu Women's Rights to Property Act, 1937, and therefore, confirmed the dismissal of Santosh's suit in the trial Court. The learned Judge expressly left open the question whether the trial Court was right in holding that the son acquired half share in the property along with the widow, that is, whether Santosh could claim any share in the property along with Janabai.

3. In view of the uncertainty of the rights of the parties, the second round of litigation seems to have commenced by the suit out of which the present appeal has arisen. Janabai filed the suit on 23-10-1958. In this suit, she claims a declaration that the plaintiff alone is entitled to 8.60 acres to the exclusion of the defendant Santosh, and therefore, Santosh, or now his widow Parwati, should be permanently restrained from interfering with plaintiff's possession and enjoyment of this much land.

4. The defence raised on behalf of Santosh put forth several contentions. Santosh denied that there was a partition or that the father and the son were in separate possession of the lands alleged to be allotted to the share of each. The lease to Appaji was also denied and he contended that the decision of the trial Court that both were co-owners having been upheld by the High Court, that decision operates as *res judicata* and the matter should not be reagitated.

5. On the pleadings of the parties several issues were framed. The trial Court held that there was a partition between Gadi and Santosh under which 7.60 acres were allotted to Gadi and 3.80 acres were allotted to Santosh. On 31-3-1947 Santosh sold to one Laxman one acre out of 3.80 acres which he got in partition and that Gadi purchased the same. The trial Court held that Santosh inherited, on the death of Gadi, one half share in property left by Gadi and the plaintiff alone could not claim to have inherited the whole of 8.60 acres of land. The trial Court held against the contention of the defendant on the question of *res judicata* on account of the position in the previous suit. But the suit was ultimately dismissed as the Court held that both were co-owners to the extent of one half share each.

6. Against this judgment and decree Janabai preferred an appeal. On a review of authorities the lower Appellate Court held that it was proved that Janabai, the plaintiff, had become exclusively entitled to 8.60 acres of land after the death of her husband and had confirmed the finding of the trial Court that the previous decision was not *res judicata* between the parties. The appeal was,

therefore, allowed and suit has been decreed.

7. Against this decision, Parwati filed Second Appeal in this Court and when arguments were advanced before the learned Single Judge, in view of certain conflicting authorities, a reference has been made to the Division Bench for answers to the question framed by the learned Judge.

8. The provision of law required to be interpreted is provision of Section 3 of the Hindu Women's Rights to Property Act i. e. Act No. XVIII of 1937, as amended by Central Act No. XI of 1938. Section 3, as amended, is as follows:

"3(1) When a Hindu governed by the Dayabhaga School of Hindu law dies intestate leaving any property, and when a Hindu governed by any other School of Hindu law, or by customary law dies intestate leaving separate property, his widow, or if there is more than one widow all his widows together, shall, subject to the provisions of sub-section (3), be entitled in respect of property in respect of which he dies intestate to the same share as a son;

Provided that the widow of a predeceased son shall inherit in like manner as a son if there is no son surviving of such predeceased son, and shall inherit in like manner as a son's son if there is surviving a son or son's son of such predeceased son;

Provided further that the same provision shall apply *mutatis mutandis* to the widow of a predeceased son of a predeceased son.

(2) When a Hindu governed by any school of Hindu law other than the Dayabhaga school or by customary law dies having at the time of his death an interest in a Hindu joint family property, his widow shall, subject to the provisions of sub-section (3), have in the property the same interest as he himself had.

(3) Any interest devolving on a Hindu widow under the provisions of this section shall be the limited interest known as a Hindu woman's estate, provided however that she shall have the same right of claiming partition as a male owner.

(4) The provisions of this section shall not apply to an estate which by a customary or other rule of succession or by the terms of the grant applicable thereto descends to a single heir or to any property to which the Indian Succession Act, 1925, applies".

9. Now, there is not much dispute between the parties, that in view of the decision of the Federal Court reported in *Umayal Achi v. Lakshmi Achi*, AIR 1945 FC 25 the property allotted to the share of Gadi in the partition between himself and his son Santosh, in 1946, cannot be considered as 'separate pro-

perty' of Gadi. It was not the self-acquired property of Gadi, and therefore, cannot be considered to be 'separate property' to which the provision of sub-section (1) of Section 3 could properly be attracted in this case. The argument, therefore, revolves round the interpretation and true construction to be placed on sub-section (2) of Section 3 of the Hindu Women's Rights to Property Act. It is contended on behalf of the respondent by the learned counsel that the property allotted to Gadi in the partition between himself and his son, if it is not to be treated as 'separate' or 'self-acquired property', must be treated as property belonging to a Hindu joint family. In other words, it is contended that Gadi, as a Hindu, who is governed by Mitakshara School, had, at the time of his death, an interest in a Hindu joint family property, and therefore, on his death his widow, namely, Janabai, alone should be held entitled to get that property.

10. On the other hand, the contention of the learned counsel for the appellant is that there is no joint family and there was no joint family property inasmuch as Gadi had already separated from his son with whom he could possibly form and constitute a joint family, and therefore, this is a case which is outside all the provisions of both sub-sections (1) and (2) of Section 3 of the Hindu Women's Rights to Property Act and the general provisions of Hindu Law are attracted in determining the succession to the property. Under general Hindu law where Statute has not interposed to give rights to women or widows in competition between son and the widow of the deceased Hindu in respect of property left by him and which cannot be considered as his self-acquired property or separate property, the preferential heir between the two will be the son to the exclusion of the widow, or at any rate, along with the widow. But it may be that because of the previous position in the case, at any rate, Santosh cannot be denied one half share. We have to decide which of these rival contentions is correct, in view of the judicial pronouncements of different Courts and also in this Court in one case.

11. Considerable reliance is placed on a Division Bench decision of Nagpur High Court on behalf of the appellant in a case reported in *Bhaorao v. Chandrabhagabai*, AIR 1949 Nag 108. In that case one Pandurang had a son by name Dada and two wives Chandrabhagabai and Bhimabai. Pandurang being lunatic, proceedings appear to have been taken under the Lunacy Act and the manager was appointed in respect of property of Pandurang. While the case was before the District Judge, the property belonging to the joint family was partitioned and the son,

Dada, received half share in the property. On death of Pandurang, the manager applied that the property allotted to Pandurang should be handed over to lawful heirs and a direction to that effect should be given by the District Judge. Notice of this application was issued to Dada but he also died before he appeared in Court. His sons then put in a claim. The contest was between the widows of Pandurang and sons of Dada, that is, widows of father and sons of deceased son respectively. The District Judge ordered that the property be handed over to the two widows and against this order sons of Dada preferred an appeal. The Division Bench accepted the contention of Dada's sons and held that the position of the divided son was superior to that of the widows, and therefore, Dada's sons were entitled to inherit in preference to widows. In coming to this conclusion, the Division Bench observed in paragraph 7 as follows:

"The position of a widow vis-a-vis a separated son is discussed by Mulla in Sections 340 and 341 of his book. According to the learned author, the effect of a partition is to dissolve the coparcenary with the result that the separating members hold their respective shares as their separate property and the share of each member passes on his death to his heirs. The position of the divided son, is superior to that of the widow. The learned author says that if there be no undivided son, the divided son is entitled to succeed to the self-acquired property in preference to his father's widow. No distinction is made between self-acquired property and property obtained on partition as a separate share. The illustration to Section 341 given by the learned author says:

A and his son B are members of an undivided family, B receives his share of the joint property, and separates from A. A then dies leaving a widow and his son B. B as A's son, is entitled to inherit to A in preference to the widow. The fact that B has separated from A does not interfere with his right of inheritance.

In Section 230 of his book Sir Dinshaw Mulla says:

"Property acquired in any of the following ways is the separate property of the acquirer, it is called 'self-acquired' property and is subject to the incidents mentioned in Section 222.

(6) Share on partition—property obtained as his share on partition by a coparcener who has no male issue." It would thus appear that the divided son is a preferential heir under the Hindu law.

We have next to see if the Hindu Women's Rights to Property Act has made any difference. The coparcenary had certainly come to an end with the

goods or descriptions of goods and not a mere general intention of extending his business at some future time to anything which he may think desirable. This question we answer in the negative."

23. Again, similar principle was emphasized by the Court of Appeal in England in *De Cordova v. Vick Chemical Co.* dealing with the word "Vapo-Rub" reported in (1951) 68 RPC 103, Lord Radcliffe at p. 107 of that report observed as follows:

"Merely to find these books in Jamaica is not enough if, as is evidently the case, this particular part of their contents has not passed into the speech of Doctors, or of druggists, or of dealers, or of the general public. For the Jamaican Register is a source of title in its own right; and in considering any question that bears on registration in Jamaica or on the nature or extent of the monopoly in Jamaica that is granted by S. 39 of the Jamaica's Trade Marks Law, it is usage within the territorial jurisdiction of this law-making authority that must be taken into account. What is not merely descriptive by Jamaican usage is not altered in character by what may well be the different usage of the United Kingdom. To say this is only to say what has been said more than once in Trade Mark cases in this country; see for instance, *Re, Reddaway and Co.'s application*, (1925) 42 RPC 397, (1927) 44 RPC 27, and *Impex Electrical Ltd. v. Wein Baum*, (1927) 44 RPC 405."

24. It will be appropriate to refer in a little greater detail to the Trade Marks case of *John Batt and Co.*, reported in (1898) 2 Ch D 432. It first lays down the principle that a trader cannot properly register a trade mark for goods in which he does not deal or in which he has not, at the time of registration, some definite and present intention to deal. It further lays down the principle that where there had been no real user of a trade mark before or since its registration, and it had been registered in a particular class, without any bona fide intention to use it in that class, the Court, on the application of another trader to register an identical mark in respect of that class could rectify the Register by expunging the existing mark as an entry made without sufficient cause. This principle is very much against the appellants, both in fact and in law, in the present appeal. Here, there has been the following finding by the Registrar:—

"In effect, there is no evidence before the Tribunal regarding the user of the Registered mark at any time in this country."

25. In *John Batt's* case the decision of *Romer, J.*, was affirmed on appeal. As the facts are important and as the contentions are similar in the present appeal, I propose to examine in still greater

detail what was said in that decision. *Romer, J.*, at p. 438 of that Report made the following findings:—

"Looking at the evidence as a whole, which I do not intend to refer to in detail in this judgment, I come to the following conclusions of fact on the evidence before me; that there was no real user of this trade mark of a "Butter fly" at any time before registration; that there has been no real user of the "Butter fly" trade mark since registration in respect of any of the articles in Clause 42; and I further come to the conclusion that at the date of this registration there was no bona fide intention on the part of this firm to use that trade mark for any of the goods in that class.

The result is that in my opinion that registration was wrong and ought to be expunged from the whole class and I order that it be expunged accordingly."

26. I find the tests of facts which *Romer, J.*, applied in that case are similarly applicable against the appellant in the present case before me. It is difficult to imagine that the appellant had any bona fide intention to use the trade mark in Indian Market when it knew that it was registering at a time when there was a virtual prohibition of all importation of foreign matches according to them. On appeal, *Lindley M. R.* made the observations which I have already quoted from the judgment of *Sargant, J.*, in *Neufchatel's case*, (1913) 2 Ch 291.

27. On principles I take the same view. The Trade Mark law from that point of view is not extra-territorial; that use abroad in foreign countries under foreign registration can be use within the meaning of the Indian Trade and Merchandise Marks Act of 1958. This statute is an Act which provides for registration and better protection of trade marks and for the prevention of the use of fraudulent marks on merchandise. That is its preamble. That preamble I read as confined to the territorial limits of India. Section 1 (2) of the statute extends it to the whole of India. The statute establishes trade marks register for India. The definition of a trade mark in Section 2 (v) speaking of use in relation to goods must in my opinion be understood as use within the territory of India and not use abroad. On the authorities quoted above and on the principles that I have just mentioned I am of the opinion that under Section 46 of the Trade and Merchandise Marks Act, 1958 the word "use" employed therein is used within India. Naturally if it is not used in India that would be a ground for removal from the Indian register. I cannot imagine that a foreign use or use abroad or outside India could be pleaded as a sufficient ground for retaining a registered Trade Mark on the Indian Trade Mark

register. I cannot import any extra-territorial notion to construe the Indian Trade and Merchandise Marks Act 1958 to cover foreign use. I am of the opinion that registration of a Trade Mark and its continuance on the register are exclusively within the scope and ambit of domestic and national law. The "International convention for the protection of Industrial property" originally of Paris in 1883 and recently revised at Lisbon in 1958 clearly recognises the principle specially in its Article 6 that when a Trade Mark has been duly registered in the country of origin and is then registered in other Convention Countries, each of these national marks is to be considered as independent, and the renewal of registration in the country of origin does not involve the obligation to renew in other Convention Countries. As I read the British law a Trade Mark registration, whether of a British citizen or a foreigner, and whether with Convention priority or not is consistently regarded as completely independent of any foreign registration. I am therefore of the opinion, both on the interpretation of the Indian Statute and on principle, that registration of the "Three Stars" Trade Mark of the Swedish Match Company in foreign or Convention Countries, cannot help the appellant in this appeal, on the question of Indian registration and its Statutory Conditions under the Indian Trade Mark and Merchandise Marks Act, 1958.

28. It is, therefore, clear that the biggest handicap for the appellant is that in all these cases which have been cited on its behalf there was some user and then there was interruption of that user due to special circumstances. But in the present appeal before me the appellant has not proved, as he could not, any user at all.

29. I shall now come to the question about the existence of the special circumstances which the appellant pleads as the cause of the non-user of its Trade Mark as well as its legal effect.

30. Strangely enough, no attempt has been made by the appellant or on its behalf to produce any single order or notification of 1944 when it registered its mark to show that there was a total or virtually total prohibition of the import of foreign matches into India. Vague references have been made to the import policy and war conditions. No doubt the Court will take judicial notice of the War and of the fact that a War was on at the time when the registration was effected on the 24th February, 1944, by the appellant company. But mere existence of the War will not be enough to show that foreign matches could not come to India or that they were totally prohibited. The state of fact that they could

not enter the Indian Market or that they were totally prohibited must be proved.

31. The present import trade control was first introduced in India as a war time measure in the early stages of the Second World War. A notification to that effect was issued on May 20, 1940 in exercise of the powers conferred by the then Defence of India Rules. In the Import Trade Control Handbook of rules and procedure published by the Government of India, Ministry of Commerce, 1967 it is stated that the primary object of that measure of 1940 was to conserve foreign exchange resources with the successful prosecution of War and to make the best possible use of the limited space of ship available. It mentions that import of only 68 commodities, mainly consumer goods, was subjected to control and subsequently with the growth of exchange difficulties the control was extended to other commodities as well. It is also stated there, on December 31, 1940 unmanufactured and manufactured steel was brought under control followed by control of machine-tools on February 15, 1941 and ultimately by August 23, 1941, most of the remaining commodities, particularly capital goods and other goods required for industrial purposes, were brought within the ambit of control. Finally on July 1, 1943, a consolidated notification was issued pertaining to all the controlled items except machine-tools. But neither the appellant nor the respondent has drawn my attention to any actual prohibition of import of foreign matches in the year 1944 and particularly on the 24th February 1944 when the appellant got its mark registered.

32. No doubt after the end of the War and the lapse of the Defence of India Rules in September 1946, the policy of import trade control was kept alive by the Emergency Provisions (Continuance) Ordinance, 1946, replaced by the Imports and Exports Control Act, 1947 which came into force on the 25th March 1947. The present position is governed by the Imports and Exports Control Act, 1947, and the Imports (Control) Order, 1955 as amended. Under this import control policy, what is usually referred to as publication of the Red Book has come into practice. The Red Books as indicating the Government's import policy under the above statute and orders show prohibitory control over matches from 1950. But what I am concerned is not with the year 1950, but with the date 24th February, 1944 and the year 1944 when the appellant's mark was registered in India. In that year and at that time I do not find any notification to substantiate or support the fact on which the appellant is relying that there was a total or virtual prohibition of importation of foreign matches into India.

33. The Registrar in his decision shows that he directed a specific enquiry and asked the appellant to adduce evidence of user of its registered trade mark in India at any time since the date of its registration in 1944. But none was produced. On behalf of the appellant certain charts have been produced to show that there was hardly any import during this period. They are statistics and charts from the Director General of Commerce, Intelligence and Statistics. The first chart from 1940 to 1946 does not mention, however, Sweden as a country unless it comes within "other countries". The other sheet of the chart shows the years from 1957 to 1963 which indicates some importation from Sweden of safety matches, 8 in 1957. I do not think that is any evidence on which I can come to any finding on this point.

34. At this stage it will be convenient to refer to the decision in the matter of a Trade Mark of James Crean & Sons Ltd., which is reported in (1921) 38 RPC 155. I shall call this as the "Aladdin" soap case. There in that case at p. 161 Sargant, J., observed as follows:—

"It is admitted on behalf of Messrs. Crean that there has been no bona fide use of the trade mark in connection with the goods during those 5 years. But it is said that they escaped from the consequences because they fulfilled the condition "unless in either case such non-user is shown to be due to special circumstances in the trade and not to any intention not to use or abandon such trade mark in respect of such goods." It is said that not only was it not shown that there was no intention not to use, or to abandon, but also that the non-user is shown by them to be due to special circumstances in the trade viz., the difficulty which arose during the war of getting moulds and plates and so on and pushing the trade in this soap."

35. Now, this exactly is the whole point in the present appeal before me. Here also it is admitted that there is no actual bona fide use of the trade mark during the statutory period of 5 years under Sec. 5 (1) of the Trade and Merchandise Marks Act 1958 of India. It is also said here that this non-use is due to special circumstances which I have already mentioned.

36. Now, it would be material to notice the observations of Sargant, J., in (1921) 38 R.P.C. 155, and specially the observations of the learned Judge at pp. 161-2 which are as follows:—

"But it seems to me that, in order that the saving clause of the section should apply, it must be shown that the non-user was due to the special circumstances of the trade and was not due to some other cause which would have operated

whether the special circumstances had arisen or not. That is to say, although it might be that the special circumstances of the trade taken by itself would have prevented the user of the mark, yet if the non-user of the mark was in fact due to some other circumstances and would have occurred whether the special circumstances had followed or not, then the saving clause would not apply."

37. Here, the Appellant pleads the special circumstances of total prohibition of the import of foreign matches which he did not prove at the time when the mark was registered. But even before that, his very application for registration on 24-2-44 shows that the Appellant did not state that he was only proposing the mark which was not in use at that time but stated in the application that the Appellant was actually using the mark even at that time. But no proof of actual user has been given by the Appellant. If, therefore, he had not used the trade mark then the intervention of the alleged special circumstances of prohibition of import of foreign matches cannot help the Appellant on the principle enunciated by Sargant, J., in James Crean's case quoted above.

38. I should like to pursue a little further the observations of Sargant, J., at p. 162 of that Report in James Crean's case where the Learned Judge says as follows:—

"What have we here? We have got this that from the time when the sales to the Co-operative Societies ceased, the Titan Co., had no sale at all of "Aladdin" soap and no definite goodwill in respect of that soap. There was no business with regard to it. From the time that Mr. Crean bought in June 1910, again there was no use whatever by him of this particular trade mark; and, as was admitted, or rather put forward by Messrs. Crean in their evidence, that this was due to the desirability of using and pushing the better-known trade marks of the Titan & Co. and the difficulty of dealing with other subsidiary and less well-known trade marks. That continued right down to the time of the war, and in my judgment, there is nothing to show that the non-user of the "Aladdin" mark would not have been as complete if there had been no war as it was in fact in the circumstances. There appears to have been no desire during the whole of that period to endeavour to push or to make use of the "Aladdin" trade mark not more than the other 27 or 28 trade marks which were assigned together with the factory and business of the Titan & Co. to Messrs. Crean at the time when the purchase was made in the year 1910. It seems to me to rely (sic) that Messrs. Crean have been roused to action in res-

pect of this trade mark and have put forward these claims of intention to use, and of policy, and so on merely because they have found that they have got on the Register a trade mark which somebody else wants to use and that they are pursuing these obstructive tactics which are not unusual in such cases. I have not the slightest reason to place confidence whatever in the story that they told in the box as to their meaning to make use of this trade mark and being debarred from doing so and by the difficulty of obtaining moulds and dyes and so on. Their whole conduct appears to me to contradict that view."

39. The above observations apply with force both to the facts and the law of the present appeal before me. The Registrar has rightly found "in effect there is no evidence before the Tribunal regarding the user of the registered mark at any time in this country." It also appears that the Appellant has been quite indifferent by reason of the fact that the Madras Match Co. had been using a similar mark of "Three Stars" on their matches for over eleven years and it was not until 1963 that the Appellant chose to write calling upon the Madras Match Co., to desist from using the mark of Three Stars and that was done on 8-8-63 when three months before that by 4-5-63 the Madras Match Co., had already made its application No. 215348 — before the Registrar in Madras for registration of their trade mark of Three Stars. It is the Appellant's case that they only became aware of the Madras Match Co.'s mark in August, 1963, but that only proves how indifferent the Appellant has been to the use of this mark even if that statement is true.

40. In my view it is necessary to emphasise that when in proceedings under Section 46 (1) (e) non-use for the statutory period of five years is admitted as a fact then the defence that the non-use is due to special circumstances under Section 46 (3) of the Trade and Merchandise Marks Act, 1958 must be proved by the party taking the defence. The onus of proving it is upon that party taking the defence of "special circumstances". In Gramophone Trade Mark case, in the matter of Columbia Gramophone Co. Ltd. reported in (1932) 49 RPC 621, Lord Hanworth, Master of the Rolls at pp. 628-629 makes the point of onus clear in the following observations:—

"One more observation may be made. It would appear that, if it is proved that there has been no bona fide user during the span of the five years, there is cast upon the respondents the duty of overcoming the inference that is to be then drawn and the duty that would be imposed upon the Court in consequence; and the onus is on the respondents of show-

ing that the non-user is due to the circumstances of the trade, and that those circumstances of the trade were a compelling factor to which he yielded; and he would have no (sic) negative the intention not to use or to abandon such trade mark in respect of such goods in his personal trade".

41. This plea of "special circumstances" as the cause of the non-user is really a defence in the nature of frustration in a contract. Special circumstances like frustration should not be induced by the proprietor himself nor can it be individual or personal. It must always be circumstances beyond his control and for which he is not responsible in any way. Again, such "special circumstances" must be the direct cause of the non-use. If the non-use is due to other causes apart from special circumstances then the special circumstances cannot be availed to overcome the handicap of non-use of the statutory period of five years. See Sargant, J.'s observations in James Crean's case, (1921) 38 RPC 155 at pp. 161-2.

42. Mr. Sen, Learned Counsel on behalf of the appellant relied on two cases which I shall notice now. One is 'Lanette' case The Gardinol Chemical Co.'s application for the rectification of the register reported in (1950) 67 RPC 95. This was a case which was an aftermath of the Second World War. This decision was given by Mr. Justice Vaisey. The relevant observations appear at page 98 wherein the learned Judge said:—

"Thus after the 3rd September, 1939, the position of a person domiciled in Germany, who was the proprietor of a trade mark registration in the United Kingdom, was that he was unable to exercise any control over the use of his mark and, if it were infringed during the period of the war, he would not be able to sue (if at all) until after the termination of the War. For these reasons, if the registration were valid at the outbreak of war, I consider that that if any application were received by the Registrar under the provisions of Section 26 of the Act (British Trade Act, 1938) for the removal of such a mark from the Register because of non-use during the period of the war, it would be an improper exercise of the discretion conferred upon him were he to accede to such application on that ground alone, for such an action on his part might be wholly inconsistent with the terms of a future Peace Treaty, and if taken as a precedent could form the basis of a wholesale removal of such German-owned marks. Similarly, if a valid trade mark registration as postulated were infringed on an extensive scale during the war, and the infringer were to seek removal of the mark on the ground that it had by such unchallenged infringement lost its dis-

fractiveness, I consider that it would be improper for the Registrar to allow the infringer or any other person to plead the infringement as a basis for obtaining the removal of the mark. On the other hand, if it were shown either that immediately before the outbreak of war the registration was invalid, or that the mark was properly removed from the Register under the provisions of Section 26, and that there was no war time use upon which the registered proprietor could rely, then I consider that even at this date the Registrar might, in appropriate circumstances, properly exercise his jurisdiction to remove the mark, for there is no obvious reason to my mind why the bare transfer of the mark into the Custodian's control should preserve the mark from an enquiry as to whether or not it was improperly on the Register on the 3rd September, 1939. In consequence, I deem it of the utmost importance in these proceedings to ascertain if possible the status of the mark 'Lanette' at the outbreak of World War II."

43. Now, this appears to me clearly against the appellant in its essential import and application. In the first place, the time which is important to consider, is the time of registration. That point of time is against the appellant for he chose the time, when according to him, there could be no use and yet stated in his application for registration on February 24, 1944 that the appellant did use this mark. The appellant did not mention that he only proposed to use the mark nor did he mention that his user had to stop by reason of import prohibition when he made that application for registration. In the second place, this 'Lanette' case lays down the principle that the Registrar has the discretion in these matters and the Court should not unreasonably interfere with it. As I have stated before the Registrar has used his discretion here properly, appropriately and legally and not beyond the bounds of the Statute.

44. The other case on which Mr. Sen relied is the 'Black Flag' case in the matter of an application by David Thom and Co. Ltd. for rectification of the register reported in (1946) 63 RPC 161. There the point raised was that the 'Black Flag' trade mark could not be used because the owner was prevented by the war which made it impossible, inter alia, to obtain import licences for certain ingredients required to manufacture the goods and where it was held that non user was proved to be due to special circumstances of the trade. Here again this was a war-time case. It was particularly pointed out there at pages 166-67 that the new evidence which was not before the Assistant Controller showed that as early as 13th July 1939, before the negotiations

for the purchase of the business of the 'Black Flag' were complete, the difficulties were undisputed. Then at page 168 of the report it is expressly pointed out by the learned Judge "I should have thought that the existence of special circumstances in the trade as the result of such conditions of War as prevailed in the years 1940 and 1941 was almost self-evident, and that the real question in this class of case was not whether there were special circumstances but whether if there had not been those special circumstances the proprietor of the mark could have taken any steps. On that point it seems to me that the correspondence is quite conclusive and based upon that sort of matter no doubt that the evidence has to be tested very carefully in this class of case". On such careful testing of evidence on this point it is plain in the facts of the present appeal before me, special circumstances or no special circumstances, of import prohibition, the appellant has not chosen to use the mark at any time in India and has not proved that the appellant had so used.

45. I, therefore, do not think that either the Lanette's case, (1950) 67 RPC 95 or the Black Flag case, (1946) 63 RPC 161 helps the appellant in the facts of this present appeal.

46. The discretion of the Court or the Registrar under Section 46 of the Trade and Merchandise Marks Act, 1958 entitles the Court or the Registrar, either to order the rectification or not to do so, and the question is not so much between the applicant for rectification on the one hand and the respondent on the other but between the public and the respondent. See Kerly, 9th Edition on the Law of Trade Marks and Trade Names, paragraph 383 and the decisions noted there of Noblitt-Sparks Industry's application, (1950) 68 RPC 168. It is therefore not necessary or relevant to examine the conduct of the respondent Madras Match Company. Were I to do so, I would hold in their favour because I see nothing against their act or conduct except perhaps that they chose a mark which happened to be similar to the mark of the appellant Swedish Match Co.

47. For these reasons, I am inclined to uphold the order and decision of the Registrar and dismiss the appeal. I am of the opinion that the Registrar when he gave the decision was right both on the facts and the law as he found there. But this decision has to be modified in the light of the subsequent events which took place after the decision of the Registrar. In order to do complete justice between the parties to this appeal these subsequent events are relevant and have to be considered.

48. That event is the order of the Assistant Registrar of Trade Marks, Madras,

permitting the Madras Match Company, the respondent in this appeal, concurrent registration with the appellant under Section 12 (3) of the Trade and Merchandise Marks Act, 1958. A copy of that order has been placed before me, admitted by all the parties in this appeal and which I direct should be kept with the records of this appeal.

49. Now in this order of the Assistant Registrar of Trade Marks, Madras, he notices that the Madras Match Company claimed registration under Section 12 (3) of this statute. Section 12 (3) of the Trade and Merchandise Marks Act, 1958 provides as follows:—

"In case of honest concurrent use or of other special circumstances which in the opinion of the Registrar make it proper so to do he may permit the registration by more than one proprietor of trade marks which are identical or nearly resemble each other, whether any such trade mark is already registered or not, in respect of the same goods or description of goods subject to such conditions and limitations if any as the Registrar may think fit to impose."

Even the Counsel for the Madras Match Company before the Assistant Registrar, Trade Marks, is recorded to have agreed to have concurrent registration. The reasons which impelled the Assistant Registrar in that order to grant concurrent registration under Section 12 (3) to the Madras Match Company is summarised in his own words at the conclusion of that order in these terms:—

"I am therefore of the opinion that this is a fit case in which the applicants should be granted concurrent registration under Section 12 (3). The applicants have used their mark for over 12 years and their total sales exceed Rs. 30 lakhs. The opponents, though they registered their mark 22 years ago, have not yet started using it in India. The hardship to the applicants of refusing registration appears to be out of proportion to any hardship to the opponents or inconvenience to the public which can possibly result from granting it. In fact it is difficult for me to imagine a more suitable case for the application of Sec. 12 (3)." At the time when this order was made, this present appeal to this Court had not been filed. The present appeal in this Court was filed on the 20th September, 1966 against the order of the Deputy Registrar of the 22nd June, 1966. This course was thought to be the best course having regard to the prospect of this appeal being filed and to make an order which will not be prejudicial to any of the parties.

50. Now, the subsequent order of the Assistant Registrar directing concurrent user, registration to the Madras Match Company is not under appeal either by

the present appellant before me or by the Madras Match Company. That order therefore has become final. In essence there could be no concurrent use because it is admitted that the appellant had no use in the Indian Market. But I suppose the Assistant Registrar made this order as a *via media* and as a compromise course.

51. Be that as it may, the position now is that while the appeal from the Registrar's decision expunging the appellant Swedish Match Co's trade mark was pending and is being disposed of, there has already been an order for registration of the Madras Match Co's trade mark concurrently with the Swedish Match Co's registered mark. I need hardly say that this subsequent order was made on the Madras Match Co's application for registration of its mark.

52. From the practical point of view this concurrent registration will not prejudice either the Madras Match Company or the Swedish Match Company. The appellant Swedish Match Company will of course not be in a position to use its trade mark so long as the import prohibition lasts and which according to them has already lasted for 24 years. At the same time, in that situation the Madras Match Co's mark even though similar, has been registered and it will be in a position to carry on its business unhampered by any competitive use in actual trade or business in the Indian market from the Swedish Co. This Court has power just as much the Registrar has the power in proceedings under Section 46 to impose appropriate limitations, conditions and directions. This will be clear if Section 46 is read with Section 56 (3) and Section 109 (6) of the Trade and Merchandise Marks Act 1958.

53. I, therefore, dispose of the Appeal by maintaining the concurrent registration with the following directions:—

(1) The Appellants will not assign the trade mark registered under No. 93017 and will not apply for registration of any other person as registered user of the said trade mark.

(2) That the Appellants shall not permit any person other than their servants or agents and no other employee (sic) to use the said trade mark in relation to matches manufactured either by the appellants or on behalf of and under the control of the Appellants.

(3) That in actual use in relation to matches, the Appellants' trade mark shall be limited to the particular colours shown in the specimen which has been annexed in the agreed terms and the manner therein shown.

(4) That the Appellants shall not in any way challenge the registration of the mark of the Nadar respondents (the

Madras Match Co.) in Application No. 215348 by way of Appeal or otherwise. There will be a similar direction upon the Nadar respondents not to challenge the validity of the Appellants' registered trade mark No. 93017.

54. I am obliged to learned Counsel on either side for the very able arguments advanced on many points raised in this appeal and also for the undertaking which has been given on behalf of the Appellants by their counsel. I direct the terms submitted, but not signed, by counsel on either side, be filed with the records of this appeal and kept as a part of the same.

55. The terms also set out the specimen of the Madras Match Co.

56. In conclusion, therefore, the appeal is disposed of by allowing the Appellants' trade mark, registered under No. 93017, to remain on the Register subject to aforesaid directions and undertakings.

57. In view of my decision and having regard to my findings, the Appellants will pay to the Nadar Respondents costs settled at a sum of Rs. 6000/- only within a month and in default pay interest thereon at 6 per cent per annum.

58. I shall only add this further direction and limitation in the order that in default of carrying out the undertaking as reported in the terms set out above or for violating any of the directions of this Court set out above, the Appellant Co.'s trade mark will be cancelled forthwith. That will be one of the conditions of this order.

59. The Registrar will be paid his costs of the Appellant Co. and I settle the Registrar's cost at 60 G. Ms. to be paid by the Appellants to the Registrar within two months from date.

TVN/D.V.C. Judgment accordingly.

AIR 1969 CALCUTTA 55 (V 56 C 10)

R. N. DUTT AND K. K. MITRA, JJ.

Rabindra Nath Dutta, Petitioner v. The State, Opposite Party.

Criminal Revn. No. 661 of 1964, D/- 11-4-1968.

(A) Penal Code (1860), S. 494 — Applicability — It must be shown that subsequent marriage was solemnised upon due performance of essential ceremonies whereupon only marriage becomes valid marriage. (Para 8)

(B) Hindu Marriage Act (1955), S. 17 — Penal Code (1860), S. 494 — Applicability — There must be subsequent marriage during lifetime of spouse from stand-point that prior marriage was duly

solemnised — Essential ingredient to prove charge under S. 494 — Presumption in favour of validity of marriage.

Under the Hindu Marriage Act, 1955 monogamy has become the law of the land to the persons to whom the Act applies. So, marriage for the second time, when there is already a subsisting marriage, has been made null and void and at the same time the man entering into a second marriage has been made punishable under S. 17 of the Act. It is, therefore, necessary to see before one can be made punishable to determine the fact whether there had been a subsequent marriage during the lifetime of the spouse from the stand-point that the prior marriage was duly solemnised. So, in a case where the allegation is that a man has married twice it has got to be decided if the first marriage had been duly solemnised and then there had been another marriage duly solemnised. In case where either of the two marriages is found to be not duly solemnised the position is that in the eye of law there is only one legal and valid marriage making the charge of bigamy unsustainable.

(Para 13)

The allegation of a prior marriage by a man with a woman giving the status of a wife to the woman must therefore be seen if the alleged prior marriage had been solemnised after due observance of the rites and ceremonies. If it be found that the alleged prior marriage had not been so solemnised, the mere fact that the man had lived with such a woman with whom some ceremonies of marriage had been performed will not satisfy the essential ingredient to prove the charge under S. 494 I. P. C. that there was a wife living as obviously such woman cannot claim the status of a legally married wife.

(Para 14)

There is, of course, a strong presumption in favour of the validity of a marriage if from the time of such marriage the parties are recognised by the people concerned as man and wife and such presumption applies also as to the question whether the formal requisites of a valid marriage ceremony were satisfied. AIR 1965 SC 1564, Ref. (Para 15)

(C) Hindu Marriage Act (1955), S. 7 — Validity of marriage — Determination of — Expression 'customary rites and ceremonies' — Meaning — It means sastric ceremonies customarily followed in caste or community to which party belongs.

Under S. 7 of the Hindu Marriage Act, 1955 the entire question for determining the validity of a marriage will depend on observance of the customary rites and ceremonies of either party as was prevalent in 1955. In fact, the solemnisation of a Hindu marriage depends solely on observance of the customary rites and ceremonies with no hard and fast con-

nection with these religious ceremonies as enjoined in the Hindu Sastras.

(Para 19)
The Act does not lay down any special or particular kind or form of ceremonies to be compulsorily observed in all Hindu marriages. In fact, the form of marriage, prescribed by the Sastras, is subject to modifications by custom or usage. But the expression 'Customary Ceremonies' cannot be taken to mean that 'Sastric Ceremonies' have been totally ignored. The expression 'Customary Rites and Ceremonies' naturally mean such sastric ceremonies, which the caste or community to which the party belongs is customarily following. Customary rites and ceremonies to be accepted must be shown that such custom as an essence of marriage ceremony had been followed definitely from ancient times and that the members of the Caste, Community or Sub-Caste had recognised such ceremonies as obligatory. Once it is proved by evidence what ceremonies had been followed as customary rites, it is no longer left to the will of the Caste, Community or Sub-Caste to alter them as the essence of custom is that on account of its definiteness it had been recognised and adopted by the caste or community with certainty and without any variation.

(Para 20)

Section 7 (2) makes it clear, however, that when such rites and ceremonies include the Saptapadi the marriage becomes complete and binding when the seventh step is taken. When it is proved that Saptapadi Gaman is not a part of the Customary rite it need not be performed. Otherwise, Saptapadi remains as essential ceremony in a Hindu marriage. As a Hindu marriage is a sacrament, the performance of a Sanskar, the customary religious rite must be observed in order to make a marriage valid.

(Para 21)

(D) Hindu Law — Marriage — Ceremonies — Ceremony known as 'Kushandika' is associated with 'nuptial homa' and performance of Sanskar. (Para 22)

Cases Referred: Chronological Paras
(1966) AIR 1966 SC 614 (V 53)=

1966 Cri LJ 472, Kanwal Ram v. Himachal Pradesh Administration 16

(1965) AIR 1965 SC 1564 (V 52)=
1965 (2) Cri LJ 544, Bhaurao San-

sakar Lokhande v. State of Maharashtra 11

A. K. Dutt, Tarak Nath Banerjee and Dilip Kumar Dutt, for Petitioner; Chintaharan Roy, Sarojesh Biswas, for Opposite Party; Amal Ch. Chatterjee, for the State.

K. K. MITRA, J.:— This is a rule directed against the order passed by the Presidency Magistrate, convicting the petitioner under Section 494 Indian Penal Code and sentencing him to rigorous imprisonment for three months.

2. The facts of the case are as follows:

One Sovarani Dutta made a complaint to the effect that she was married with the petitioner according to Hindu rites, on the 1st of May, 1962 and she lived with the petitioner as husband and wife for sometime till November, 1962 and then the petitioner married for the second time under the Special Marriage Act of 1954 on the 24th of January, 1963.

3. On these allegations the petitioner was charged under Section 494 Indian Penal Code for marrying again when he had a wife living. The petitioner pleaded not guilty to the charge. His defence was that he never married Sovarani, the complainant.

4. The Learned Magistrate found the charge under Section 494 Indian Penal Code proved and convicted the petitioner.

5. There is no dispute on the point that the petitioner married one Manika Sarkar under Act XLIII of 1954 on 24th of January, 1963. Exhibit II is the certificate of marriage given by the Marriage Officer under Section 13 of Act XLIII of 1954. The question is if Sovarani is the wife of the petitioner.

6. Section 494 Indian Penal Code reads as follows:

"Whoever, having a husband or wife living, marries in any case in which such marriage is void by reason of its taking place during the life of such husband or wife shall be punishable....."

Section 17 of the Hindu Marriage Act renders a marriage solemnised after the commencement of the Act void if at the date of such marriage the party had a wife living and the provisions of Sections 494 and 495 Indian Penal Code are then made applicable.

7. So the provision of Section 494 Indian Penal Code is attracted when a person marries after the commencement of the Hindu Marriage Act when he has a wife living.

8. The law prohibits and makes punishable a husband who marries for the second time during the lifetime of the first wife. It is a settled principle of law that in order to attract the penal provision of Section 494 Indian Penal Code it must be shown that the subsequent marriage was solemnised upon due performance of the essential ceremonies upon which only a marriage becomes a valid marriage.

9. Here it is conclusively proved that the petitioner had married Manika Sarkar and that marriage had been in accordance with law and therefore duly solemnised to make it a valid marriage. The contention of the petitioner is that Sovarani cannot be said to be his wife as there was no marriage between him and

Sovarani celebrated with proper ceremonies and in due form. Obviously, if the marriage between the petitioner and Sovarani had not been solemnised with due performance of the ceremonies, Sovarani even though alive cannot be said to be the wife of the petitioner and in that sense the marriage of the petitioner with Manika Sarkar does not become void and such marriage does not make the petitioner punishable under Section 494 Indian Penal Code.

10. The essential elements needed to be established to make a person punishable under Sec. 494 Indian Penal Code, are as follows:

- (1) There must be a wife living.
- (2) There must be another marriage by reason of its taking place during the life of the wife.

11. So while Section 17 of the Hindu Marriage Act renders a second marriage of a male Hindu during the lifetime of an existing wife void, the husband marrying for the second time is also punishable under Section 494 Indian Penal Code. In the case reported in AIR 1965 SC 1564, *Bhaurao Sankar Lokhande v. State of Maharashtra*, it had been held that it is essential for the purpose of Section 17 of the Act that the marriage to which Section 494 Indian Penal Code applies on account of the provisions of the Act should have been celebrated with proper ceremonies and in due form and that merely going through certain ceremonies without the intention that the parties be taken to be married will not make the ceremonies prescribed by law or approved by any established customs. In that case the husband was charged under Section 494 Indian Penal Code as he had married for the second time during the lifetime of his wife. The second marriage was said to have been performed in 'gandharbha' form as has been modified by the custom prevailing amongst the Maharashtrians. It was found that the alleged second marriage had not been solemnised after due observance of the ceremonies and there was no evidence to show that there had been any modification of the essential marriage ceremonies on the observance of which a marriage becomes valid by the proof of any custom in the particular community or caste.

12. The question, however, arises for consideration if it is necessary to sustain a charge under Section 494 Indian Penal Code to prove that the wife who is living is a legally married wife. In other words, the question is if it is to be shown that the alleged first marriage can be treated as a legally valid marriage being solemnised with due observance of the ceremonies before it can be said that there is a wife living. Naturally, one acquires the status of a husband or wife only when it is shown that there was a

marriage duly solemnised after due performance of the rites and ceremonies.

13. Under the Hindu Marriage Act, monogamy has become the law of the land to the persons to whom the Act applies. So, marriage for the second time, when there is already a subsisting marriage has been made null and void and at the same time the man entering into a second marriage has been made punishable under the Act. It is, therefore, necessary to see before one can be made punishable to determine the fact whether there had been a subsequent marriage during the lifetime of the spouse from the stand-point that the prior marriage was duly solemnised. So, in a case where the allegation is that a man has married twice it has got to be decided if the first marriage had been duly solemnised and then there had been another marriage duly solemnised. In case where either of the two marriages is found to be not duly solemnised the position is that in the eye of law there is only one legal and valid marriage making the charge of bigamy unsustainable.

14. The allegation of a prior marriage by a man with a woman giving the status of a wife to the woman must therefore be seen if the alleged prior marriage had been solemnised after due observance of the rites and ceremonies. If it be found that the alleged prior marriage had not been so solemnised, the mere fact that the petitioner had lived with such a woman with whom some ceremonies of marriage had been performed will not satisfy the essential ingredient to prove the charge under Section 494 Indian Penal Code that there was a wife living as obviously such woman cannot claim the status of a legally married wife.

15. There is, of course, a strong presumption in favour of the validity of a marriage if from the time of such marriage the parties are recognised by the people concerned as man and wife and such presumption applies also as to the question whether the formal requisites of a valid marriage ceremony were satisfied. In the instant case, evidence had been adduced by the prosecution regarding the ceremonies as to marriage which took place on the 1st of May, 1962.

16. The prosecution produced a letter Ext. 5 which was written by P. W. 11 Balai Chandra Dutta on 21-1-63 to Sovarani Dutta under instruction of the petitioner and the contents of the letter show that the petitioner wanted Sova Dutta to come to his place and live with him as being the legally married wife. It is urged by Mr. Roy, that the petitioner under whose instruction this letter had been written had admitted the marriage with Sova and therefore, this letter creates an evidence as to the fact of the mar-

riage. In a case reported in AIR 1966 SC 614, Kanwal Ram v. Himachal Pradesh Administration it had been held that admission in letter is not to be taken as an evidence of the fact of the marriage having taken place.

17. In this criminal case the prosecution must prove their case beyond reasonable doubt and for that the onus is heavy upon the prosecution to prove first of all that Sovarani was a legally married wife of the petitioner and secondly that during the subsistence of the marriage tie the petitioner had entered into another marriage duly solemnised in accordance with law. The presumption of innocence always stands in favour of the accused. There cannot be presumption in favour of a valid legal marriage as between the petitioner and Sovarani just merely on the basis of evidence that some ceremonies of marriage had been performed. It is only a proof of due performance of essential ceremonies of a marriage that the marriage tie becomes legally enforceable.

18. Section 7 of the Hindu Marriage Act provides how a Hindu marriage may be solemnised. The section runs as follows:

"(1) A Hindu Marriage may be solemnised in accordance with the customary rites and ceremonies of either party thereto.

(2) Where such rites and ceremonies include the Saptapadi (that is, the taking of seven steps by the bridegroom and the bride jointly before the sacred fire), the marriage becomes complete and binding when the seventh step is taken."

19. Thus, the entire question for determining the validity of a marriage will depend on observance of the customary rites and ceremonies of either party as were prevalent in 1955. In fact, the solemnisation of a Hindu Marriage depends solely on observance of the customary rites and ceremonies with no hard and fast connection with these religious ceremonies as enjoined in the Hindu Sastras.

20. The Hindu Marriage Act does not lay down any special or particular kind or form of ceremonies to be compulsorily observed in all Hindu marriages. In fact, the form of marriage, prescribed by the Sastras, is subject to modifications by custom or usage. But the expression 'Customary Ceremonies' cannot be taken to mean that 'Sastric Ceremonies' have been totally ignored. The expression 'Customary Rites and Ceremonies' naturally means such sastric ceremonies, which the caste or community to which the party belongs is customarily following. Customary rites and ceremonies to be accepted must be shown that such custom as an essence of marriage ceremony had been followed definitely from ancient

times and that the members of the Caste, Community or Sub-Caste had recognised such ceremonies as obligatory. Once it is proved by evidence what ceremonies had been followed as customary rites, it is no longer left to the will of the Caste, Community or Sub-Caste to alter them as the essence of custom is that on account of its definiteness it had been recognised and adopted by the caste or community with certainty and without any variation.

21. Sub-section (2) of Section 7 makes it clear, however, that when such rites and ceremonies include the Saptapadi the marriage becomes complete and binding when the seventh step is taken. When it is proved that Saptapadi Gaman is not a part of the Customary rite it need not be performed. Otherwise, Saptapadi remains as essential ceremony in a Hindu Marriage. As a Hindu Marriage is a sacrament, the performance of a Sanskar, the customary religious rite must be observed in order to make a marriage valid.

22. In the instant case no evidence had been adduced to show if there was any particular customary ceremony prevailing in the family of the parties and from the side of the prosecution, evidence had been given on the point as to what religious ceremonies had been observed at the marriage. P. W. 4, Bejoy Bhattacharjee who acted as the priest at the marriage in question stated that the marriage had been performed according to Hindu Rites and the 'Sampradan Ceremony' had been performed by the mother of the bride. The priest stated that on the marriage night there was no 'Kushandika'. The priest further stated that during 'Kushandika' the function of Saptapadi is held. Under the Act the taking of seven steps by the bride-groom and the bride together before the nuptial-fire is an essential ceremony to make a marriage valid. It is clear from the evidence that after the marriage Sovarani went to her husband's place at Begumpur on the following day morning. P. W. 13 Sovarani, stated that 'Kushandika' was performed on the following day at the house of the accused at Begumpur. Taking the evidence of the priest who performed the marriage ceremonies and the evidence of Sovarani it appears to me that 'Kushandika' had been performed at the following day and at that time the Saptapadi ceremony had been performed. The meaning of the word 'Kushandika' as given in the well-known Bengali Dictionary of Colloquial words "Chalantika" by Rajsekhar Bose as "Bibahedey Kariya Homer Janna Agnisanskari Kriye". The taking of seven steps by the bride and the bride-groom together before the nuptial fire and the performance of 'nuptial homa' are the two essential ceremonies of a Hindu marriage. The ceremony

known as 'Kushandika' is associated with 'nuptial homa' and the performance of a Sanskar. The evidence conclusively shows that at the time of performance of 'Kushandika' on the following morning both the ceremony of Saptapadi Gaman as well as the performance of homa had been done together and that the marriage became complete and binding between the parties.

23. The petitioner has, therefore, been rightly convicted u/s. 494 I. P. C. There is no extenuating circumstances for which the sentence can be reduced. The petitioner is an educated person engaged in the profession of teaching. It is clear from the evidence that after entering into a legal valid marriage he had taken a second wife and that he tried to avoid and deny the prior marriage with Sovarani.

24. The rule is, accordingly, discharged. The petitioner do surrender to the bail bond to serve out the sentence of rigorous imprisonment passed by the court.

25. R. N. DUTT, J.:— I agree.
Rule discharged.
MBR/D.V.C.

AIR 1969 CALCUTTA 59 (V 56 C 11)
A. N. RAY AND S. K. MUKHERJEA, JJ.
Gadadhar Ghose, Appellant v. Janaki Nath Ghosh and others, Respondents.
A. F. O. D. No. 118 of 1967, D/- 8-8-1967.

(A) Partition Act (1893), Ss. 2 and 6 — Partition suit — Power of Court to order sale — Sale has to be by public auction — Sale to co-sharers alone not warranted. Order of Datta J. D/- 15-6-1966 (Cal). Reversed. (1950) 86 Cal LJ 144 and (1952) 90 Cal LJ 147, Overruled.

In a suit for partition if any sale is directed it has to be a sale first, in accordance with the provisions of the Partition Act and secondly, if a sale is directed under Section 2 of the Partition Act it has to be a sale by public auction. A sale confined only to co-sharers is not warranted by the provisions of the Act. (1950) 86 Cal LJ 144 and (1952) 90 Cal LJ 147, Overruled: Order of Datta, J., D/- 15-6-1966 (Cal). Reversed. AIR 1952 Cal 893. Rel. on. (1911) 15 Cal WN 555 (FN) and (1911) 15 Cal WN 552 and (1884) ILR 10 Cal 675 and AIR 1930 Cal 616, Disting. English case law reviewed. (Paras 15, 34, 36)

(B) Partition Act (1893), S. 2 — Power of Court to direct sale — Conditions essential.

The conditions which have to be satisfied before the Court can exercise the power under S. 2 are:

(i) There has to be a request by a shareholder or shareholders interested individually or collectively to the extent of at least a moiety of the property.

(ii) The Court must be of opinion that by reason of the nature of the property or the number of shareholders or some special circumstance a division of the property cannot reasonably or conveniently be made and a sale of the property and distribution of the proceeds would be more beneficial for all the shareholders. (Para 24)

Cases Referred: Chronological Paras
(1958) AIR 1958 Cal 177 (V 45)=
100 Cal LJ 123, Probhat Kumar
v. Ram Mohan Dutt 41

(1952) AIR 1952 Cal 893 (V 39)=
57 Cal WN 439, Nriitya Gopal Samanta v. Pran Krishna Dau 9, 12
13, 14, 27, 30, 32

(1952) 90 Cal LJ 147, Narendranath Das v. Jnanendra Nath Das 9, 27, 32, 40

(1950) 86 Cal LJ 144, Pannalal Dutt v. Hrishikesh Dutt 9, 11, 12, 27, 31, 40

(1948) 52 Cal WN 739, Rani Bala Bose v. Hirendra Chandra Ghose 9, 13, 32, 40

(1946) AIR 1946 Mad 299 (V 33)=
1946-1 Mad LJ 107, Durgamba v. Lakshminarasimhaswamy Rice Factory 13, 40

(1930) AIR 1930 Cal 616 (V 17)=
52 Cal LJ 68, Mohit Krishna v. Pranab Chandra 9, 11, 27, 31, 40

(1929) AIR 1929 All 443 (V 16)=
1929 All LJ 651, Ram Prasad v. Mt. Mukandi 27, 31

(1926) AIR 1926 Cal 1190 (V 13)=
44 Cal LJ 47, Atul Chandra Kundu v. Bhusan Chandra Kundu 36

(1911) 15 Cal WN 552=13 Cal LJ 322, Debendra Nath v. Hari Das 9, 11, 27, 29, 30, 31

(1911) 15 Cal WN 555 FN, Basanta Kumar Ghosh v. Moti Lal Ghosh 9, 27, 29

(1884) ILR 10 Cal 675, Ashanulla v. Kali Kinker 27, 28

(1880) 5 AC 651, Peter Pitt v. T. W. Jones 9, 10

(1875) 10 Ch A 204, Williams v. Games 9, 10

(1875) 20 Eq 528, Drinkwater v. Ratcliffe 38

(1803) 8 Ves 143=32 ER 307, Turner v. Morgan 9, 21

S. K. Ghosh with B. Gupta, for Appellant; P. K. Das with J. K. Mitra, for Respondents.

RAY, J.:— This appeal is from the decree passed by Datta, J., on 15th June, 1966.

2. The appeal raises an important question. The question is whether the learned Judge was right in directing sale

of the premises in suit to the parties or co-owners only.

3. The importance is because of certain provisions in the Partition Act 1893 and also of certain decisions of this Court.

4. The premises forming subject-matter of the Suit, 24, Guruprosad Chowdhury Lane, Calcutta are owned by several sharers. The real importance of this matter is whether the Court in directing a sale under Section 2 of the Partition Act 1893 is entitled to order a sale among co-sharers only and not direct a public sale. The provisions contained in the Partition Act and which are material for the purposes of the present appeal are to be found in Sections 2 and 6 of the Partition Act. In Section 2 it is enacted as follows:

"Whenever in any suit for partition in which, if instituted prior to the commencement of this Act, a decree for partition might have been made, it appears to the Court that, by reason of the nature of the property to which the suit relates, or of the number of the shareholders therein, or of any other special circumstance, a division of the property cannot reasonably or conveniently be made, and that a sale of the property and distribution of the proceeds would be more beneficial for all the shareholders, the Court may, if it thinks fit, on the request of any of such shareholders interested individually or collectively to the extent of one moiety or upwards, direct a sale of the property and a distribution of the proceeds."

Section 6 is as follows:

"(1) Every sale under Section 2 shall be subject to a reserved bidding, and the amount of such bidding shall be fixed by the Court in such manner as it may think fit and may be varied from time to time.

(2) On any such sale any of the shareholders shall be at liberty to bid at the sale on such terms as to non-payment of deposit or as to setting off or accounting for the purchase money or any part thereof instead of paying the same as to the Court may seem reasonable.

(3) If two or more persons, of whom one is a shareholder in the property, respectively advance the same sum at any bidding at such sale, such bidding shall be deemed to be the bidding of the shareholder."

5. Section 3 (sub-section 1) of the Partition Act contains provisions that if in any case in which the Court is requested under Section 2 to direct a sale any other shareholder applies for leave to buy at a valuation the share or shares of the party or parties asking for a sale, the Court shall order a valuation of the share or shares in such manner as it may think fit and offer to sell the same to such shareholder at the price so ascertained.

If two or more shareholders severally apply for leave to buy as provided in sub-section (1), the Court shall order a sale of the share or shares to the shareholder who offers to pay the highest price above the valuation made by the Court. If no such shareholder is willing to buy such share or shares at the price so ascertained, the applicant or applicants shall be liable to pay all costs of or incidental to the application or applications. These are the provisions of Section 3 of the Partition Act.

6. There are certain provisions of the English Partition Act of 1868 which may be kept in view in order to appreciate certain differences between the English Partition Act and our Partition Act. To illustrate, Section 3 of the English Partition Act contains a provision to the effect that if it appears to the Court that by reason of the nature of the property to which the suit relates, or of the number of the parties interested or presumptively interested therein, or of the absence or disability of some of those parties, or of any other circumstance a sale of the property and a distribution of the proceeds would be more beneficial for the parties interested than a division of the property between or among them, the Court may, if it thinks fit, on the request of any of the parties interested and notwithstanding the dissent or disability of any others of them, direct a sale of the property accordingly and may give all necessary or proper consequential directions. According to the English Act any one of the co-sharers may move the Court and if the Court, in the exercise of its discretion, thinks that a sale is more advantageous than a partition, it may cause a sale to take place. There is no such provision in the Indian Act.

7. The reason why some reference has been made to the provisions of the English Partition Act is because of certain words and phrases which are common to both the Acts and which will be referred to hereinafter.

8. Before the introduction of the Partition Act in India there was no power to direct sale under the Indian Law. That is why the Partition Act was enacted. There are also provisions to enjoin safeguards in regard to preservation of property as also preservation of certain sharers' interest in the property.

9. The learned Judge in the present case did not deliver any judgment but directed sale among co-sharers and the decree is sought to be upheld by the respondents by placing reliance on the Bench decisions in Debendra Nath v. Hari Das, (1911) 15 Cal WN 552, and Mohit Krishna v. Pranab Chandra, 52 Cal LJ 68=(AIR 1930 Cal 616) and the decision of S. B. Sinha, J., in Pannalal Dutt

v. Hrishikesh Dutt, (1950) 86 Cal LJ 144 and the decision of Bachawat, J., in Narendranath Das v. Jnanendra Nath Das, (1952) 90 Cal LJ 147. Counsel for the appellant, on the other hand, contended that the decree in the present case cannot be sustained and reliance was placed on the decision of Chakravarti, J., in Rani Bala Bose v. Hirendra Chandra Ghose, (1948) 52 Cal WN 739 and the Bench decision in Nitya Gopal Samanta v. Pran Krishna Dau, 57 Cal WN 439= (AIR 1952 Cal 893). In Debendra Nath Bhattacharjee's case reported in (1911) 15 Cal WN 552 it was an appeal in a suit which was described in the report as one for partition of joint property, but the true object of the suit was also said to enable the plaintiff-respondent to compel the appellant to transfer his share to them at a valuation. There was a previous suit for partition of the joint properties. All properties were divided except a property which formed the subject matter of the decision in that appeal. That property covered land and buildings. The plaintiffs in that suit asked for a decree for possession of the property and a valuation of the share of the defendant and possession of the share of the defendant upon payment of compensation to the defendant proportionate to his share. It was held that the procedure adopted by the Court below in giving the plaintiffs a decree and directing to pay the defendant one-third of the value of the property could not be supported either on principle or on the authorities. The Bench decision further referred to well-known English decision in *Turner v. Morgan*, (1803) 8 Ves 143 and expressed the opinion that where the nature of the property was such that a division could not reasonably or conveniently be made the plaintiff did not have any right to claim that the defendant should be compelled to transfer his share to the plaintiff at a valuation. Reference was made to an earlier Bench decision in *Basanta Kumar Ghosh v. Moti Lal Ghose* which is also reported in the foot-note at page 555 of (1911) 15 Cal WN 555 FN where it was laid down that when it was inconvenient to divide a property that property must be left in the possession of the person in occupation and the other person who could not conveniently get possession should be compensated. *Basanta Kumar's* case, (1911) 15 Cal WN 555 FN was distinguished on the ground that the person was a stranger to the family. In *Debendra's* case, (1911) 15 Cal WN 552 it was said that it would be arbitrary and unjustifiable interference with the rights of the owner of the property if one of the parties were compelled to transfer his share to another co-owner. The Bench decision in *Debendra's* case, (1911) 15 Cal

WN 552 expressed the opinion that both the parties agreed that the nature of the property was such that a division among the shareholders could not be reasonably or conveniently made. There is an observation that the proper course to follow is to direct a sale of the property among the co-sharers. This observation is not supported by any authority nor are any reasons assigned for that view. On the contrary, it is stated in the Bench decision that the defendant cannot be compelled to transfer his share at a valuation to the plaintiff and the decisions in *Williams v. Games*, (1875) 10 Ch A 204 and *Pitt v. Jones*, (1880) 5 AC 651 are referred to.

10. In (1875) 10 Ch A 204 the plaintiffs who were owners of one seventh of an estate filed a bill praying for partition or sale. The owners of five sevenths opposed sale. Under the English Partition Act any sharer might ask for sale. Owners of a moiety might also ask for sale. Under the English Act unless the parties interested in the property or some of them undertake to purchase the property the Court may direct a sale and if undertaking is given the Court may order a valuation. It was held that there was nothing in the Act to compel a man to sell his share. It was held that under Section 5 of the English Act nothing was to be done except at the request of the person who wanted a sale. A partition decree was ordered. In (1880) 5 AC 651 owners of three sixteenths of a property sought to have sale while owners of thirteen sixteenths objected to a sale. Under the English Partition Act any party could ask for a sale under Section 3 of the English Act. Section 4 of the English Act provided that one half or more of the owners could ask for sale. Section 5 of the English Act enacted that if any opposing party undertook to buy at a valuation the interest of the party proposing the sale the Court would direct such valuation. *Malins v. C.* ordered valuation under Section 5 of the English Act. The Court of Appeal decided that the case fell under Section 3 of the Act and directed a sale. The House of Lords held that a party asking for sale was not compellable to part with his share on a valuation. Lord Blackburn in (1880) 5 AC 651 made the distinction between a sale by valuation and an open sale and said that a party asking for sale could accept a valuation but could not be compelled to do so. Lord Watson in the same case said that a party asking for sale could retract from accepting a valuation unless it became a judicial contract. These decisions are not authorities for holding a sale confined only to co-sharers.

11. The decision in *Pannalal Dutt's* case, (1950) 86 Cal LJ 144 was relied on by

counsel for the respondent. At page 147 of the report S. B. Sinha, J., said that it is well known that before the passing of the Partition Act the Court had no alternative but to make a decree for partition even though such a decree was ruinous to the party. It is also said there that the Partition Act directed a sale of the property when it appeared to Court that it could not be reasonably or conveniently partitioned. Section 2 of the Partition Act provides that an order for sale can only be made on the request of shareholders interested in a moiety of the property to be partitioned. In Pannalal Dutt's case the learned Judge said that the procedure laid down by the Partition Act could not be taken advantage of in that case and there was no jurisdiction to direct a sale of the property and distribution of the proceeds in the absence of a request from shareholders interested individually or collectively to the extent of one moiety in the said property. Reference was made to the decisions in (1911) 15 Cal WN 552 and 52 Cal LJ 68=(AIR 1930 Cal 616) which followed Debendra's case, (1911) 15 Cal WN 552 and it was said that the authorities indicated that apart from and independently of the provision of the Partition Act there was no jurisdiction to order a sale of the properties between the parties. It is manifest that if there was no jurisdiction before the Partition Act to direct a sale of the properties there could not be the inherent jurisdiction of the Court to direct a sale.

12. The decisions which were relied on by Counsel for the respondent in support of the contention were discussed in the Bench decision in 57 Cal WN 439=(AIR 1952 Cal 893). The decision in Debendra Nath Bhattacharjee and the decisions in (1950) 86 Cal LJ 144 as also other cases which were cited at the Bar were reviewed in the Bench decision of 57 Cal WN 439=(AIR 1952 Cal 893). Das, J., said, "The result of the above discussion in my opinion is that there is no current of authority which would establish that in a suit for partition the Court possesses a power to direct a sale apart from the Partition Act. In my opinion, in the absence of clear authority which binds us, it is open to us to come to a conclusion based on the terms of the Act looked at from the historical perspective. In my opinion the effect of the Partition Act cannot be whittled down by drawing upon some undefined and uncertain inherent powers in Court to direct a sale in lieu of partition where the invitation of the parties to the Court is merely to make a partition between the co-sharers inter se. The power of the Court to direct a sale in a suit for partition must be held to be limited to the cases provided for in the Partition Act".

13. The question which was raised as to whether there can be any sale apart from the Partition Act is answered in the negative by the Bench decision in 57 Cal WN 439=(AIR 1952 Cal 893). The other question is whether in directing sale the Court can confine it only to co-sharers. Reference to Section 6 of the Partition Act will indicate as to what the character and nature of sale is as contemplated by Section 2 of the Partition Act. In the case of (1948) 52 Cal WN 739 the question was whether a sale which was directed in that case was a sale under the Partition Act or not. One of the contentions was that the sale was not a sale under the Partition Act because it was a sale by private treaty and not a sale by public auction as required by Section 6. Dealing with that contention Chakravarti, J., said, "The other ground is seemingly a more substantial one, for Section 6 of the Act uses the words "bid" and "bidding" and does indicate that where the sale is not to co-sharers under Section 3, it must be a sale by public auction." Counsel for the respondent submitted that this was not the view expressed, but was merely taking notice of arguments. I am unable to read the decision in that manner. Further the provisions contained in Section 6 of the Partition Act and, in particular the provisions that when there would be a bidding and of the two bidders one would be a shareholder certain relief would apply in regard to payment of price by such a shareholder bidder indicate that the sale that is contemplated in Section 2 of the Partition Act is a public sale open to shareholders and outsiders. See Durgamba v. Lakshminarasimhaswamy Rice Factory, AIR 1946 Mad 299.

14. The authorities reviewed in the Bench decision of Nriya Gopal Samanta, 57 Cal WN 439=(AIR 1952 Cal 893) indicate, as has been laid down in that decision, that a sale can be only under the Partition Act. If a sale is only under the Partition Act and if provisions contained in Section 2 are attracted, any co-sharer willing to bid will have opportunities provided by Section 3 of the Partition Act. The reason why a public sale is contemplated in Section 2 is furnished by the language of the section. The words enjoined in Section 2 of the Partition Act are, first that where the Court by reason of the nature of the property or of the number of shareholders or of any other special circumstance finds that a division of the property cannot reasonably or conveniently be made and secondly that a sale of the property and distribution would be more beneficial for all the shareholders the Court has the discretion to order a sale. The words 'more beneficial for all the shareholders' are to

be kept in the forefront. It will appear in Halsbury's Laws of England, 1st Edition, Volume 21, paragraph 1579, page 844 that in determining whether a sale is more beneficial than a partition, the Court considers only the pecuniary results disregarding matters of sentiment and has regard to the interest of all parties interested as a whole. The reason why reference has been made to the first Edition of Halsbury's Law of England is because the Partition Act in England has gone out of statutory field and is now replaced by other statutes. The present provisions of the Law of Property Act which are a substitution of some of the provisions of the English Partition Act have been dealt with in Halsbury's Laws of England, Third Edition, Volume 32 and it will appear from paragraph 543 pages 344 and 345 that the words beneficial for all the shareholders are to be judged in terms of pecuniary gain to all the parties interested as a whole.

15. The result, in my opinion, is that if any sale is directed it has to be a sale first, in accordance with the provisions of the Partition Act and secondly, if a sale is directed under Section 2 of the Partition Act it has to be a sale by public auction. A sale confined only to co-sharers is not warranted by the provisions of the Partition Act.

16. For all these reasons I am of opinion that the decree cannot be sustained in the form of directing sale only among co-sharers. I agree with my Lord as to the form of the Order.

17. **S. K. MUKHERJEA, J:—** The question which has to be decided in this appeal is whether in a partition suit, the Court has power, except by consent, to direct sale of the property among the co-sharers only. It is not in dispute that the parties, as also the Court, have found that it will be inconvenient to divide the property. The parties have, therefore, asked the Court to order a sale. On June 15, 1966 Mr. Justice S. K. Datta passed a preliminary decree by which the property was directed to be sold by private treaty to the best purchaser or purchasers confining the sale to the members of the families of the parties. The defendant No. 1 has come in appeal.

18. The appellant contends that the learned Judge had no power or jurisdiction to direct a sale among the co-sharers and the order ought to have been for a public sale. Some of the respondents claim that the order was made under Section 2 of the Partition Act 1893 or in the alternative, under the inherent power of Court to direct such a sale.

19. In order to dispose of the appellant's objections, it will be necessary to go to the source of the Court's power to

order a sale in a partition suit and ascertain the limits of the power. It is common knowledge that English principles of law and equity have largely governed partition in this country and the Partition Act 1893 was inspired by the English Partition Act of 1868. Therefore, it will not be out of place to indicate briefly the legal position in England with regard to the power of Court to direct sale in a partition suit.

20. Before the Partition Act 1868, Courts of Common Law could only direct a mere partition or allotment of lands and other real properties between the parties, according to their respective shares having regard to the value of the properties. The Courts of Equity could, however, with a view to a more convenient and just partition, order payment of compensation to one of the parties for owelty or equality of partition, so as to prevent any injustice or avoidable inequality. (Story on Equity Jurisprudence, 3rd Edn. Art. 654).

21. In England, before the Partition Act of 1868 came into force, the Court had no power at common law to direct a sale in lieu of partition even in cases where partition in specie was highly inconvenient and largely affected the value of the property. A classic example is provided by the case of (1803) 8 Ves 143, 11 Ves 157 where a decree was passed for partition of a house among three persons. The Commissioner allotted to the plaintiff the entire stock of chimneys, all the fire places, the only staircase in the house and all the conveniences in the yard. On appeal, Lord Eldon, the Lord Chancellor, in overruling the objections, said that "he did not know how to make a better partition for the parties; that he granted the commission with great reluctance; but was bound by authority; and it must be a strong case to induce the Court to interpose; as the parties ought to agree to buy and sell."

22. By the Partition Act 1868, jurisdiction was conferred on the Court to order a sale, if any party, however, small his interest might be, made a request for a sale and it appeared to the Court that it would be more beneficial for the parties to direct a sale by reason of the number of parties interested or of the nature of the property or by reason of absence or disability of some of the parties or any other circumstances. Moreover, the party or parties individually or collectively interested to the extent of a moiety or upwards in the property could force a sale by a request to the Court to direct a sale instead of a division of the property and a sale and distribution of the proceeds was to be ordered unless the Court saw good reason to the contrary. By an Amendment made in 1876, it was provided that an action for parti-

tion was to include action for sale and distribution of proceeds. The Partition Acts of 1868 and 1876 have been repealed and partition in default of agreement is now governed by the Law of Property Act, 1925.

23. In India, the legal position appears to have been the same as in England. The Court had no power whatsoever to direct sale of a property in a partition suit except by consent of parties. The Partition Act of 1893 for the first time made it possible for the Court to direct a sale in certain circumstances, but the power conferred on the Court was a limited power. The Statement of Objects and Reasons, recited:

"As the law now stands the Court must give a share to each of the parties and cannot direct a sale and division of proceeds in any case whatever. Instances, however, occasionally occur where there are insuperable practical difficulties in the way of making an equal division, and in such cases the Court is either powerless to give effect to its decree, or is driven to all kinds of shifts and expedients in order to do so. Such difficulties are by no means of rare occurrence, although in many cases where the parties are properly advised they generally agree to mutual arrangement and thus relieve the Court from embarrassment."

"It is proposed in the present Bill to supply this defect in the law by giving the Court, under proper safeguards, a discretionary authority to direct a sale where a partition cannot reasonably be made and the sale would, in the opinion of the Court, be more beneficial for the parties. But having regard to the strong attachment of the people in this country to their landed possessions, it is proposed to make the consent of parties interested at least to the extent of a moiety in the property a condition precedent to the exercise by the Court of this new power."

24. It was therefore clearly recognised that the Court did not have any power to direct a sale except by consent of parties. Section 2 of the Partition Act for the first time conferred power on the Court to direct a sale. The conditions which have to be satisfied before the Court can exercise the power are:

(i) There has to be a request by a shareholder or shareholders interested individually or collectively to the extent of at least a moiety of the property.

(ii) The Court must be of opinion that by reason of the nature of the property or the number of shareholders or some special circumstance, a division of the property cannot reasonably or conveniently be made and a sale of the property and distribution of the proceeds would be more beneficial for all the shareholders.

25. It will be noticed that under the Partition Act 1893, the scope for sale is far more restricted than under the English Partition Act of 1868.

26. If the Court did not have any inherent power or jurisdiction to direct sale in a partition suit, it is difficult to see how the Court can have inherent jurisdiction to do so independently of the Partition Act after the Partition Act came into force. It is clear that if the Court has no power apart from the Partition Act to direct a sale, it can have no such power to direct a sale among the parties only.

27. In (1950) 86 Cal LJ 144, S. B. Sinha, J., relying on certain orders for sale among co-sharers made in some cases for which no reasons were given by the learned Judges who decided those cases, expressly held that the Court has jurisdiction apart from and independently of the provisions of the Partition Act to order a sale of the property among the parties and directed such a sale. In (1952) 90 Cal LJ 147, Bachawat, J., agreed with S. B. Sinha, J. In 57 Cal WN 439=(AIR 1952 Cal 893) a Division Bench of this Court consisting of G. N. Das and Guha Roy, JJ., on a review of the law of partition and an elaborate analysis of decided cases, held that the Court has no inherent power of sale even in cases where the Court finds that the property cannot be conveniently partitioned or that the partition will affect the intrinsic value of the property. So far as this Court is concerned, the matter might be said to have been concluded by the Division Bench judgment and it would not have been necessary for us to pronounce on this question afresh were it not for the submission made by counsel for the respondents that two earlier Division Bench judgments, one presided over by Rampini, J. and the other by Sir Ashutosh Mookerjee, J., had held to the contrary. Apart from these Division Bench judgments in (1911) 15 Cal WN 555 FN and (1911) 15 Cal WN 552, counsel relied on *Ashanulla v. Kali Kinker*, (1884) ILR 10 Cal 675, *Ram Prasad v. Mt. Mukandi*, AIR 1929 All 443, 52 Cal LJ 68=(AIR 1930 Cal 616), (1950) 86 Cal LJ 144 and (1952) 90 Cal LJ 147.

28. In (1884) ILR 10 Cal 675 this Court reversing a decree of the Lower Appellate Court by which compensation was ordered to be paid to the defendant, directed a division of the property. There is however, an observation of Field, J., that "where the effect of a partition would be to destroy the intrinsic value of the whole property or of the shares, the Court will pay to the plaintiff compensation for his share." The case does not relate to sale at all and the observation, which is an obiter, was made not with reference to sale but with refer-

ence to payment of compensation in lieu of division.

29. In (1911) 15 Cal WN 555 FN, Rampini and Sharafuddin, JJ., affirmed a decision by which the defendant was allowed to buy up the share of the plaintiff at a proper valuation. The defendant was in possession of the property. It appears from the Report that what was really intended to be done, was to pay fair compensation to the plaintiff for his share. This is made clear in the observation of Rampini, J., that "it is a well-known principle of equity, which must be adopted in all partition cases that when it is inconvenient to divide a property, that property must be left in the possession of the person in occupation, and the other person who cannot conveniently get possession must be compensated." Therefore, it appears that the learned Judges were not directing a sale in exercise of any inherent jurisdiction but were directing payment of compensation by applying, what they considered to be principles of equity. This case is not, in my opinion, an authority for saying that apart from the Partition Act, the Court has any power to direct a sale. In (1911) 15 Cal WN 552 where this decision came up for consideration, Mookerjee, J., expressed the view that in the absence of a statutory provision, a party cannot be compelled to transfer his share to the other co-owners at a valuation to be fixed by the Court and the claim of a co-sharer to a preferential right to acquire the entire property at a valuation because he was in possession of the property at the commencement of the suit is indefensible. Mookerjee, J., sought to explain the decision in (1911) 15 Cal WN 555 FN on the ground that the property was a family dwelling house in which the plaintiff, a stranger had acquired an interest and consequently under Section 4 of the Partition Act, he could not claim a share in the property much less could he claim to acquire the property at a valuation. In these circumstances, and especially having regard to the fact that the question whether the Court has any inherent jurisdiction to direct a sale in a partition suit did not arise for determination, and the learned Judges did not pronounce on the question, I am of opinion that the case is of no assistance to the respondents.

30. In (1911) 15 Cal WN 552, the parties agreed that the property was incapable of partition. The plaintiffs who had a two-thirds interest in the property submitted that the property might be valued by the Court and the entire property allotted to them on payment of compensation to the defendant. The defendant also offered to take the property at a valuation. The Trial Court, by a decree, allotted the entire property to the

plaintiffs, on the ground that they were in possession and directed the plaintiffs to pay compensation. The learned District Judge affirmed the decree. On appeal, the Court rejected the contention of the plaintiffs that they had a preferential right by reason of their having been in possession, set aside, the decree and directed a sale of the property among the co-sharers. Mookerjee, J., made it clear that as the plaintiffs who had an interest in the property of more than moiety, had not requested for sale, the Partition Act had no application. The order for sale among the co-sharers was therefore not made and could not have been made under the Partition Act. The question therefore arises, under what power and jurisdiction was the order made? The judgment is silent on the point. No reasons have been given for the order. The question of inherent jurisdiction was neither raised nor decided. In *Atul Chandra Kundu v. Bhusan Chandra Kundu*, 44 Cal LJ 47=(AIR 1926 Cal 1190) a Division Bench of this Court consisting of Cumming and Page, JJ., expressed the view that all that (1911) 15 Cal WN 552 decided was that the defendant could not be compelled to transfer his share to the plaintiffs at a valuation merely because the latter happened to have possession of the property. In 57 Cal WN 439=(AIR 1952 Cal 893) it was held that the decision was not intended to lay down a general principle of law that the Court possesses in a suit for partition, a power of sale apart from the Partition Act.

31. In AIR 1929 All 443 and 52 Cal LJ 68=(AIR 1930 Cal 616) although no requests were made for sale under Section 2 of the Partition Act, the Court ordered sale of the property among the co-sharers. No reasons were given in those judgments for the orders. In (1950) 86 Cal LJ 144 to which reference has already been made, S. B. Sinha, J., relied on (1911) 15 Cal WN 552, AIR 1929 All 443 and 52 Cal LJ 68=(AIR 1930 Cal 616) and held that apart from the Partition Act the Court has power to direct sale among the co-sharers in exercise of its inherent jurisdiction.

32. These cases, as has been seen, do not lay down expressly or impliedly the proposition of law which S. B. Sinha, J., thought they did, and we respectfully agree with the views expressed in 57 Cal WN 439=(AIR 1952 Cal 893) that "there is no current of authority which would establish that in a suit for partition the Court possesses a power to direct a sale apart from the Partition Act. The effect of the Partition Act cannot be whittled down by drawing upon some undefined and uncertain inherent powers in courts to direct a sale in lieu of partition where the invitation of the parties to the Court

is merely to make a partition between the co-sharers inter se. The power of the Court to direct a sale in a suit for partition must be held to be limited to the cases provided for by the Partition Act." It only remains for me to add that soon after S. B. Sinha, J., had delivered his judgment, Chakravarti, J., in (1948) 52 Cal WN 739 described an order for sale by private treaty or public auction made in a partition suit as a wrong direction or too wide a direction and held that an order for sale can be made in a partition suit only under the Partition Act or by consent and if consent is excluded, the only other source of authority which remains is the Act. It is not a little unfortunate that this case was not cited before Bachawat, J., in (1952) 90 Cal LJ 147 or before the Division Bench in 57 Cal WN 439=(AIR 1952 Cal 893).

33. The next question which arises for decision is whether the decree under appeal could have been made under the Partition Act. The requirements of Section 2, it is conceded, have been satisfied. Co-sharers interested in more than a moiety have requested for sale. The parties other than the plaintiffs however did not agree to a sale among the co-sharers alone. In these circumstances, can such an order be made under Section 2? The section speaks only of "sale" not of the mode of sale. The intention of the legislature, however, has not been left in doubt by Section 6 which provides:

(1) Every sale under Section 2 shall be subject to a reserve bidding, and the amount of such bidding shall be fixed by the Court in such manner as it may think fit and may be varied from time to time.

(2) On such sale any of the shareholders shall be at liberty to bid at the sale on such terms as to non-payment of the deposit or as to setting off or accounting for the purchase money or any part thereof instead of paying the same as to the Court may seem reasonable.

(3) If two or more persons, of whom one is a shareholder in the property respectively advanced the same sum at any bidding at such sale, such bidding shall be deemed to be the bidding of the shareholder.

34. It is clear from Section 6 that Section 2 does not contemplate sale by private treaty, because if it did, Section 6 should not have provided for reserve bidding in every sale under Section 2. The property therefore has to be sold by bidding and by no other mode. Can the Court in its discretion restrict the bidding to the co-sharers alone? Section 6 (2) confers liberty on the shareholders to bid at every sale. The liberty is given by the statute and not left to the Court's discretion. Only some of the terms which enure to the benefit of the co-

sharers and to which the co-sharers may take recourse at the time of sale, have been left to the Court's discretion. In every sale under Section 2, the shareholders can therefore bid, as of right. Sub-section (3) of Section 6 again, necessarily implies that the sale contemplated in Section 2 is a sale from which persons other than co-sharers cannot be excluded.

35. It was contended before us that as the word 'sale' has been used in Section 2 without any qualification, there is no restriction on the power of Court to direct a sale confined to the co-sharers only. It was said that sub-sections (2) and (3) of Section 6 merely provide for cases where a public sale is ordered. If the Court directs a sale confined to co-sharers alone, Section 6 or at least sub-sections (2) and (3) of Section 6 will have no application.

36. The argument is not sound. Section 6 (1) opens with the words "every sale under Section 2 shall be subject to a reserve bidding." Therefore sub-section (1) is attracted to every sale. Sub-section (2) says that "on any such sale, any of the shareholders shall be at liberty to bid at the sale". In the context of sub-section (2) "any such sale" means any sale to which sub-section (1) is attracted. Sub-section (1) is attracted to every sale under Section 2. Sub-section (2) is therefore necessarily attracted to every sale under Section 2.

37. In my opinion, there is another reason why the sale contemplated by Section 2 should be held to be a public sale. Under Section 2 the Court may exercise the power to direct a sale only if the Court is of opinion that a sale will be more beneficial than a division of the property to all the co-sharers. In the scheme of the section, the relevant consideration for sale is not the benefit of some co-sharers or even the greatest good of the greatest number, but the benefit of all the co-sharers. It is true that the words "more beneficial" have been used with reference to comparative advantages and disadvantages of division and sale and not with reference to sale by one mode and sale by another. Nevertheless, it is abundantly clear that the sale contemplated in Section 2 is intended to benefit all the co-sharers. A public sale in which the co-sharers have the right to bid, as they have under Section 6, is more beneficial to all the co-sharers than a sale among the co-sharers only, because a higher price is likely to be reached in such a sale which will enure to the benefit of all. If the property sells at a lower price, it will be more beneficial to the co-sharer whose bid is accepted but prejudicial to the other co-sharers who lose the benefit of a higher price.

38. It was contended by Mr. P. K. Das, learned Counsel for the respondents that 'benefit' does not mean financial benefit alone. Respect for the sentiment of co-sharers, he said, is equally beneficial to all. But then all the co-sharers may not share a sentiment. I am unable to agree that "beneficial" in the context of the section means anything other than "financially beneficial" to the co-sharers. In this connection, reference may be made to *Drinkwater v. Ratcliffe*, (1875) 20 Eq 528 where Sir George Jessel M. R. said: "I am to direct a sale if I am of opinion that the sale would be more beneficial for the parties interested. What does that mean? It means in a pecuniary sense. I cannot go into questions of sentiment. I must look merely to the monetary results."

39. In the view I have taken, I must hold that a sale under Section 2 of the Partition Act must be a public sale.

40. In holding that a sale under Section 2 must be a public sale, I have not been unmindful of the fact that in none of the reported cases where the Court directed a sale among the co-sharers, was the order made under Section 2 of the Partition Act. Moreover, no reasons were given for the order except in (1950) 86 Cal LJ 144 and (1952) 90 Cal LJ 147 where the Court claimed to have made the order in exercise of its inherent jurisdiction, a jurisdiction which we have held the Court does not possess. On the other hand, there are some precedents for holding that a sale under Section 2 must be a public sale. In AIR 1946 Mad 299 it was held by a learned Single Judge of the Madras High Court that a sale under Section 6 of the Partition Act must be open to the public as sub-sections (2) and (3) of that section clearly contemplate the presence of bidders other than the shareholders at the sale. In (1948) 52 Cal WN 739 it was contended before Chakravarti, J., that an order for sale by private treaty was not an order for sale under the Partition Act as it is not by public auction as required by Section 6 of the Act. Chakravarti, J., remarked that the contention was "seemingly a substantial one, for Section 6 of the Act uses the word "bid" and "bidding" and does indicate that where the sale is not to co-sharers under Section 3, it must be a sale by public auction". It ought to be pointed out that the question as to whether a sale under Section 2 must be a public sale was not directly involved in that case. In 52 Cal LJ 68=(AIR 1930 Cal 616), S. K. Ghosh, J., recorded in his judgment, without a demur, an argument that a request for sale among the co-sharers is not a request for sale under Section 2 which read with Section 6 provides for a public sale. In (1950) 86 Cal LJ 144, S. B. Sinha, J., expressed the view

that S. K. Ghose, J., held in that case that Section 2 provides for a public sale.

41. A decision of Mallick, J., *Probhat Kumar v. Rammohan Dutt*, AIR 1958 Cal 177 was cited at the Bar. In that case, a question arose whether a family dwelling house which could not be conveniently partitioned by metes and bounds could be sold by an order of Court although no request had been made for sale under Section 2 of the Partition Act. Some of the co-sharers were living in the dwelling house and others had built houses of their own. The plaintiff submitted that the house should be sold to the highest bidder among the parties. The learned Judge found that the property could not be sold under the Partition Act, nor could he direct a sale in exercise of any inherent jurisdiction apart from the Partition Act. It appears from the Report that the learned Judge allotted the property to the co-sharers who were living in the house and directed payment of compensation to others. The case is not relevant for the purpose of the present appeal as in the case before us the property has been directed to be sold among the co-sharers and not allotted to some co-sharer or co-sharers with a direction for payment of compensation to others. It is not therefore necessary for us to express any opinion on the decision of Mallick, J., or on the course adopted by him.

42. In the view we have taken, the appeal succeeds. The order of the learned Judge directing sale of premises No 24 Guruprasad Chowdhury Lane by private treaty to the best purchaser or purchasers confining the sale to members of the family of the parties, is set aside. The decree is varied to the extent that the Commissioner of Partition is directed to sell the premises by public auction in compliance with the provisions of Section 6 of the Partition Act. Time to file the Commissioner's Return is extended by six months from the date of the decree passed herein. The appearing respondents will pay to the appellant the costs of this appeal.

GGM/D.V.C.

Appeal allowed.

AIR 1969 CALCUTTA 67 (V 56 C 12)
BIJAYESH MUKHERJI, J.

Benu Roy, Defendant, Petitioner v. Manindra Nath Chatterjee, Plaintiff, Opposite Party.

Civil Revn. Case No. 1301 of 1968, D/- 18-7-1968.

Houses and Rents — West Bengal Premises Tenancy (Amendment) Act (4 of 1968), Ss. 17-B(1), 1(2) — Date of commencement of Act for purposes of S. 17B (1) — Date is March 26, 1968.

GL/IL/D217/68

Section 17B (1) of the West Bengal Premises Tenancy (Amendment) Act, 1963 is prospective only, in so far as the making of the requisite application by the tenant is concerned, and, therefore, when there is a conflict between the named day of the Act's commencement (August 26, 1967) and the day when the President's assent was received (March 26, 1968), the Act came into operation, for the purposes of S. 17B (1) on March 26, 1968. (1834) 4 Nev. & M. 893, Rel. on. AIR 1954 All 150 and AIR 1956 Raj 193 and Maxwell on the Interpretation of Statutes, 10th Edn. page 409, Ref. (Paras 7, 11)

Cases Referred: Chronological Paras (1956) AIR 1956 Raj 193 (V 43)= 1956 Raj LW 324, Satya Dev Cheema v. Addl. Dy. Custodian, Evacuee Property 10

(1954) AIR 1954 All 150 (V 41)= 1952 All LJ 30, Radhey Lal v. Mt. Lareti 9

(1834) 4 Nev & M 893=110 ER 1445, Burn v. Carvalho 4, 5, 8

Amiya Kumar Chatterjee, for Petitioner; Pramatha Chandra Roy, for Opposite Party.

ORDER:— The question raised upon this rule under Section 115 of the Code of Civil Procedure at the instance of the tenant-defendant is: whether or no his application dated April 8, 1968, under Section 17B, sub-section (1) of the West Bengal Premises Tenancy (Amendment) Act, 4 of 1968, (shortened hereafter into the Act) is time-barred by virtue of the provisions in Section 17B, sub-section (1), itself. The learned munsiff holds, it is.

2. As a matter of words, there appears to be no escape from the conclusion the learned munsiff has come to. And what are the words? Other ingredients being there—they are very much there—the tenant may, within a period of sixty days of the commencement of the Act, make the requisite application. So, what is the date of such commencement? Section 1, sub-section (2) of the Act answers it:

"It shall be deemed to have come into force on the 26th day of August 1967." Sixty days from that day expired on October 25, 1967. But the petitioner filed his application on April 8, 1968. It is thus much beyond sixty days from August 26, 1967. Will it, therefore, be barred? As a matter of words only, it looks like that.

3. Mr. Chatterjee, appearing in support of the rule, does not deny that the way I have proceeded does lead to the conclusion I have come to. But he contends, in that case there cannot be a single application under Section 17B, sub-section (1), of the Act which was published for the first time in the Calcutta Gazette Extraordinary dated March 26, 1968, when a period of sixty days from

August 26, 1967, had long passed by. I, for my part, shall not deny that what Mr. Chatterjee says is very true. What then is the way out?

4. Mr. Chatterjee says: reckon sixty days from March 26, 1968, the date when the Act, with the President's assent, was published for the first time in the Calcutta Gazette Extraordinary. But can I do so? That is the question. Here is a passage from Maxwell on the Interpretation of Statutes, 10th Edition, at page 409:

"* * * where a particular day is named for its commencement (that is the commencement of an Act), but the Royal assent is not given until a later day, the Act would come into operation only on the later day."

This passage rests on footnote (p) which bears:

"(p) Burn v. Carvalho, (1834) 4 Nev. & M. 893. S. 9, Newspaper Libel Act, 1881 (c.60) required printers to make certain returns before July 31, 1881, yet it was not passed till the following August 27."

5. In the case just mentioned, the full title of which is (1834) 4 Nev & M 893, Assignees of Fortunato, a Bankrupt, (in Error), Fortunato committed the act of bankruptcy. Result: all the property, legal and equitable, which he had, became vested in the plaintiffs by the assignment. Having once passed to them, it could not be divested again to answer the event of a conditional assignment in favour of the defendants. The judgment entered for the plaintiffs was, therefore, affirmed.

6. The Master, upon the taxation of the costs of the plaintiffs, took this case to be within Section 30 of 3 and 4 Will. 4, Cap 42, the burden of which is that

"Interest shall be allowed by the Court of Error for such time as execution has been delayed by such Writ of Error, for the delaying thereof."

Accordingly, the Master allowed interest from June 3, 1833, on which day the writ of error was tested. As a matter of words, there appears to be little wrong in that. Because, Section 44 of that Act enacts that "this Statute shall commence and take effect on the First Day of June" 1833. The statute, however, received the Royal assent on August 14, 1833. The Master's order, allowing interest from June 3, 1833, was set aside, on the ground that "Section 30 is prospective only in its language and cannot, therefore, apply to this case".

7. Such then is the ratio. But what language Section 17B, sub-section (1), speaks — prospective or retrospective? The key words, for the present purpose, are:

" * * * the tenant may within a period of 60 days of such commencement make an application."

Thus, it is plain to be seen that the language is prospective only. Once that is so, and the President's assent is regarded as equivalent to the Royal assent — as, indeed, it must be — the Act, for the purposes of Section 17B, sub-section (1), must be taken to have come into operation on March 26, 1968, when the Act — the President's Act with the President's assent — was published in the Calcutta Gazette Extraordinary of that very date and necessarily made available or known to the public that day (March 26, 1968) for the first time.

8. So, this ancient case of (1834) 4 Nev & M 893 contributes to the solution of the problem before me; not Section 6 of the Bengal General Clauses Act, 1 of 1899, sub-section (1) of which opens with the words: "where any * * * West Bengal Act is not expressed to come into operation on a particular day". Here, by Section 1, sub-section (2), the Act "shall be deemed to have come into force on the 26th day of August 1967." So, the latter part of Section 6, sub-section (1), of the Bengal General Clauses Act, providing by Clause (b), that an Act, in such circumstances, that is, when it is not expressed to come into operation on a particular day, shall come into operation on the day on which the assent thereto of the President is first published in the Official Gazette, cannot receive effect.

9. Radhey Lal v. Mt. Lareti, AIR 1954 All 150, deals with the U. P. (Temporary) Control of Rent and Eviction Act, 3 of 1947, which received the Governor's assent on February 28, 1947, and was published in the Official Gazette on March 1, 1947, but Section 1, sub-section (3), of which contained the 'deeming' provision:

"It shall be deemed to have come into force on the 1st day of October 1946." More, by Section 14, it was enacted:

"No decree for the eviction of a tenant * * * passed before the commencement of this Act, shall * * * be executed against him as long as this Act remains in force * * *"

The decree in ejectment was recorded on January 2, 1947. It was held that the date of commencement of the Act was, as laid down in Section 1, sub-section (3), October 1, 1946, thereby making the decree dated January 2, 1947, a decree passed after the commencement of the Act on October 1, 1946, and thus beyond the reach of Section 14. The ratio of this decision favours the view that in the present case also the date of commencement of the Act must be taken to be August 26, 1967. But the principle of the English case I have gone by was not taken into consideration in the Allahabad

decision. That apart, the language of Section 14 is such that it may well be regarded as retrospective only, stalling, as it does, the execution of the decrees passed before the commencement of the Act. No action for the future, as the making of an application in Section 17B, sub-section (1), of our Act, is provided for in Section 14 of the U. P. Act. What is provided for is stalling of action. So, the Allahabad decision would, perhaps, remain as it is, in spite of the principle of the English case.

10. Satya Dev Cheema v. Addl. Deputy Custodian, Evacuee Property, AIR 1956 Raj 193, appears to be a case of another sort. There, Section 10 of the Administration of Evacuee Property (Amendment) Act, 42 of 1954, makes Section 4 *ibid.* retrospective from May 7, 1954. That does not, however, change the date of commencement of the Amendment Act on October 8, 1954, on which date it received the President's assent. This only illustrates the familiar case of different parts of an Act coming into force on different dates, and has little to do with Section 1, sub-section (2), of our Act, by which it shall be deemed that the whole of the Act has come into force on August 26, 1967.

11. To sum up, Section 17B, sub-section (1), of the Act is prospective only, in so far as the making of the requisite application by the tenant is concerned, and, therefore, when there is a conflict between the named day of the Act's commencement (August 26, 1967) and the day when the President's assent was received (March 26, 1968), the Act came into operation, for the purposes of Section 17B, sub-section (1), on March 26, 1968. I am, therefore, prepared to accept Mr. Chatterjee's contention: reckon 60 days from March 26, 1968. By parity of reasoning, I am unable to accept Mr. Roy's contention that in no event can there be relaxation from the date, namely, August 26, 1967, specified in Section 1, sub-section (2), of the Act.

12. In the result, the rule succeeds and be made absolute. Upon all I see here, I make no order as to costs.

MBR/D.V.C. Rule made absolute.

AIR 1969 CALCUTTA 69 (V 56 C 13)
BIJAYESH MUKHERJI, J.

Narayan Prasad Ruia, Petitioner v. Mutuni Kohain and another, Opposite Party.

Civil Revn. Case No. 2123 of 1967, D/-9-7-1968.

Civil P. C. (1908), O. 22, R. 3 — Hindu Succession Act (1956), S. 6 Proviso and

GL/HL/D86/68

Explanation I — Proceedings instituted by Karta of joint Hindu Mitakshara family — Death of minor coparcener during pendency of lis and after commencement of Act — Failure to substitute his only heir (mother) — Lis abates as a whole.

Where the proceedings for eviction of thika tenant were initiated by the Karta of the Joint Hindu Mitakshara family consisting of himself and his three minor sons and one of the sons died during pendency of the lis and after the Hindu Succession Act (1956) came into force, the failure to substitute the mother of the deceased, the only heir left behind, would result in abatement of the lis as a whole. The female heir having been left, the proviso to S. 6 read with Explanation I thereto was attracted and the result was that the share of the deceased coparcener must be deemed to have been partitioned out immediately before his death and devolved on his mother. That being so the very nexus of the joint family was gone and the karta could not represent his deceased son's mother and necessarily his wife on partition AIR 1964 Ker 125 (FB), Foll AIR 1967 SC 272 and ILR (1956) 1 Cal 348, Disting.

(Paras 3 and 4)

Cases Referred: Chronological Paras
(1967) AIR 1967 SC 272 (V 54)=

(1967) 1 SCR 7, Satrugan Isser v. Sabuipari 6

(1964) AIR 1964 Ker 125 (V 51)=
ILR (1963) 2 Ker 541 (FB), Venk-

teswara Pai Ram Pai v Luis 2
(1956) 59 Cal WN 304=ILR (1956)

1 Cal 348, Nanigopal Mukherjee 6
v. Panchanan Mukherjee

Apurbadhan Mukherji, Chandidas Roy Chowdhury and Jagannath De, for Petitioner; Padmabindu Chatterjee, Tara Kumar Majumdar and Mrinal Kumar Ghosh, for Opposite Party No. 2.

ORDER:— The only point which I have been called upon to decide, in this rule under Article 227 of the Constitution, at the instance of the landlord in proceedings for eviction of thika tenants, is: in the lis initiated by Narayan Prasad Ruia as karta of the joint Mitakshara family, consisting of himself and his three minor sons: (1) Mahendra Kumar Ruia, (2) Surendra Kumar Ruia, and (3) Mahesh Kumar Ruia, just as the cause-title of the application under Section 5 of the Calcutta Thika Tenancy Act, 2 of 1949, is, Surendra Kumar Ruia having died on February 2, 1965, during the carriage of the lis, and his mother, the only heir, having not been substituted in her place to this day, does the lis as a whole abate?

2. The Thika Controller solves the problem by expunging the name of the deceased: vide his order No. 34 dated October 8, 1966. The appellate Judge takes a different view on this "knotty

point", as he puts it, governs himself by the Full Bench decision of the Kerala High Court in Venkiteswara Pai Ram Pai v. Luis, AIR 1964 Ker 125 (FB), and finds that the lis for eviction is not maintainable in absence of the heir of the deceased Surendra Kumar Ruia. Hence this rule.

3. Mr. Apurbadhan Mukherji, appearing in support of the rule, contends that the lis by the karta is too good, death of this member or that of the undivided family being of no consequence, because the karta still remains the karta. Had the old Hindu Law remained static, such contention would have had perhaps no answer. But it has not remained so. On the contrary, a serious inroad has been made into the preserve of the old Hindu Law by the Hindu Succession Act, 30 of 1956, which Mr. Padmabindu Chatterjee, appearing for the opposite party, rightly, refers me to. What calls attention is the proviso to Section 6 of the Hindu Succession Act, read with Explanation I thereto. Translated to the facts here, these provisions work out as under:

Surendra Kumar Ruia, a Hindu Mitakshara coparcener, dies, leaving behind him surviving his mother, a female relative specified in Class I of the Schedule to the Act, and, therefore his heir too in Class I. More, the interest of such a one, Surendra Kumar Ruia, a Hindu Mitakshara Coparcener, shall be deemed to be the share in the property that would have been allotted to him if a partition of the property had taken place immediately before his death.

4. Such then is the effect, by the conjoint operation of the proviso and Explanation I to Section 6. What is seen, therefore, is a notional partition, coupled with devolution of such notionally partitioned property upon Surendra Kumar Ruia's mother. What remains, then of Narayan Prasad Ruia as the karta? A karta a joint family property is quite an understandable concept. But a karta for a divided property, of property partitioned, notionally though, appears to be incomprehensible. So, the old karta theory cannot help matters forward for the petitioner before me, and Narayan Prasad Ruia as karta cannot represent his deceased son's mother and necessarily his wife upon whom devolves the share of the property after partition. The very nexus of the joint-family property is gone. A conclusion as this is to be regretted, but cannot perhaps be helped.

5. The Full Bench decision of the Kerala High Court, the learned Appellate Judge governs himself by, and Mr. Padmabindu Chatterjee refers me to, lays down the law as such too. In a suit for specific performance of a contract for sale of land belonging to a Hindu joint

family against the karta and two members thereof, one member dies, during the carriage of the suit and after the Hindu Succession Act, leaving behind him surviving his widow, two daughters and two sons, who are not impleaded, and deliberately too, inside of the prescribed time, on the ground that the karta defendant alone is competent to represent the entire joint family in the suit, just what Mr. Mukherji contends before me. Madhavan Nair, J., speaking for the Full Bench, sees no merit in such an approach, the share in the coparcenary property being deemed to have been partitioned out immediately before such a one's death and to have devolved on his heirs: the widow, the daughters and the sons, and concludes:

"That share, being no more part of the coparcenary property, is not within the competence of the first defendant as the karta of the joint family to represent in the suit."

I adopt this, if I may, with respect. And this appears to be the complete answer to Mr. Mukherji's contention.

6. Mr. Chatterjee also refers me to *Satrugan Isser v. Sabuipari*, AIR 1967 SC 272, which points out the fundamental changes made in the concept of a coparcenary by the Hindu Women's Rights to Property Act, 18 of 1937, as amended in 1938, and *Nanigopal Mukherji v. Panchanan Mukherji*, (1954) 59 Cal WN 304, where it is held that the Court's power to grant exemption under Order 22, R. 4, sub-rule (4), of the Civil Procedure Code, as amended by our Court, can be exercised only before the suit has abated. These decisions do not reach the case in hand. And I leave them at that.

7. In the result, the rule fails and do stand discharged, but without costs.
Rule discharged.
CWM/D.V.C.

AIR 1969 CALCUTTA 71 (V 56 C 14)
P. B. MUKHARJI AND K. L. ROY, JJ.

Commissioner of Income-Tax, W. B. I.
Applicant v. National & Grindlays Bank Ltd., Calcutta, Respondent.

Income-tax Ref. No. 159 of 1964, D/- 28-2-1968.

Income-tax Act (1922), S. 42 (1) — "Money in cash or in kind" — "Money in kind" does not mean any and every article into which the money had been converted. (Interpretation of Statutes — Fiscal statutes) — (Civil P. C. (1908) Preamble — Interpretation of Statutes) — (Income-tax Act (1922) Preamble — Interpretation of Fiscal Statutes) — (Court Fees Act (1870) Preamble — Interpretation of Fiscal Statutes) — (Words and

Phrases — "Money in kind") — (Succession Act (1925) S. 74 — Will — Construction — Principles of construction of fiscal statutes).

The 'money in kind' in S. 42 (1) of the Income-tax Act means that which retains its character or quality or its kind as money, namely in commercial forms recognised in the commercial world such as bills of exchange, I. O. U.s or even gold and silver bars or ingots. It will be illegal and unjustified to extend the meaning of the expression beyond these accredited uses of money accepted, used and recognised in the commercial world and the usual transactions. Money in kind does not mean any and every article into which the money had been converted. It has still to be money 'in kind' and not money converted into goods, without anything more. (Para 18)

The word 'money' used in the Income-tax Act should not be construed on lines of construction of a will. The word 'money' used in a will is construed in its widest sense. But in a statute like the Income-tax Act its scope for this kind of construction is limited, firstly, because it is a tax imposition and therefore must be in clear language and if not always explicit at least by necessary and compelling implication and secondly, because a statute like a taxing statute is a legal document using legal words, and is not the naive and artless product of a legally, inexperienced and ignorant testator.

(Paras 13, 16)

The assessee Bank in London advanced moneys on overdraft facilities to an Electricity supply corporation at London to meet its financial obligations in respect of equipment purchased by it in England and brought and installed in India several years prior to the above advances sanctioned by the bank. The Revenue sought to bring the case within the ambit of S. 42 (1) of the Income-tax Act on grounds that the corporation had, converted the moneys advanced by the assessee bank into equipment which they brought to India and that this amounted to bringing of money in kind into India within the meaning of S. 42 (1) of the Act. The Revenue also contended that the lender being aware of the purpose of the borrowing, the transactions of purchase of machinery, the contractual liabilities of the corporation to pay those bills and the overdrafts formed integral parts of one complete transaction.

Held (rejecting the above contentions) that the equipment was not income that could be said to have been brought into India, which alone could be taxed under the Act. It was a transaction of lending and borrowing at London between parties whose registered offices were at London and the moneys were advanced there and interest was also payable there. There

was therefore nothing else left of this money or interest which could connect it with taxable territories in India. Therefore, the equipment was neither money in cash or in kind nor income within the meaning of S. 42 (1) of the Act. AIR 1940 PC 36 and AIR 1949 FC 18, Rel. on. 1902 AC 287 and 1961 AC 967 and AIR 1966 SC 1506 and AIR 1965 Mad 381, Dist. (Paras 11, 12, 18, 24 & 25)

Obiter: The result would have been quite different had the corporation been the assessee instead of the bank.

(Paras 12 & 25)

K. L. Roy, J.: Even assuming that the expression "money in kind" included also articles into which money had been converted, the facts of the case clearly showed that no goods or commodity into which the money lent by the assessee to the corporation was converted could be said to have been brought into India. It was so because even prior to the overdraft facilities were allowed by the bank, the corporation had purchased the machinery and brought and installed the same in India. (Para 33)

Cases Referred: Chronological Paras

- (1967) AIR 1967 SC 819 (V 54)=
 (1967) 63 ITR 609, Commissioner of Income-Tax, Madras v. Sri Meenakshi Mills Ltd., Madurai 20
 (1966) AIR 1966 SC 1506 (V 53)=
 (1966) 60 ITR 405, Commissioner of Income-Tax, Bombay v. Tata Locomotive & Engineering Co. Ltd. 23
 (1965) AIR 1965 Mad 381 (V 52)=
 (1964) 53 ITR 780, Lakshmanan v. Commissioner of Income-Tax, Madras 23
 (1961) 1961 AC 967, Tomson v. Moysse 21, 22
 (1949) AIR 1949 FC 18 (V 36)=
 1949-17 ITR 63, Wadia A. H. v. Commissioner of Income-Tax, Bombay 9, 19, 20, 33
 (1943) 1943 AC 399=112 LJ Ch 81, Perrin v. Morgan 15
 (1940) AIR 1940 PC 36 (V 27)=
 (1940) 8 ITR 95, Commissioner of Income-Tax, Bombay v. Ahmedabad Advance Mills Ltd. 17
 (1930) 1930 Ir R. 196, In re, Jennings; Coldback v. Stafford 14
 (1902) 1902 AC 287=71 LJ KB 618, Gresham Life Assurance Society Ltd. v. Bishop 17, 22
 Balai Pal with Dipak Sen, for Applicant; Sukumar Mitra with Arijit Chowdhury, for Respondent.

P. B. MUKHARJI, J.:—This reference under Section 66 (1) of the Indian Income-tax raises the following questions for an answer:—

"(1) Whether on the facts and in the circumstances of the case the Tribunal was right in holding that the provisions

of Section 42 (1) of the Indian Income-Tax Act, 1922, had no application to the assessee's case in respect of the interest received on overdraft granted to the Calcutta Electric Supply Corporation Ltd.?

(2) Whether the computation of the amounts of taxable interest in the case of the tea company as made by the Appellate Assistant Commissioner and confirmed by the Tribunal, was in accordance with law?"

2. The facts giving rise to these questions are briefly as follows:

The assessment years are 1953-54 and 1954-55 for which the previous years are the calendar years 1952 and 1953 respectively. The assessee is a sterling banking company and has been assessed as a non-resident in both the years in question. During the relevant years interests amounting to £ 35,576.94 and £42,638.23 were received by the assessee in the United Kingdom from Messrs. Calcutta Electric Supply Corporation, which is a company incorporated in England with its head office in London and was during relevant periods carrying on business of supplying electricity in the city of Calcutta and certain other places in India. The Corporation maintained a current bank account with the assessee's head office in London at 26, Bishops Gate, London, E. C. 2.

3. On the 24th May 1950 the Corporation applied to the assessee bank for grant of temporary financial accommodation to the extent of £ 1 million. The reason for seeking the financial accommodation as given in the application was that according to the balance-sheet on the 31st December 1949 there was a contingent liability of £ 2.4 millions in respect of contracts for capital expenditure already placed at that date. It was stated in that application that such liability would mature progressively during the course of the next eighteen months and that the same had been incurred in connection with the building of the Corporation's new Cossipore Generating Station and extension to Mulajore station. On the 31st May 1950 the assessee sanctioned the overdraft facility of £1 million in the Corporation's said current account with it. This facility was later extended by increasing the limit of the overdraft to further amounts. The Corporation having utilised the overdraft facility, its aforesaid current account remained overdrawn throughout the relevant previous years 1952 and 1953 on which the sterling interests were paid by the Corporation to the assessee in England.

4. The assessee's case before the Income-tax Officer was that the money lent by it to the Corporation had not at all been brought into India. As such no interest accrued to the assessee on money

lent and paid within the taxable territories under Section 42 (1) of the Income-tax Act. The same contention was repeated in respect of interests received from the tea companies. The assessee also received interest during the said years from the two tea companies doing business in India and the assessee claimed that no portion of the interest was taxable under the Income-tax Act.

5. The Income-tax Officer's decision is based on the fact which he held that the Corporation while carrying out capital expansion in India utilised the overdraft granted by the assessee in purchasing machinery in England and bringing the same for installation in India. He, therefore, came to the conclusion that inasmuch as the interest on the overdraft was deemed to accrue on money brought into India "in kind", the assessee came within Section 42 (1) of the Act. The basis of his decision was that the expression "money in kind" in Section 42 (1) of the Income-tax Act included anything into which the money had been converted. The Income-tax Officer held that the money was brought into India in the form of electrical machinery and generators with the full knowledge of the assessee that while granting the overdraft that the facility would be utilised in India. This is why he held that even though the overdraft was granted to meet the contractual liability in respect of the capital expenditure already incurred, it was obvious that all these transactions, namely, the purchase of the capital machinery, the contractual liability to pay those bills and the overdrafts were integral parts of one complete transaction.

6. The assessee appealed to the Appellate Assistant Commissioner from the judgment of the Income-tax Officer. The Appellant Assistant Commissioner confirmed the Income-Tax Officer's order but modified the quantum. He called upon the assessee to furnish figures of interest accruing on the daily balance of the overdraft specifically utilised for the purpose of purchasing plants and machinery which came to India. The assessee furnished those figures and data. The quantum of the taxable interest received from the Corporation was reduced to £16,297 and £6,225 for these two years respectively. In respect of the interest chargeable to tax received from the tea companies it was reduced to £2,612 for the assessment year 1953-54.

7. Both the assessee and the Revenue Authorities preferred appeals to the Tribunal against such finding and decision of the Appellate Assistant Commissioner. The assessee in its appeal challenged the validity of the assessment of tax of interest received by it from the Corporation. But with regard to the interest re-

ceived from Tea Companies the assessee accepted the order of the Appellate Assistant Commissioner. The Department, however, challenged the method in which the Appellate Assistant Commissioner computed the taxable amount of interest.

8. There were, therefore, altogether four appeals, two by the Department and two by the assessee for the two respective assessment years. All these four appeals were heard together by the Tribunal and a consolidated order was passed in respect of them. The major decision of the Tribunal may now be noticed.

9. The Tribunal found that Section 42 (1) of the Income-Tax Act had no application to the assessee's case in respect of interest received by it from the Corporation. The Tribunal gave two reasons, namely, first that the money lent by the assessee was neither brought in cash nor in kind in the taxable territories. The Tribunal developed its reason by saying that admittedly no money was brought in cash and it was neither brought in kind in view of the fact that what was brought to India was only electric generators and plants purchased in the United Kingdom from the money received from the assessee in London on the overdraft. In other words, the Tribunal construed the expression "money in kind" in Section 42 (1) of the Income-Tax Act not to mean money converted in kind. According to the Tribunal electric generators and plants did not satisfy the criterion of Section 42 (1) and money meant a medium of exchange and anything to be called money must retain the character of money or its equivalent in drafts, cheques etc., which were really acceptable in the commercial world for money. Electric generators and plants did not satisfy that criterion. Secondly, the Tribunal came to the conclusion that Section 42 (1) of the Act was attracted only to a case where the lending and borrowing were an integral part of the scheme to bring money into taxable territory following the Federal Court decision in *A. H. Wadia v. Commissioner of Income-tax*, (1949) 17 ITR 63=(AIR 1949 FC 18). On reading the correspondence on this point, the Tribunal also came to the conclusion that there was no composite arrangement between the Corporation and the assessee for bringing money into India in the shape of electrical generators and plants. The Tribunal also observed that a transaction, in order to be an integrated composite whole, the transference of money to India, even if the machinery could be described to be money in kind, it must be as a result of conscious definite arrangement between the assessee and the Corporation and not simply an act of the Corporation without any reference to the assessee. The Tribunal found that the transference of the machinery to India

was the sole concern and responsibility of the Corporation alone with which the assessee was completely unconcerned. The Tribunal accordingly allowed the assessee's appeals and dismissed the appeals of the Revenue Department. The Department has now come with the above questions in this Reference.

10. The crucial question on this Reference is the interpretation of Section 42 (1) of the Income-Tax Act and particularly the expression "in cash or in kind" occurring in sub-section (1) thereof. Broadly analysed Section 42 (1) covers five different classes of income which are said to be income deemed to accrue or arise within the taxable territories. Paraphrasing Section 42 (1) and leaving aside matters not relevant for the purposes of this reference, it reads as follows:—

"All income accruing or arising whether directly or indirectly—

(1) through or from any business connection in the taxable territories or

(2) through or from any property in the taxable territories or

(3) through or from any asset or source of income in the taxable territories or

(4) through or from any money lent at interest and brought into the taxable territories in cash or in kind or

(5) through or from sale, exchange or transfer of a capital asset in the taxable territories,

shall be deemed to be income accruing or arising within the taxable territories—

and where the person entitled to the income, profits or gains is not resident in the taxable territories shall be chargeable to income-tax either in his name or in the name of his agent and in the latter case such agent shall be deemed to be for all the purposes of this Act, the assessee in respect of such income-tax."

11. The whole contention of the Revenue Authorities in this reference is on the fourth class of income shown on the above analysis. In other words, it is the contention of the Revenue in this reference that the interest on the loan granted on the overdraft by the assessee company to the Corporation is "income accruing or arising, whether directly or indirectly through or from any money lent at interest and brought into taxable territories in cash or in kind". Now it is common ground that no money as such was brought into the taxable territory of India in this case. Neither the principal amount nor the interest as such is brought into India in this case. Nevertheless, the Revenue Authorities contend that the following facts bring it within the particular statutory provision in Section 42 (1) of the Act and within the meaning of the expression "in cash or in kind". The facts on which the Revenue relies are,

the money which the Corporation borrowed from the assessee in this case was used and purchasing plant and machinery which were ultimately imported to India and installed in Calcutta for the generating stations at Cossipore and Mulajore, within the taxable territory of India. The Revenue contends that the interest which the Corporation is paying on the loan is really earned by the Corporation's business of supplying electrical energy and paid out of the profits thereof. Therefore it is contended that this interest is "money in cash or in kind" within the meaning of Section 42 (1) of the Income-Tax Act and must be deemed to accrue or arise within the taxable territory.

12. In our opinion, the contention of the Revenue on this point suffers from a number of fallacies. Section 42 (1) of the Income-Tax Act as its language reads is income which is deemed to accrue or arise within the taxable territories although which is not so in fact. It is an income which is arising outside but which by the statute is deemed to accrue or arise within the taxable territory. But then this deeming provision is careful to describe the connection or the nexus between such income and the taxable territory. That will be plain from the five different classes of income stated on the analysis of the section itself. The nexus in the first class is the business connection in the taxable territory. The nexus in the second class is the property in the taxable territory. The nexus in the third class is the asset in the taxable territory. The nexus in the fourth class is the money lent at interest but brought into the taxable territory in cash or in kind meaning thereby that that money or the interest must be brought into the taxable territory, no doubt either in cash or in kind. The nexus in the fifth class is the capital asset in the taxable territory. It is also essential to bear in mind in order to appreciate this nexus or the axis on which the income is deemed to arise within the taxable territory that it is the assessee who is the objective or the target for the Revenue and where the assessee is non-resident, his agent is necessarily the target or objective and as such is deemed to be the assessee in respect of the Income-Tax Act under Section 42 (1) of the Act. The Revenue Authorities in their contention appear to miss both the nexus as well as the concept of the assessee under Section 42 (1) of the Income-Tax Act. The picture or consideration would have varied materially if the assessee in this case, whom we are considering, was not the Bank but the Corporation. But here the assessee is the National and Grindlays Bank Ltd., Calcutta who is the lender and it is the Bank's income that we are considering in this assessment.

13. In interpreting Section 42 (1) of the Income-Tax Act, the following considerations should, in our opinion, guide the conclusion. In the first place, it is income which is being taxed under this section. Therefore, the main question is what is the income in this case which is being taxed? The Revenue contends that it is the income in the shape of interest which is being taxed. The assessee contends that the interest does not arise, nor is it brought in the taxable territory, either in cash or in kind. What then is the meaning of the expression "money in cash or in kind"? In the broadest concept and in some schools of economists money is a medium of exchange and money includes whatever is obtained by money. In other words, goods or plant or machinery bought with money are the equivalent of money and should be regarded as money. Does that broad meaning apply in a taxing and fiscal statute like the Income-tax Act in construing the expression "any money lent at interest and brought into taxable territories in cash or in kind?" A tax must be clearly brought home without equivocation to the assessee. A tax by implication is not encouraged by interpretation, unless such implication is necessary and compelling. That is a well-settled principle of construction.

14. Money has been known to be a cause of trouble and anxiety not only morally and materially but also fiscally and legally under the Income-tax Act and other taxing statutes. Judicial interpretation of "money", by Judges and Courts, have added fuel to the fire. For instance, interpretation of "money" in a will or a testament construed by Judges has almost caused intellectual uproars throughout the world. Money when used in a will has been construed by Courts in its strictest sense unless there was a context which permitted a wider interpretation. In that strict and rigorous sense money has been held to mean not only cash and in kind but also all forms of money due, such as cash at the bank, dividends due, bills, drafts and similar choses in action. Meredith, J., in re. Jennings; Coldbeck v. Stafford, 1930 Ir R 196 made the following celebrated observation:—

"The judiciary has waged a long fight to teach testators that "money" means cash, but as the ordinary testator who makes his own will does not study the law reports, he proceeds in constantly using the word in a wider sense and it is time that in such cases the popular meaning prevailed over the legal one."

15. It has taken only about 13 or 14 years for the judicial mind to change. In the decision in Perrin v. Morgan, reported in 1943 AC 399, Viscount Simonds, Lord Chancellor, observes at p. 414:

"The present question is not, in my opinion, one in which this House is required on the ground of public interest to maintain a rule which has been constantly applied but which it is convinced is erroneous. It is far important to promote the correct construction of future wills in this respect than to preserve consistency in misinterpretation."

16. But the principle of construction in a will is different from that in an Income-tax statute. In interpreting the will, what the Judge is supposed to do is to sit in the arm-chair of the testator and if not with the invalid outlook of the testator to construe the meaning of the words in the sense the testator understood and used, and therefore the popular meaning and popular connotation of a word, as normally understood by men or ordinary testators, is to be adopted. But in a statute like the Income-tax Act, the scope for this kind of construction is limited. It is limited for a variety of reasons. First, because it is a tax imposition and therefore must be in clear language and if not always explicit at least by necessary and compelling implication. Secondly, because a statute like a taxing statute is a legal document using legal words, expression and concepts and is not the naive and artless product of a legally inexperienced and ignorant testator. The expression "money in cash or in kind" can lend itself to the popular meaning that money is not only technical money in the technical sense but also money in all kinds of converted forms including goods, plant or machinery purchased or sold, so that all worldly goods can be seen as the alter ego of money. For taxing purpose, we have no hesitation to come to the conclusion that that is not the meaning which can be adopted for the expression "in cash or in kind", in Section 42 (1) of the Income-tax Act. Appeal, therefore, to the dictionary meaning of money or to economics cannot over-ride the context of the Income-tax Act, its purpose and its ambit and the actual language of Section 42 (1) of the Income-tax Act and its interpretation.

17. It would be necessary here perhaps to make an excursion into the area of authorities and judicial decisions. The classic and the leading case on the point is the one decided by the Privy Council in Commissioner of Income-tax, Bombay v. Ahmedabad Advance Mills Ltd., reported in 1940-8 ITR 95=(AIR 1940 PC 36). There the assesseees were owners of sterling bonds of the Government of India, the interest on which was payable in England received in England and they invested that income in the purchase of certain mill stores and machinery in England and brought the articles purchased to India and employed them for

the purposes of their mills. It was decided by the Privy Council there confirming the decision of the Bombay High Court that the income was not received in or brought into India within the meaning of Section 4 (2) of the Income-tax Act and the assessee was not accordingly liable to pay Income-tax on this amount. No doubt this decision must be read subject to the Explanation to Section 45 of the Act after the Amendment Act of 1939. But certain principles there discussed are of crucial importance for the purposes of this case. Lord Romer in delivering the judgment of the Privy Council approved the observation of Lord Lindley in *Gresham Life Assurance Society Ltd. v. Bishop*, 1902 AC 287 where Lord Lindley had said "a sum of money may be received in more ways than one e.g., by the transfer of coin or a negotiable instrument or other document which represents and produces coin, and is treated as such by businessman. Even a settlement in account may be equivalent to a receipt of a sum of money although no money may pass." Lord Romer at page 98 of the report in 1940-8 ITR 95=(AIR 1940 PC 36) makes the following significant observations:

"It is not and cannot be suggested in the present case that the mill stores and machinery were purchased in England and shipped out to India as a method of bringing over the sterling interest that had been received in this country. No one in his senses would think of employing such a method of transmitting money. But apart from the inherent improbability of the thing, it is found as a fact by the Commissioner that the mill stores and machinery were required by the respondents for their business in India, and it is not suggested that they will be sold or will be employed otherwise than in and for the purposes of the respondents' mills."

In rejecting the contention which the Revenue is making here before us in the present reference Lord Romer again at page 99 gave the following pertinent illustration:

"Their Lordships are not prepared to accept so extravagant a contention. To show how extravagant it is many illustrations might be given. A resident in British India when on a visit to this country receives here the sum of £ 500 sterling as interest on British Government Stock. He expends it here in replenishing his wardrobe and in purchasing a motor car. At the end of two years he returns to British India taking with him the garments and the motor car. The garments have been worn for two years and the car in that time may have been driven 40,000 miles or more. Yet if the appellant is right the person in question will on his return to India be deemed to

have brought with him £ 500 interest that he received in this country. The truth of the matter is that in such a case he does not bring back into India a penny of the £ 500. He has spent it all in England. If upon his return to India the question was put to him "How much have you left of the £ 500"? his answer would be "none", and the answer would be a true one whether addressed to a casual enquirer or to the Income-tax Officer. What he has taken back to India are some much worn clothes and a car which depreciated in value. But these things can in no sense be described as income; and it is only income that can be taxed under the Indian Income-tax Act".

18. The last observation of Lord Romer in that above passage still remains true. Applying that principle contained in those observations the plant or the machinery in this case is not income and it is only income that can be taxed under Section 42 (1) of the Income-tax Act and nothing else.

19. The next landmark in judicial decisions is to be found in (1949) 17 ITR 63=(AIR 1949 FC 18), a decision of the then Federal Court of India. Three of the learned Judges Kania, C. J., Mahajan, J. and Mukherjee, J., came to the conclusion in that case that the provision in Section 42 (1) of the Indian Income-tax Act was not ultra vires on the ground that it was extra-territorial in operation for the nexus, according to the three learned Judges was the bringing of the money into India with the knowledge of the lender and borrower giving the real territorial connection. Patanjali, J., disagreed with that view that bringing of money by the borrower could not constitute a sufficient territorial connection. Kania, C. J., at page 71 of the report analysed Section 42 (1) of the Income-tax Act and showed the nexus or the connection in each case on the lines which we have already indicated above. Interpreting Section 42 (1) on the point which is present before us Kania, C. J., observed at page 73 of the report as follows:

"The exact words used in the Section are, arising from any money lent at interest and brought into British India in cash or in kind. In my opinion it is proper to read this as one head and as indicating one composite transaction. The interest must be the result of the loan of money and the money must be brought into British India in cash or in kind. Reading it in that way the incident of bringing the money into British India in cash or in kind to the knowledge of the lender and borrower is an integral part of the transaction. After the money is brought into India, how it is used by the borrower, to my mind, is an irrelevant question."

20. Exposition of this principle under Section 42 (1) of the Income-tax Act is to be found from a few more decisions. In the Commissioner of Income-tax, Madras v. Sri Meenakshi Mills Ltd., (1967) 63 ITR 609=(AIR 1967 SC 819) the Supreme Court drew the ratio of the decision in 1949-17 ITR 63 =(AIR 1949 FC 18) in the following words of Ramaswami, J., at page 614 "but all the learned Judges agree that the knowledge of the lender and the borrower that the money is to be taken into British India must be an integral part of the transaction. That is a ratio of the decision of the Federal Court with regard to the construction of Section 42 (1) of the Act". The Supreme Court in the case of Sri Meenakshi Mills came to the conclusion that the principle laid down in Wadia's case was specified and that the Income-tax authorities there were right in holding that the entire interest earned on fixed deposit was taxable.

21. In a recent decision of the House of Lords in Tomson v. Moyse, 1961 AC 967 the House of Lords considered the question of a taxpayer domiciled in the United States of America, but at all material times a British subject resident in the United Kingdom, who was entitled to income from the estates of his mother and father, both estates being situate in the United States. In that case payments of income from the estates were actually made by the trustees into an account in the taxpayer's name in the Bank at New York. The taxpayer drew cheques in dollars on the Bank of New York in favour of one or other of his bankers in the United Kingdom and requested them to purchase the cheques. The taxpayer's English bankers sold the amount of dollars specified in the respective cheques to the Bank of England and credited to the taxpayer's account in England an amount in sterling equivalent at the then rate of exchange to the amount of dollars specified in the cheques. Then the English bankers, by registered mail, presented the taxpayer's cheques to the Bank of New York, which honoured those cheques and on the instruction of the English bankers, transferred the amount of dollars in question in each case to the account of the Bank of England with the Federal Reserve Bank of the United States. The taxpayer was assessed to income-tax. The House of Lords held that the sterling credits were sums received by the taxpayer in the United Kingdom out of his American income which had pro tanto been used to acquire them and that in this sense he had brought forward his American income to the United Kingdom. It is pointed out in this decision by the House of Lords that for the purposes of Rules 2 of Case IV and Case V of Sche-

dule D of the British Income-tax, the bringing in of a person's income meant nothing more than the effecting of its transmission from one country to the other by whatever means, the agencies of commerce or finance might make available for that purpose. If that transmission took place it was immaterial whether any thing, items of property or instrument of transfer, had actually been brought into the country or not. Nor was it said to be relevant to ascertain what had happened to the taxpayer's money in the country where the income arose. The language of the Act and the rules there construed by the House of Lords is different from what we have here for construction under the Indian Income-tax Act.

22. Viscount Simonds in 1961 AC 967 at pages 987-88 distinguished and noted the difference between 1902 AC 287 and these classes of cases. His Lordship observed as follows:—

"With such a case in mind I turn to the authorities. The first which I need consider is 1902 AC 287. There no sum had in fact been received by the Society in the United Kingdom. The argument for the Crown was that 'received in the United Kingdom' is not confined to physical receipt, and that it was enough that the Society's foreign income had been used to pay foreign debts which would otherwise have had to be paid out of money here. No one appears to have had in mind a case where a sum was in fact received in this country although nothing had been brought into this country: it seems to have been assumed that if a sum being or representing foreign income is received in this country it must have been brought in, but any such assumption was quite unnecessary for the decision at which this House arrived * * * but I cannot infer from that that, if a method had been pointed out to him by which a sum of income could be received in the United Kingdom without anything being brought in, he would have held that the sum so received was not taxable. I think that the same applies to the other noble and learned Lords whose speeches are reported. The subsequent application of what was said in the Gresham's case seems to me a good example of the danger of applying judicial pronouncements literally to situations which cannot have been in mind when they were made."

The same principle of distinction is noticeable here. No money or no interest was brought into India, nor was it payable in India in the facts of this reference.

23. The Supreme Court decision in Commissioner of Income-tax, Bombay v. Tata Locomotive and Engineering Co.,

Ltd., (1966) 60 ITR 405=(AIR 1966 SC 1506) considered the question where the Indian assessee repatriated his dollars from the United States. It was held there that the act of retaining the money in the United States for capital purposes after obtaining the sanction of the Reserve Bank was not a trading transaction in the business of manufacture of locomotive boilers and locomotives and it was clearly a transaction of accumulating dollars to pay for capital goods, the first step to the acquisition of capital goods. Therefore, the surplus attributable was capital accretion and not profit taxable in the hands of the assessee. See the observations of the Supreme Court particularly at page 410 of that report. This question of capital assets has come up in the matter of interpretation in other decisions. We shall notice one decision of the Madras High Court in Lakshmanan v. Commissioner of Income-tax, Madras, (1964) 53 ITR 780=(AIR 1965 Mad 381). It was held there on the facts of that case that the assessee had capitalized whatever surplus income was in his hands in the foreign country and there was no material upon which the Tribunal could reach the conclusion that the capitalization was not effected. The Court came to the conclusion that the amounts received were capital in nature and hence not assessable. But these decisions really turn on the question whether an amount is capital or income, a point with which we are not concerned in this reference.

24. A point was made by Mr. Pal appearing for the Revenue that the lender, the assessee in this case, knew from the correspondence disclosed that the whole object of obtaining this loan and paying interest for it, was to buy capital goods in England such as plant and machinery, bring them to Calcutta and instal them here within the taxable territory. We are not impressed by this line of argument for the purpose of this reference. The assessee in this case was lending money. How the borrower would use the money after obtaining it was not a matter of concern for the lender, the assessee. That a case was made to represent to the lender that the real reason for borrowing the money was to buy goods which were ultimately to be brought to India did not really make it a part of the loan or an obligation of the loan or a part of the legal arrangement in respect of this overdraft for a loan, for it must be emphasised that the statement of case and facts in this Reference make it abundantly and expressly clear that the debts for which the overdraft loan was taken, had already been incurred. Supposing the Corporation after obtaining the money from the assessee bank did not buy the goods and

did not instal them; even then the loan was good enough and the lender could insist that you repay the loan and also in the meantime pay the interest due on the loan.

25. It is possible to imagine a case where the lender and the borrower come into a kind of agreement for the loan and its repayment which clearly stipulates a legal obligation on the borrower about a particular use of the money in buying goods and a particular obligation to pay back to the lender after installing a kind of floating or other charge upon the assets of the Company and a further obligation to pay the interest out of the profits earned by the use of such goods, then in such cases of facts a nexus may be built up which will change the picture and bring the assessee within the meaning of Section 42 (1) of the Income-tax Act. But then these are not the facts in this case. It was a loan simpliciter, a bank giving a loan to an old customer. The whole transaction of the loan was in England. The Head Office and the Registered Office of the lender and the borrower were both in London. The money was advanced in London. The interest was payable in London. There was nothing else left of this money or interest which can connect it with the taxable territory in India. We are unable to hold that in this case the electrical generator plant is "money in kind" within the meaning of Section 42 (1) of the Income-tax Act. The "money in kind" in Section 42 (1) of the Income-tax Act means that which retains its character or quality or its kind as money, namely in commercial forms recognised in the commercial world such as bills of exchange, I. O. Us, or even gold and silver bars or ingots. It will be illegal and unjustified in our view to extend the meaning of the expression "money in kind" in Section 42 (1) of the Income-tax Act beyond these accredited uses of money accepted, used and recognised as such in the commercial world and in the usual transactions. We, therefore, hold on the interpretation of Section 42 (1) of the Income-tax Act that the plant, goods, machinery or the generator brought in this case was neither money in cash nor money in kind nor income within the meaning Section 42 (1) of the Income-tax Act and it does not mean any and every article into which the money had been converted. It has still to be money "in kind" and not money converted into goods, without anything more.

26. For these reasons and on these authorities, we answer the first question in the affirmative holding that the Tribunal was right in coming to the conclusion that Section 42 (1) of the Income-tax Act 1922 had no application to the assessee's case in respect of the interest received

on the overdraft granted by the assessee to the Calcutta Electric Supply Corporation Limited.

27. The other question relates to the computation of the amount of taxable interest in the case of the Tea Co., repay. It was contended that this computation was not in accordance with the law. It is conceded that on principle it is taxable under Section 42 (1). The only objection of the Revenue Authorities is with regard to the computation of it. It is admitted that the money is borrowed from the Bank and by this Tea Company was brought to India and not in the shape of goods and machinery. That concession is given by Mr. Pal on behalf of the Revenue Authority. In respect of the Darjeeling Tea Co. Ltd., the Appellate Assistant Commissioner finds the fact that a part of the interest charged on these accounts were chargeable to Income-tax. But he could not accept the estimate made by the Income-tax Officer that such income would come to £ 3000. Therefore, the Appellate Assistant Commissioner on the basis of the figures of the net interest which the appellant furnished came to the conclusion that the amount was £ 2162 and in respect of the two other Companies the figures of gross interest on the amount borrowed and brought into India were respectively £ 600 and £ 252. Therefore, the question of allowance of the proportionate cost to the Head Office of earning the interest is to be deducted. The gross interest was £ 852. On the facts supplied before the authorities regarding the Head Office cost, such cost with respect to this gross interest would come to £ 400. Therefore, the Appellate Assistant Commissioner found that the net interest income chargeable was £ 400 and the total income chargeable would thus come to £ 2612 (£ 2162 plus £ 450) as against £ 3000 estimated by the Income-tax Officer. In those circumstances, he restricted the amount chargeable to £ 2612 which means deduction of £ 388.

28. Mr. Pal for the Revenue has not been able to show us in what way this computation was against the provisions of any law. The Tribunal found as a fact that the Appellate Assistant Commissioner rightly computed the net interest in the amount of interest taxable. This being so, the answer to the second question is in the negative and we hold that the computation of the amounts of taxable interest in the case of the Tea Company as made by the Appellate Assistant Commissioner was in accordance with the law.

29. The Commissioner will pay the costs of this Reference. Certified for two Counsel.

30. K. L. ROY, J.:— While respectfully agreeing with the judgment delivered and the answers given by My Lord to the questions referred I wish to add a few words of my own.

31. In support of his contention that the expression "money in kind" in Section 42 (1) of the Act would include anything into which the money has been converted, Mr. Pal referred us to the meaning of the expression "in kind" in Murray's Oxford Dictionary, 1901 Edn. Vol. V at p. 699 which is as follows:—

"Item 15: In kind: in the very kind of article or commodity in question; usually of payment; in goods or natural produce as opposed to money."

32. In my opinion, the meaning attributed to the word "in kind" in the Oxford Dictionary is that the article or commodity in question must be of the very kind or of the same kind. It is only in the case of payment in kind that goods or natural produce, as opposed to money, is implied.

33. Even assuming that the expression "money in kind" includes also the articles into which the money has been converted, as contended by Mr. Pal and for which Mr. Pal relies on the observation of Mukherji, J., of the Federal Court in Wadia's case at p. 123 of the Report, 1949-17 ITR: (at p. 49 of AIR 1949 FC), in this case no goods or commodity into which the money, lent by the assessee to the Corporation is an overdraft account, was converted could be said to have been brought into the taxable territory. The application by the Corporation to the assessee for the overdraft dated May 24, 1950 shows clearly that the plant and machinery required for the Corporation's power stations in the taxable territories had already been ordered for, despatched to and installed in India before the end of 1949. As on December 31, 1949 the liability of the Corporation was to the manufacturers of the machinery in the United Kingdom for the price of the machinery supplied and such liability was to mature within the course of the next 18 months from May, 1950. The overdraft accommodation obtained from the assessee was utilised by the Corporation to meet its liability to the manufacturers in England as and when such liability matured. It has also been found by the Appellate Assistant Commissioner that a part of this overdraft was utilised by the Corporation for meeting its overhead charges in the United Kingdom. So, it could not be said that the amount of the overdraft granted by the assessee to the Corporation had been brought into the taxable territories in cash or in kind.

34. Further, the statements made by the assessee and the Corporation before the Income-tax Officer would show that

not only had the plant and machinery arrived in India but they had been installed and was in most cases in operation on or before June 1950. The statement filed by the Corporation before the Income-tax Officer, which is included in the paper book, at p. 63-65, shows that during the accounting years 1952 and 1953 very substantial amounts were utilised out of the overdrafts for meeting the ordinary day to day expenditure of the Corporation in the U. K. It could not, therefore, be said that the overdraft accommodation granted by the assessee to the Corporation had been utilised solely for the purpose of bringing in plant and machinery into the taxable territories.

35. Mr. Pal was somewhat taken aback when we drew his attention to the fact that he had not advanced any arguments on the second question referred and though he made a valiant attempt to convince us that both the Appellate Assistant Commissioner and the Tribunal acted arbitrarily in deducting the proportionate costs of the Head Office from the amount of the income from interest on the overdrafts granted to the Tea Companies, he was not successful. Mr. Pal, somewhat hesitatingly, pointed out that this was not the question asked to be referred by the Commissioner in his application under Section 66 (1). The question that the Commissioner had asked for reference was that if the first question was answered in favour of the Department, then whether the computation of the income from interest on the overdrafts granted to the Corporation by the assessee was in accordance with law, and that through inadvertence the Tribunal has referred the question of the propriety of the computation of such income in the case of the Tea Companies.

36. I, therefore, concur with the answers given by my Lord to the questions referred to this Court in this reference.

TVN/D.V.C.

Reference answered accordingly.

AIR 1969 CALCUTTA 80 (V 56 C 15)
P. B. MUKHARJI, J.

Prem N. Mayor and others, Plaintiffs
v. Registrar of Trade Marks and others,
Defendants.

Trade Mark Appeal No. 20 of 1965,
D/- 24-4-1968.

(A) Trade and Merchandise Marks Act (1958), S. 23 — Reasonable diligence and expedition at every stage throughout process of registration is necessary.

(B) Trade and Merchandise Marks Act (1958), S. 12 (1) — Similarity of marks

FL/JL/C697/68

— Test for determining — On facts held that appellations of 'Lion Brand' chaffcutter blades and 'Ma Durga Brand' were entirely distinct and separate.

The general requirement of the law is that the mark must be distinctive in the sense that it must be adapted and distinguished. This distinctiveness is fundamental and primarily a matter of fact. Past decisions may offer suggestions or principles for guidance showing what kinds of evidence or considerations should influence the Court in coming to the conclusions but they are of no further help. It is a caution in Trade Mark law which is frequently missed and yet of central significance. Distinctiveness being primarily a matter of fact, evidence can be given regarding distinctiveness in fact. There are no narrow or rigid rules about distinctiveness. Such distinctiveness may be either in individual features or in general arrangement. A mark should therefore be considered as a whole on its total impression and as a general rule attempts to dissect a mark in order to destroy distinctiveness have been disapproved. It is the totality of the impression, phonetically and visually, which is the test. If that totality of impression is likely to cause deception or confusion, then the identity is established. If not, then they are dissimilar: AIR 1960 SC 142 (147), Foll. (Para 9)

Held on facts that the appellation of the respective marks, viz., the applicant's 'Ma Durga Brand' chaffcutter blades and the opponent's 'Lion Brand' chaffcutter blades were entirely distinct and separate. There was no phonetic similarity, there was no visual similarity. No doubt the lion was common to both. But even the pictorial representation of the lion in either case was entirely distinct and separate. The majesty of the Goddess sitting on the lion overwhelmed the lion part of the device in applicants' application for registration. The lion in 'Ma Durga Brand' was also very different from the lion in the 'Lion Brand'. The lion in the 'Lion Brand' was not only sole or solitary lion without a rider but made a full face with all the manes showing while the lion in the 'Ma Durga Brand' was a lion facing sideways and it was the image of goddess Durga which faced the front. Therefore, what was important was that the first glance and the first impression of these two marks would be 'lion' in the case of 'Lion Brand', goddess 'Durga' in the case of 'Ma Durga Brand': AIR 1960 SC 142 (144) and AIR 1963 SC 449 (452), Foll. (Para 8)

Even assuming that purchasers of the goods in question are illiterate, uneducated peasants, that fact does not help the opponent in the present case. For in spite of illiteracy and lack of education

in the peasants of India, they are quite familiar with the image and idea of what is a lion and what is Goddess Durga. It needs emphasis in this case that the type of goods on which the opponent uses his trade mark demands skill and technology which may not associate the purchasers of this class of goods with the total darkness of illiteracy and lack of education. *Prabhudas Bhaichand v. Tribhubandas* decided by Bombay High Court on 12-1-1961, Rel. on. (Para 11)

(C) Trade and Merchandise Marks Act (1958), Ss. 12 (1), 31, 32 — Application for registration — Opponent cannot rely on mere circumstance of his prior mark on the register — Only presumption that follows from registration of mark is its prima facie evidentiary value about its validity and no other presumption is recognised: AIR 1960 SC 142 (146-47), Foll. (Paras 15, 17)

(D) Trade and Merchandise Marks Act (1958), S. 12 (1) — Evidence Act (1872), Ss. 13, 43 — Question whether applicant's mark is identical or deceptively similar to trade mark of opponent — Opponent citing judgments in which parties, facts and trade marks were entirely different — Such judgments or their facts cannot be used against applicant: AIR 1929 PC 99 (102) and AIR 1931 PC 89 (92) and AIR 1942 PC 40 and AIR 1954 SC 606 (614), Ref. (Paras 19 and 23)

(E) Trade and Merchandise Marks Act (1958), Section 21 — "Any person" — Need not be only a prior registered trade mark owner — Even customer, purchaser or member of public likely to use goods may object to registration on ground of possible deception or confusion. (Para 25)

(F) Trade and Merchandise Marks Act (1958), Ss. 18, 19, 20, 21, 22 — Trade Mark Rules, Rr. 37 to 43, 51 to 55 — Nature of onus of proof (Obiter).

The question of onus of proof in trade mark law is a complicated question. No fixed or rigid formula is available nor is there any fixed doctrine of onus which can be spelt out of the Trade Mark law or the statute. The brief analysis of the Trade and Merchandise Marks Act 1958 and the rules made thereunder emphasise certain broad principles and features. From Ss. 18 to 22, one thing is clear that when an applicant makes his application for registration, the onus in the first place is upon him to show that he is within the law prima facie and he does not infringe Ss. 8-14 of the statute. It is only when he has discharged that primary onus that the application can be accepted by the Registrar under S. 18 (4) of the statute. The Registrar can refuse the application at that stage or may accept it absolutely or may accept it subject to amendments, modifications, conditions or limitations as he thinks fit. But when he accepts it, then that acceptance

prima facie shows that the applicant has crossed the preliminary hurdle of onus unless it is withdrawn under S. 19 of the statute. If it is not withdrawn, then this application is advertised inviting opposition, if any, to registration. The stage which follows after advertisement appears to throw the burden upon those who are opposing to prove their opposition and the onus is upon them to show that what the Registrar has prima facie accepted is not entitled to registration. The onus, therefore, would be upon the opposer to support his grounds of opposition at that stage. The Trade Mark Rules under S. 133 of the Trade and Merchandise Marks Act 1958 appear to subscribe to that view. Trade Mark Rules 37 to 43 show the preliminary onus upon the applicant for registration of a trade mark. Rules 51 to 55 appear to show that the onus shifts then to the opposer to support his grounds of opposition by evidence. Rule 53 expressly requires evidence in support of opposition and Rule 53 (2) goes so far as to say that if an opponent makes no opposition under Rule 53 (1) within the time therein prescribed, he shall, unless the Registrar otherwise directs, be deemed to have abandoned his opposition. This rule shows definitely that if he does not oppose and if he does not support his opposition by evidence, he would be deemed to have abandoned his opposition. This would indicate that the onus is upon the opposer to support his grounds of opposition. (Obiter). (Para 31)

Cases Referred: Chronological Paras
(1963) AIR 1963 SC 449 (V 50)=

(1963) 2 SCR 484, *Amritdhara Pharmacy v. Satya Deo* 29, 31

(1961) *Prabhudas Bhaichand v. Tribhubandas Kusaldas*, a decision of Shah, J. delivered on 12-1-1961 (Bom) 10

(1960) AIR 1960 SC 142 (V 47)=

(1960) 1 SCR 963, *Corn Products Refining Co. v. Shangrila Food Products Ltd.* 9, 15, 28

(1954) AIR 1954 SC 606 (V 41), *Sitaldas v. Sant Ram* 23

(1945) 63 RPC 97, In the matter of *Smith Hayden & Co.* 32

(1942) AIR 1942 PC 40 (V 29)=

202 Ind Cas 203, *Coca-Cola Co. of Canada Ltd. v. Pepsicola Co. of Canada Ltd.* 22

(1935) 52 RPC 136 In re, *William Bailey (Birmingham) Ltd., Re; Gilbert & Co.* 9

(1934) 52 RPC 15, In re, *Hawthorn & Co. Ltd., Re.* 9

(1931) AIR 1931 PC 89 (V 18)=

58 Ind App 125, *Gobinda Narayan Singh v. Shamlal Singh* 21

(1929) AIR 1929 PC 99 (V 16)=

ILR 56 Cal 1003, *Gopika Raman Roy v. Atal Singh* 20

(1924) 41 RPC 423, William Henry Huxley, In the Matter of 39
 (1906) 23 RPC 774, Pianotist Co's, In re 30
 39 RPC 285, Willesden Varnish Co., Ltd. v. Young & Marten Ltd. 15
 B. K. Bachawat and A. C. Roy, for Plaintiffs; Tibrewalla, for Defendants.

JUDGMENT:— This is an appeal under Section 109 of the Trade and Merchandise Marks Act, 1958 from the decision of the Deputy Registrar of Trade Marks dated the 7th November, 1964, dismissing the appellant's opposition to the respondent Pannalal Agarwal's application for registration. The other respondent in this appeal is the Registrar of Trade Marks.

2. Before stating the facts giving rise to the points for decision in this appeal it will be worth drawing attention to the present situation in respect of registration of Trade Marks and the delay that has occurred in this case. The application for registration was made as early as the 18th April, 1960. This appeal in this Court is being heard eight years after that application was made. About two years passed from the date of the application for registration for advertisement to issue; such advertisement issued on the 1st January, 1962. Again another two years elapsed before the matter was heard before the Deputy Registrar on the 6/7th October, 1964. This period of two years was too long for affidavits. The period that elapsed for advertisement was also too long. The appeal from the decision of the Deputy Registrar, Trade Marks was filed expeditiously. The Deputy Registrar's decision was given on the 7th November, 1964, and the appeal to this Court filed on the 5th February, 1965. Then again more than three years have elapsed before the appeal came up for hearing. It is necessary to emphasise that registration of Trade Marks is of vital importance and significance to trade and commerce and there should be reasonable diligence and expedition at every stage throughout the process of registration. If an applicant for registration of a Trade Mark has to wait for eight or ten years to have his mark registered, then it is a lamentable state of affairs which should be remedied.

3. The facts of the case giving rise to this dispute are simple. Respondent Pannalal Agarwal of 157, Netaji Subhash Road, Calcutta made an application on the 18th April, 1960, for registration in Part A of the Register of a Trade Mark consisting of a label containing the device or a composite picture of a goddess seated on a lion and the words "Ma Durga Brand" underneath the device in Class 7 in respect of agricultural implements

specially for chaffcutter blades. At the preliminary stage before acceptance of this application for registration by the Registrar the applicant Pannalal Agarwal agreed to amend the designation of the goods to "Chaffcutter blades" and to disclaim the letters "Ma". The application so amended was advertised as accepted subject to opposition. The advertisement appeared in Trade Marks Journal dated the 21st January, 1962. A notice of opposition was filed on the 20th March, 1962, by the appellant. When I say the opposition was filed by the appellant, there is a point which may be indicated. The appellant is a registered firm under the Indian Partnership Act but the person registered as the owner of another Trade Mark called the "Lion Brand" was a Joint Hindu family Firm. I shall return to this point later.

4. Continuing with the facts of the case the appellant's opposition was based on the prior user, registration and reputation of a Trade Mark No. 12301 registered in Class 7 in respect, inter alia, of "chaffcutter blades and knives". Affidavits according to the Trade Marks Rules were filed before the Registrar in support of the respective cases of the appellant and respondent Pannalal Agarwal. The whole case of the opposition of the appellant to the registration of "Ma Durga Brand" with that device described above was based on the contention that that mark resembled the registered Trade Mark of the appellant and there was likelihood of confusion or deception. The short point, therefore, for decision is whether the respondent Pannalal Agarwal's mark is deceptively similar to the appellant's registered mark within the meaning of Section 12 (1) of the Trade and Merchandise Marks Act, 1958. The language of Section 12 (1) of the Trade and Merchandise Marks Act, 1958, is, inter alia, as follows:—

"Save as provided in sub-section (3) no Trade Mark shall be registered in respect of any goods or description of goods which is identical with or deceptively similar to a trade mark which is already registered in the name of a different proprietor in respect of the same goods or description of goods."

The test of "same goods or description of goods" in Section 12 (1) of the Act applies here because the appellant's trade mark No. 12301 on the register is in respect of the same goods for which respondent Pannalal Agarwal applied for registration viz., "chaffcutter blades" of the description quoted above. The whole point therefore is reduced to this question, whether the respondent Pannalal's application for registering the "Ma Durga Brand" trade mark is identical with or deceptively similar to the registered trade mark of the appellant?

5. What then are the respective marks involved in this dispute? The appellant's trade mark consists of a label containing the device of a lion, a blank scroll above and a scroll containing the words "Lion Brand" below the lion device. It was registered on the 18th February, 1943, in Part A of the Register in Class 7 in respect of "agricultural implements of the larger kind, and parts thereof: agricultural machinery and parts thereof, including chaffcutter blades and knives". This registration was renewed for a period of 15 years on 18-2-1950 which expired in 1965.

6. The striking features of the Appellant's trade mark are the device of a Lion and the words "Lion Brand". These are the distinguishing and essential features of that mark. In fact, the device contains no other picture of anything else but that of a lion of the above description. The Appellant's goods, it is said, were bought and sold by reference to the word "Lion" of that device.

7. Respondent Pannalal Agrawal's mark, for which he applied for registration, consists of the label containing the device of a goddess seated on a lion and the caption "Ma Durga Brand". The goddess device is a four-armed device of a goddess holding a trident in one hand, a sword in another, a discus in the third and a bow in the fourth. This goddess device has all the well-known attributes or symbols of a four-armed goddess Durga. In the label she is shown seated on her "Vahan" (mount) which is a lion. The goddess device is so blended with the lion device that the lion device has totally lost all its individuality and the identity of the label has merged into that of Goddess Durga. The dominating and the commanding attention, feature, concentration and totality of the picture are occupied by the figure of the Goddess. Respondent Pannalal Agarwal's goods are bought and sold by reference to the Goddess Durga Brand and not to the device of lion.

8. The appellation of the respective marks, viz., Appellant's "Lion Brand" and the Respondent Pannalal Agarwal's "Ma Durga Brand" are entirely distinct and separate. There is no phonetic similarity; there is no visual similarity. No doubt the lion is common to both. But even the pictorial representation of the lion in either case is entirely distinct and separate. The majesty of the Goddess sitting on the lion overwhelms the lion part of the device in Respondent Pannalal Agarwal's application for registration. The lion in "Ma Durga Brand" is also very different from the lion in the "Lion Brand". I shall not dissect the picture of the lion showed in this picture because what, I shall presently show, is not in-

tended by the law. It is enough to say that the lion in the "Lion Brand" is not only sole or solitary lion without a rider but makes a full face with all the manes showing while the lion in the "Ma Durga Brand" is a lion facing sideways and it is the image of goddess Durga which faces the front. Therefore, what is important is that the first glance and the first impression of these two marks would be "lion" in the case of "Lion Brand", and Goddess "Durga" in the case of "Ma Durga Brand".

9. As I understand the law of Trade Mark on the point, the general requirement of the law is that the mark must be distinctive in the sense that it must be adapted and distinguished. This distinctiveness is fundamental and primarily a matter of fact. Past decisions may offer suggestions or principles for guidance showing what kinds of evidence or considerations should influence the Court in coming to the conclusions but they are of no further help. It is a caution in Trade Mark law which is frequently missed and yet of central significance. Distinctiveness being primarily a matter of fact, evidence can be given regarding distinctiveness in fact. There are no narrow or rigid rules about distinctiveness. Such distinctiveness may be either in individual features or in general arrangement. A mark should therefore be considered as a whole on its total impression and as a general rule attempts to dissect a mark in order to destroy distinctiveness have been disapproved in such cases as *Re, Hawthorn & Co., Ltd.*, (1934) 52 RPC 15 and *Re, William Bailey (Birmingham) Ltd., Re, Gilbert & Co.*, (1935) 52 RPC 136. In fact, the general principle of trade mark law in determining the question of identity or deceptive similarity is that the marks, names or get-up concerned must always be considered as a whole as the true test. See the observation of the Supreme Court in *Corn Products Refining Co. v. Shangrila Food Products*, AIR 1960 SC 142 at p. 147 where it says "It is well recognised that in deciding a question of similarity between two marks, the marks have to be considered as a whole". It is the totality of the impression, phonetically and visually, which is the test. If that totality of impression is likely to cause deception or confusion, then the identity is established. If not, then they are dissimilar. Support for this view of the law is obtained from Article 874 at p. 527 and Article 987 at p. 589 of Lord Simond's 3rd Edn. of Halsbury's Laws of England, Vol. 38. In that authority, in Article 992 at p. 591 of 38 Halsbury it has been stated also "where there are common elements in two or more marks, more regard must be paid to the parts that are not common but the common parts must not be

disregarded." There are a number of authorities cited in support of that proposition. So even if the lion is a common part in these two marks under consideration, the fact that one is alone lion and the other a lion with the goddess Durga with four arms would avoid any risk of identity or deceptive similarity or confusion.

10. Both the decision of the Dy. Registrar and learned Counsel appearing for the Registrar of Trade Marks before me have relied on the unreported judgment of the Bombay High Court in *Prabhudas Bhaichand v. Tribhubandas Kulsaldas*, a decision of Shah, J., delivered on January 12, 1961 (Bom.). That case discussed the competition between two marks — one only a horse and the other a horse with a rider who was a fairy with wings. The first was known as the "Horse Brand" and the other was known as "Pari Ghora". Shah, J., in course of his judgment upholding the decision of the Registrar of Trade Marks there in allowing registration of the horse with the fairy *inter alia* observed as follows:—

"This makes, in my opinion, all the difference between the respective designs of the petitioners and the respondents. Whereas the petitioners' design does not spell any mythological legend, the design of the respondents does spell it. To the sight of an ordinary man, the design of the horse in the mark of the petitioners would appear to be more of a race horse than a celestial horse, but the picture of the horse in the design of the Respondents mere looks like a celestial horse. The distinguishing feature, in my opinion, is the picture of the fairy on the top of the horse and if one finds out distinguishing features in the two different designs, the test laid down by our Court in the case cited above is clearly satisfied."

11. If the horse with a fairy carries the mythological tradition, the "Ma Durga Brand" of Respondent Pannalal Agarwal in this case carries a more forceful mythological and religious legend known to the people of the country who are familiar with the goddess Durga with the "Vahan" of a lion. The point is of some importance because the Appellant contended before this Court that these goods were purchased by ordinary illiterate and uneducated peasants in carrying on their agricultural occupation. There is however no evidence on the point of what classes of purchasers usually buy the Appellant's goods. I shall come to the question of evidence presently. But even assuming that purchasers of the goods in question are illiterate, uneducated peasants, that fact does not help the Appellant in the present case. For in spite of illiteracy and lack of education in the

peasants of India, they are quite familiar with the image and idea of what is a lion and what is Goddess Durga. It needs emphasis in this case that the type of goods on which the Appellant uses his trade mark demands skill and technology which may not associate the purchasers of this class of goods with the total darkness of illiteracy and lack of education.

12. In fact, it will not be inappropriate to quote Shah, J., again in that Bombay decision where on a similar argument of illiteracy the learned Judge observed as follows:—

"As stated above, the design must be looked at as a whole and when the Respondent's design is thus looked at, the idea that is clearly conveyed to one's mind and this does not require any amount of literacy because all that one has got to do is to see with one's eyes, which do not require to be literate or illiterate is that it is a picture somewhat of a celestial character having no parallel in this mundane world. One does not find fairies on the surface of the earth nor believe that witness (sic). Fairies are mythological figures and, irrespective of one's literacy or illiteracy, I should imagine everybody knows what a fairy or Pari in Indian language means."

13. Applying that test, it can be equally said on the facts here before me that a goddess with four arms is not a familiar mundane figure which can be seen in the roads and streets. If the fairy was celestial in the Bombay case, Ma Durga is more celestial in the present case. They are therefore sufficient distinctive characteristics of this device for which the Respondent Pannalal Agarwal seeks to have a registration.

14. It will be appropriate here at this stage to come to the facts found by the Deputy Registrar. The appellant's position on the facts appears to be hopeless. It is his case that registration of the respondent Pannalal Agarwal's mark will cause deception or confusion but no evidence whatever has been produced about the possibility of such deception and confusion. Secondly, although the date of registration of the appellant's trade mark shows the date when it was registered, there is no evidence whatever of continuous user from any independent source. Thirdly, there is no evidence from any independent source about the reputation that this mark of the appellant is alleged to have acquired. Fourthly, no fact or evidence has been produced to show the annual turnover of the appellant's goods or even to show the class of purchasers who buy his goods. No cash memo on behalf of the appellant has been produced. No accounts on behalf of the appellant have been shown. No advertise-

ment or publicity has been proved on behalf of the appellant or his goods. On that state of records about facts found and evidence given, I am not at all impressed by the merits of the appellant's case on deception and confusion.

15. The appellant seems to rely only on two circumstances. The first circumstance is that his mark is already a registered trade mark. I am afraid that is not enough. The Supreme Court observed in AIR 1960 SC 142 at pp. 146-47 as follows:—

"Now of course the presence of a mark in the register does not prove its user at all. It is possible that the mark may have been registered but not used. It is not permissible to draw any inference as to their user from the presence of the marks on the register. If any authority on this question is considered necessary reference may be made to Kerly page 507 and Willesden Varnish Co. Ltd. v. Young & Marten Ltd., 39 RPC 285 at p. 289." It is needless to point out that the only presumption that follows from registration of a trade mark is its *prima facie* evidentiary value about its validity and as stated in Section 31 of the Trade and Merchandise Marks Act, 1958 which reads as follows:—

"(1) In all legal proceedings relating to a trade mark registered under this Act (including applications under Section 56), the original registration of the trade mark and of all subsequent assignments and transmissions of the trade mark shall be *prima facie* evidence of the validity thereof.

(2) In all legal proceedings as aforesaid a trade mark registered in Part A of the register shall not be held to be invalid on the ground that it was not a registrable trade mark under Section 9 except upon evidence of distinctiveness and that such evidence was not submitted to the Registrar before registration, if it is found that the trade mark had been so used by the registered proprietor or his predecessor-in-title as to have become distinctive at the date of registration."

16. Section 32 of the Act makes further provision that subject to Sections 35 and 46, in all legal proceedings relating to a trade mark registered in Part A of the register, including of course applications under Section 56, the original registration of the trade mark shall after the expiration of 7 years from the date of such registration be taken to be valid in all respects unless it is proved:—

(a) that the original registration was obtained by fraud; or

(b) that the trade mark was registered in contravention of the provisions of Section 11 or offends against the provisions of that section on the date of commencement of the proceedings; or

(c) that the trade mark was not at the commencement of the proceedings, distinctive of the goods of the registered proprietor.

17. Except the presumption noted above there is no other presumption recognised by the statute. The appellant's reliance therefore on the mere circumstance of his prior mark on the Register cannot help him in this respect.

18. The other circumstance on which the appellant relies is on a series of judgments mostly of the Subordinate Courts of Punjab except one of the Punjab High Court. In order to show that the appellant had brought legal proceedings to assert his title to his registered trade mark against diverse parties, these judgments were used as parts of the affidavits filed by the appellant before the Registrar of Trade Marks.

19. Now apart from the legal question how far these judgments are admissible and whether they are at all any proof against respondent Pannalal Agarwal, the value and weight of these judgments are negligible in this case. In the first place, the parties were different. In the second place, the facts were different. In the third place, the trade marks which were alleged to have been infringing the appellant's trade mark in these legal proceedings were entirely different from the present case before me. Fourthly, not anyone of the witnesses who deposed in those cases has been produced here in this case, nor any of their affidavits used in the present case. These judgments intended to be used in support of the appellant are not judgments *in rem*. They are judgments *inter partes* and are confined to the facts of dispute in those individual cases. The respondent Pannalal Agarwal is not a party to any of these judgments or proceedings. On those facts I do not consider that these judgments or their facts can be used against respondent Pannalal Agarwal.

20. I shall notice at this stage some of the authorities on this point. The Privy Council in *Gopika Raman Roy v. Atal Singh*, AIR 1929 PC 99, a case not under the Trade Mark law laid down the obvious principle that the Evidence Act does not make finding of fact arrived at on the evidence before the Court in one case evidence of that fact in another case where the parties are not the same. See the observations of Sir John Wallis in the Privy Council at page 102 of that report.

21. On behalf of the Appellant, reliance was placed upon the Privy Council decision in *Gobinda Narayan Singh v. Shamlal Singh*, 58 Ind App 125=(AIR 1931 PC 89) to show that under Sections 13 and 43 of the Indian Evidence Act the judgment in a previous suit was admissible; but that was only admissible as

establishing the particular partition resulting from that suit and it was clearly laid down by the Privy Council that neither the reasons nor any finding of fact was relevant in the subsequent suit before the Privy Council. See observations of Sir George Lowndes, J., at p. 136 of that Report (of LA)=(at p. 92 of AIR).

22. There are some decisions on trademark judgments, regarding their admissibility, probative value and weight. The well-known decision of the Privy Council in the Coca-Cola Co. of Canada Ltd. v. Pepsi-Cola Co. of Canada Ltd., AIR 1942 PC 40 is relevant on the point. There Lord Russell delivering the judgment of the Privy Council observes at pp. 41 and 42 "the Court is not entitled to refer to or even rely upon a judgment given in proceedings to which neither the plaintiff nor the defendant was a party as proving the facts stated therein."

23. The Supreme Court in *Sitaldas v. Sant Ram*, AIR 1954 SC 606, while discussing religious endowments in Hindu law observed at p. 614: "But the judgment itself we think can be received in evidence under Section 13 of the Evidence Act as a 'transaction' in which Kishore Das, from whom Ishar Das purports to derive his title, asserted his right as a spiritual collateral of Mongal Das and on that footing got a decree." That observation is of no help to the Appellant in this case for there the title and its derivation made for a unity of the subject and all the persons claiming thereunder. Here all that is absent. It is not the Appellant's right or assertion of his trade mark which is in question in the present appeal. The question in the present appeal is whether Respondent Pannalal Agarwal's application to register "Ma Durga Brand" would create any deception or confusion with the Appellant's registered trade mark. For that purpose I fail to understand how these other judgments where the parties, the subject-matter and the alleged infringing trade marks were all different could be used against the present Respondent Pannalal Agarwal. In my opinion, they cannot be used either in fact or in law, in the present case.

24. Incidentally, it has been rightly criticised by the learned Counsel on behalf of the Registrar of Trade Marks that even the Appellant's assertion of the right to his trade mark, for which these other judgments could be admissible, become inadmissible because that assertion and the plaintiffs in those cases were not the same person as the present Appellant because those other legal proceedings, as I have said before, were instituted by a joint Hindu family and the present Appellant is the partnership firm registered under the Indian Partnership Act.

25. On this point objection was raised by the learned Counsel on behalf of the Registrar of Trade Marks that in fact the Appellant is not the registered owner of the trade mark and therefore is not entitled even to object. But that point cannot succeed because Section 21 of the Trade and Merchandise Marks Act 1958 dealing with opposition to registration speaks of "any person may object to an application for registration." Therefore "any person" need not be only a prior registered trade-mark owner. Even a customer, a purchaser or a member of the public likely to use the goods may object to the registration of a trade mark in respect of such goods on the ground of possible deception or confusion. Deception or confusion is a matter of public interest which is an important concern of the trade mark law.

26. I shall refer here to two decisions of the Supreme Court at this stage. One has already been mentioned in connection with another point viz., AIR 1960 SC 142. This decision lays down the law that in order that a trade mark may acquire reputation among the general public, what is necessary is that the reputation should attach to the trade mark. In other words, the reputation is the reputation of the trade mark and not the maker of the goods bearing the trade mark. The Supreme Court in that case lays down further this law at p. 144 by observing as follows:—

"As we have earlier stated, the Appellant had opposed the registration of the Respondent's mark under Section 8 (a) and also under Section 10 (1). In order that Section 10 (1) might apply to the case, the Appellant had to establish that its mark had been registered in respect of the same goods or description of goods for which the Respondent had made its application for registration."

27. The other Trade Marks Act decision of the Supreme Court is reported in AIR 1963 SC 449. *Amritdhara Pharmacy v. Satya Deo*. There the Supreme Court at p. 452 observed as follows:—

"It would be noticed that the words used in the sections and relevant for our purpose are 'likely to deceive or cause confusion.' The Act does not lay down any criteria for determining what is 'likely to deceive or cause confusion.' Therefore, every case must depend on its own particular facts and the value of authorities lies not so much in the actual decision as in the tests applied for determining 'what is likely to deceive or cause confusion.' On an application to the Registrar, the Registrar or an opponent may object that the trade mark is not registered by reason of Clause (a) of Section 8 or Section 10 (1) as in this case. In such a case, the onus is on the appli-

cant to satisfy the Registrar that the trade mark applied for is not likely to deceive or cause confusion. In cases in which the Tribunal considers that there is doubt as to whether deception is likely, the application should be refused. The trade mark is likely to deceive or cause confusion by its resemblance to another already registered if it is likely to do so in the course of legitimate use in a market in which two marks are assumed to be in use by the traders in that market."

28. The Supreme Court there followed the celebrated observations of Parker, J., in *In Re Pianotist Co.'s*, (1906) 23 RPC 774 at p. 777 on the principles of comparison in these terms:—

"You must take the two words. You must judge them, both by their look and by their sound. You must consider the goods to which they are to be applied. You must consider the nature and kind of customer which would be likely to buy those goods. In fact you must consider all the surrounding circumstances and you must further consider what is likely to happen if each of those trade marks is used in a normal way as a trade mark for the goods of the respective owner of the marks."

29. The Supreme Court in *Amritdhara's case*, AIR 1963 SC 449 also followed and approved the law laid down by Kerly on Trade Marks, 8th Edn. at p. 400 where it is stated: "For deceptive resemblance two important questions are: (1) who are the persons whom the resemblance must be likely to deceive and (2) what rules of comparisons are to be adopted in judging whether such resemblance exists. As to confusion, it is perhaps an appropriate description of the state of mind of a customer who on seeing a mark thinks that it differs from the mark on goods which he has previously bought but is doubtful whether the impression is not due to imperfect recollection."

30. On the application of these tests of comparison I have no reason to doubt that the marks in this case have no identity or any reasonable similarity to cause deception in any manner whatsoever.

31. In this view of the matter, the question of onus which was argued is no longer relevant or important for the decision in this case. The question of onus of proof in trade mark law is a complicated question. No fixed or rigid formula is available nor is there any fixed doctrine of onus which can be spelt out of the Trade Mark law or the statute. The brief analysis of the Trade and Merchandise Marks Act, 1958 and the rules made thereunder emphasise certain broad principles and features. The applicant for registration has certain duties and onus

to discharge while making an application for registration of a trade mark. Sections 8 to 14 of the Act indicate the requisites for registration and the limitations for application. The applicant for registration has to *prima facie* satisfy the Registrar that he does not infringe these statutory requirements. It is needless to point out that the Register is maintained under Section 6 of the statute. Sections 18, 19, 20, 21 and 22 of the Act lay down the procedure for application for registration, its acceptance by the Registrar, the withdrawal of his acceptance in certain cases, the opposition for registration and correction or amendment, and the advertisement of the application for registration. From these Sections 18 to 22, one thing is clear that when an applicant makes his application for registration, the onus in the first place is upon him to show that he is within the law *prima facie* and he does not infringe Sections 8-14 of the statute. It is only when he has discharged that primary onus that the application can be accepted by the Registrar under Section 18 (4) of the statute. The Registrar can refuse the application at that stage or may accept it absolutely or may accept it subject to amendments, modifications, conditions or limitations as he thinks fit. But when he accepts it, then that acceptance *prima facie* shows that the applicant has crossed the preliminary hurdle of onus unless it is withdrawn under Section 19 of the statute. If it is not withdrawn, then this application is advertised inviting opposition, if any, to registration. The stage which follows after advertisement appears to throw the burden upon those who are opposing to prove their opposition and the onus is upon them to show that what the Registrar has *prima facie* accepted is not entitled to registration. The onus, therefore, would be upon the opposer to support his grounds of opposition at that stage. The Trade Mark Rules under Section 133 of the Trade and Merchandise Marks Act 1958 appear to subscribe to that view. Trade Mark Rules 37 to 43 show the preliminary onus upon the applicant for registration of a trade mark. Rules 51 to 55 appear to show that the onus shifts then to the opposer to support his grounds of opposition by evidence. Rule 53 expressly requires evidence in support of opposition and Rule 53 (2) goes so far as to say that if an opponent makes no opposition under Rule 53 (1) within the time therein prescribed, he shall, unless the Registrar otherwise directs, be deemed to have abandoned his opposition. This rule shows definitely that if he does not oppose and if he does not support his opposition by evidence, he would be deemed to have abandoned his opposition. This would indicate that the onus is upon the

opposer to support his grounds of opposition.

32. After this reference to the Indian statutes and rules, one decision under the British Act, may be now noticed. That decision is reported in (1945) 63 RPC 97 under the title of, in the matter of an application by a Smith Hayden & Co. and is by Evershed, J. It is said there that the "question of resemblance is one of first impression and that the applicants had discharged the onus of showing that confusion and deception would not arise by any oral or other resemblance between the marks." This was the famous case of "Hovis" bread. At p. 102 of that Report, Evershed, J., declared that "the onus lies upon Smith Hayden & Co. as applicants for registration of satisfying the Court that a negative answer should be given to both questions, regard being had to the whole range of goods covered by the proposed registration."

33. In fact it is stated in 38 Halsbury (Simonds Edition) Article 984 at page 588, "The basic general conditions which arise in determining the degree of resemblance of trade marks etc., in all proceedings in which comparison arises are very similar, but the onus of proof may differ in the various types of cases. Thus, in the case of applications for registration of trade marks and in opposition thereto, the onus is on the applicant to satisfy the Registrar that the Trade Mark applied for is not likely to deceive or cause confusion, whereas in applications for rectification the onus is on the applicant for revocation. In action for infringement of a trade mark or passing off the onus is on the plaintiff."

34. This statement, however, does not hold good for the context of the Trade and Merchandise Marks Act, 1958 in India and the rules made thereunder show how the onus shifts from one stage to the other.

35. Finally, Kerly on Trade Marks, Ninth Edition, states the law at pages 448-49 in Section 833 in these terms:—

"The different proceedings in which the question of deception and confusion arises are summarised in paragraphs which follow, and some observations relevant to the proceeding in question are added.

"(1) On an application to register, the Registrar or an opponent may object that the trade mark is not registrable by reason of Section 11 and of Section 12 (1).

"In such cases the onus is on the applicant to satisfy the Registrar that the trade mark applied for is not reasonably likely to deceive or cause confusion so that the refusal to register does not involve the conclusion that the resemblance is such that either an infringement action or a passing-off would suc-

ceed. In cases in which the Tribunal considers that there is doubt as to whether deception is likely the application should be refused.

"Apart from the difference in onus, the question to be considered under Section 12 is roughly equivalent to asking whether any normal and fair use of the mark sought to be registered would infringe the other — whilst the question to be considered in an ordinary dispute under Section 11 is roughly equivalent to asking, whether any normal and fair use of the mark sought to be registered would be likely to cause passing-off."

36. As I have already said it will not be necessary to pursue this point of onus any further, having regard to the view that I have taken of the merits of the case.

37. Reliance has been placed on behalf of the appellant on an English decision, in the matter, William Henry Huxley, (1924) 41 RPC 423. There was one device containing four pictures separately but put together. One of such pictures was that of a ship. The other was a mark with a picture of ship only. It was held that it was a case which was likely to cause deception or confusion. This authority was invoked in the present appeal on the ground that if ship was the vitiating factor in that case then the lion can be equally so in this. I have no hesitation in rejecting this submission. The reasons are plain. In the first place, there the competing marks consisted of in one case four separate pictures put together but nevertheless separate and one such separate picture was a ship only and this was very similar to the ship in the other competing mark. The lion in "Ma Durga" here cannot be so separated. It is one composite picture inseparable with the goddess dominant in the whole picture. Secondly, in Huxley's case in (1924) 41 RPC 423 the competing words in both cases were "Ship Brand". Here I see no earthly connection between a "Lion Brand" and the "Ma Durga Brand".

38. For the reasons and authorities stated above, I uphold the decision of the Deputy Registrar of Trade Marks, Calcutta dated the 7th November, 1964 and dismiss this appeal with costs.

RSK/D.V.C. Appeal dismissed.

AIR 1969 CALCUTTA 88 (V 56 C 16)

P. N. MOOKERJEE AND

A. C. GUPTA, JJ.

Sunil Kumar Mukhopadhyaya and another, Appellants v. Provash Chandra Majumdar and others, Respondents.

A. F. A. D. No. 731 of 1962, D/- 19-5-1967.

GK/JK/B716/67

(A) Partition Act (1893), S. 4 — Scope Section should be liberally construed — Widely in favour of family members and strictly against stranger purchaser — Section 4 applies not only to suit by stranger purchaser but also to suit against him — AIR 1947 Cal 426 and AIR 1955 Cal 292, Foll. — Civil P. C. (1908), Pre. — Interpretation of Statutes). (Paras 10, 12)

(B) Partition Act (1893), S. 4 — Dwelling house — Question whether disputed land ceased to be so — Disappearance of structures thereon — Proof, not conclusive — Non-consideration of question by Courts below — Case remanded in second appeal — AIR 1928 Cal 539, Foll, AIR 1959 Orissa 173, Diss. from, Observation in AIR 1961 Orissa 203, held obiter — (Civil P. C. (1908), O. 41, R. 25).

(Paras 16, 17)

Cases Referred: Chronological Paras

(1967) AIR 1967 Mad 156 (V 54)=

(1966) 2 Mad LJ 132, Ramaswami Pillai v. Subramania Pillai 14

(1961) AIR 1961 Orissa 203 (V 48), Kanduri Maharana v. Banchhu Maharana 19

(1960) AIR 1960 Cal 467 (V 47), Kalipada Ghosh v. Tulsidas Dutt 18

(1959) AIR 1959 Orissa 173 (V 46) =25 Cut LT 133, Bikal Swain v. Iswar Swain 19

(1955) AIR 1955 Cal 292 (V 42)= 96 Cal LJ 168, Haradhane Haldar v. Usha Charan Karmakar 12

(1952) AIR 1952 All 207 (V 39)= 1952 All WR (HC) 126, Bhagirath v. Afaq Rasul 19

(1950) AIR 1950 Cal 111 (V 37)= 54 Cal WN 660, Boto Krishna Ghose v. Akhoy Kumar Ghose 11, 18

(1947) AIR 1947 Cal 426 (V 34)= 51 Cal WN 639, Abu Isa Thakur v. Dinabandhu Banik 12

(1928) AIR 1928 Cal 539 (V 15)= 109 Ind Cas 67, Nil Kamal v. Kamakshya Charan 16, 18, 19

Lala Hemanta Kumar, Amar Nath Banerjee and Chandidas Roy Chowdhary, for Appellants; Amarendra Mohan Mitra and Arunendra Nath Basu, for Respondents.

P. N. MOOKERJEE, J.:— This appeal is by the plaintiffs and it arises out of a suit for partition, in which the plaintiffs made a claim for pre-emption under Section 4 of the Partition Act.

2. The suit was instituted on March 20, 1957. The plaint was a simple plaint for partition on the allegation inter alia that the plaintiffs had 1/3rd undivided share in the disputed property. Within two days, namely, on March 22, 1957, the plaintiffs applied for a temporary injunction to restrain the defendant from erecting structures on the suit land or changing its character and, in the said application, a reference was made to the

plaintiffs' claim for pre-emption, or right in that behalf, — under Section 4 of the Partition Act upon the ground that the defendant was a stranger purchaser, although he had purchased the major share, namely, 2/3rds, and, on the implication, though not very expressly stated, that the disputed property comprised the ancestral dwelling house of the plaintiffs' family. Thereafter, the suit proceeded for some time and, eventually, on September 22, 1959, there was a specific application for pre-emption under Section 4 of the Partition Act, mentioning all the requirements under the said section.

3. The learned Trial Judge, after finding that the plaintiffs had 1/3rd share in the disputed property and the defendant the remaining 2/3rds, made a preliminary decree for partition, and, upon the plaintiffs' above application under Section 4 of the Partition Act, came to the conclusion that, having regard to the nature of the disputed property and the circumstances of this case, it could be treated as coming sufficiently within the expression "dwelling house belonging to undivided family", as used in the said section, and, accordingly, the plaintiffs were entitled to pre-emption under the said statutory provision. In that view, he allowed the plaintiffs' said claim for pre-emption.

4. On appeal, this decision was modified by disallowing the plaintiffs' claim under Section 4 of the Partition Act and giving them, in lieu thereof, only a decree for partition to be worked out in the ordinary way by a Commissioner by allotment of the disputed property to the parties in accordance with their shares, keeping in view their present possession.

5. From this appellate decree, the present second appeal has been filed by the plaintiffs, who press their claim for pre-emption under Section 4 of the Partition Act and challenge the findings and the decision of the Lower Appellate Court on the point and ask for restoration of the Trial Court's decision in respect of the same.

6. For the decision of this appeal, it will be convenient now to state, in brief, the relevant facts.

7. The suit property originally belonged to one Satya Charan, who was the grand-father of the present plaintiffs. Satya Charan died, leaving three sons Gouri, Bimal and Nirmal. Plaintiffs are the sons of Gouri and are his heirs and legal representatives. On June 15, 1954, the plaintiffs appear to have sold their 1/3rd share in the disputed property to their co-sharer, uncle Nirmal, who thus got 2/3rds share in the disputed property, 1/3rd under this purchase and 1/3rd originally by inheritance from Satya Cha-

ran. On March 19, 1955, the plaintiffs appear to have purchased, from co-sharers Bimal's heirs, their 1/3rd interest in the disputed property, and, on August 4, 1956, Nirmal appears to have sold his above 2/3rds share of the disputed property to the defendant.

8. The disputed property, as it now stands, comprises vacant land but it is well established that, upon this land, stood the original ancestral dwelling house of the plaintiffs' undivided family, or, in other words, that the disputed property was the site of that ancestral dwelling house. That house, along with the land underneath, forming its site, appears to have been requisitioned under the Defence of India Act by the military authorities, sometime in the year 1942, and it remained in their occupation until derequisition till about 1950. In the meantime, the structures on the said land, which had become dilapidated, were demolished by the military authorities and razed to the ground with the result that the site of the plaintiffs' ancestral dwelling house, or, more accurately, what was once the said dwelling house became vacant land. This was the state of the property, when the same was derequisitioned by the military authorities, and, thereafter, as we have seen above, there were certain transfers, which passed the title to undivided shares to the different parties, and, eventually, the plaintiffs became 1/3rd owners of the same under the purchase from their co-sharers (Bimal's heirs) and the defendant obtained the remaining 2/3rds from the other co-sharer Nirmal.

9. The principal question now is whether the disputed property can be held to be the dwelling house for purposes of the above statutory provision, namely, Section 4 of the Partition Act. Admittedly, there are no structures on the same at the present moment and there were never any at any time after 1950. The point is whether the absence or demolition of structures would alter the nature of the property, which was once the dwelling house of the family, and take it outside the purview or benefit of the above Section 4 of the Partition Act.

10. So far as this Court is concerned, the above statutory provision has almost always been liberally construed and widely interpreted in favour of the members of the family and strictly against the stranger purchaser. That will appear from all the relevant decisions, on the point, of this Court up till this time. Indeed, that is the view, which has been almost universally accepted in this Court and almost without demur at all times. Whether this rule of liberal construction and wide interpretation would have the effect of bringing the disputed property,

which is now vacant land, within the meaning of "dwelling house", as used in the said section, is the principal matter for consideration in this appeal.

11. We may state here that, although the plaintiffs sold their original 1/3rd share to another co-sharer Nirmal and thus became divested of any interest for some time in the disputed property, they, by the acquisition of the 1/3rd interest of co-sharer Bimal from his heirs in the year 1955, that is, before the defendant's purchase and before the institution of the present suit, brought themselves within the category of persons, entitled to claim pre-emption under the above Section 4 of the Partition Act (vide *Botokrishna Ghose v. Akhoy Kumar Ghose*, 54 Cal WN 660=(AIR 1950 Cal 111)).

12. It is also well settled in this Court that the above statutory provision (Section 4 of the Partition Act) applies not only in the case of a suit by the stranger purchaser as plaintiff but, also, to a case, where the said stranger purchaser is sued as a defendant for partition (vide *Abu Isa Thakur v. Dinabandhu Banik*, 51 Cal WN 639=(AIR 1947 Cal 426) and *Haradhone Haldar v. Usha Charan Karmakar*, 96 Cal LJ 168=(AIR 1953 Cal 292)).

13. A point has been raised by Mr. Mitra, appearing on behalf of the defendant-respondent in this case, that that interpretation would be applicable or available, only where the defendant himself was claiming a share of the disputed property and not to a case, where the defendant's claim was, as in the instant case, that the property was not undivided joint property but had already been partitioned between the parties or their predecessors. This argument, however, having regard to the concurrent findings of the two Courts below that the defence of previous partition was unacceptable, cannot be accepted as a relevant distinction. The property, if it is really joint or undivided, would entitle the defendant (stranger purchaser) to his share, acquired by him by purchase, as aforesaid, — and he is actually claiming the same, — and so, the mere fact that he raised the defence of previous partition, which was ultimately negatived, would not alter the position. Indeed, in no view, can the stranger defendant be said to have given up or abandoned his claim to the purchased 2/3rds share or to a partition of the same, in case the property is held to be joint property of the parties, and, as a matter of fact, he has pressed for the same.

14. We are, accordingly, of the view, that, provided the disputed property which, as we have said above, is vacant land at the present moment, can be treated as "dwelling house" within the meaning of the aforesaid statutory provision,

that provision would apply to the instant case to entitle the plaintiffs to their claim for pre-emption. Vide, in this connection, the authorities, already cited, and Ramaswami Pillai v. Subramania Pillai, (1966) 2 Mad LJ 132=(AIR 1967 Mad 156).

15. On the above material question, the position, as we have sufficiently indicated above, appears to be as follows:

On the vacant land in question, there was originally the ancestral dwelling house of the plaintiffs' family. During military requisition, the structures were demolished and the property was transformed to vacant land. The parties got possession in the year 1950 but, up till now, no structure has been built upon the same, although the plaintiffs claim that they had and have an intention of erecting their residence or dwelling house on it.

16. In the kobala, by which the plaintiffs' share was sold to Nirmal, there was a recital that the same was being given to Nirmal, so that he may use it for purposes of the residence of his family, the plaintiffs' shifting elsewhere for purposes of their residence. The plaintiffs, thereafter, acquired Bimal's interest in the disputed property but it is not clear from the materials, now before us, including the kobala, by which the said purchase was made, for what purpose the same was acquired. It has been ruled by this Court in Nil Kamal v. Kamakshya Charan, AIR 1928 Cal 539, that the mere fact that the structures on the disputed land, which was once the site of the family dwelling house of the parties, had disappeared, would not, by itself, be conclusive on the point, whether it had ceased to be the dwelling house of the family. In the said decision Mukherji, J., laid down the relevant test in the following terms:

"The fact that the huts have blown down does not make the dwelling house any the less a dwelling house so long as the members have not abandoned it or, at any rate, given up the idea of using it as such."

That test seems to us to be a valuable and reasonable test, relevant and cogent on the point, and decisive on the question of the character of the property for purposes of the above statutory provision and it will be necessary to find out whether, in the instant case, that test is satisfied. This aspect of the matter, however, does not appear to have been appreciated or fully realised, either by the parties or by the Courts below, and, accordingly, sufficient materials on this point are not available on the present records.

17. In the above view, we are unable to dispose of the matter finally now in this Court and the same will have to be

remitted to the Lower Appellate Court for a decision on the said question on the materials, already on record and on such further materials as may be produced before it by the parties in support of their respective cases on the point.

18. The view, we have taken above of the relative position in law and the view, we have taken of the decision, reported in AIR 1928 Cal 539 will be sufficiently, though not directly, supported by another decision of this Court, reported in Kalipada Ghose v. Tulsidas Dutt, AIR 1960 Cal 467. See also 54 Cal WN 660=(AIR 1950 Cal 111), Supra.

19. A more or less similar view appears also to have been taken by the Allahabad High Court in Bhagirath v. Afaq Rasul, AIR 1952 All 207 although it may be pointed out that the said decision may be distinguishable from some points of view. The decision of the Orissa High Court in Bikal Swain v. Iswar Swain, AIR 1959 Orissa 173, no doubt, supports the contrary, but, in our opinion, the said decision did not take a correct and comprehensive view of the decision of this Court in the above cited case, AIR 1928 Cal 539 and did not make the same liberal approach for the Section in question as has so often been stressed and recommended by this Court. We, further feel that the broad view we have taken above, seems to be supported by the object and scheme of the section under consideration and its underlying spirit and purpose and the liberal approach and wide outlook, advocated by this Court almost on all occasions, whenever the said statutory provision came up for consideration, to solve difficulties and complications that would have otherwise arisen and remained outstanding, and that no other view would be consistent or in consonance with the same, remembering that this Court has almost as a rule, striven to apply the aforesaid section to preserve the integrity of the family dwelling house and to enable the members of the family to keep it for themselves as far as possible. We may also add that the relative observations in AIR 1961 Orissa 203 are obiter and do not seriously affect the position.

20. We would, accordingly, allow this appeal, set aside the decree of the Court of appeal below and send the matter back to the said Court for further consideration and for final disposal in the light of the observations, made in this judgment.

21. Costs of this appeal will abide the final result of the suit.

22. GUPTA, J.:— I agree.

SSG/D.V.C.

Appeal allowed.

AIR 1969 CALCUTTA 92 (V 56 C 17)

S. P. MITRA AND K. L. ROY, JJ.

Ganesh Sugar Mills Ltd. Applicant v. Commissioner of Income-Tax, West Bengal, III, Respondent.

Income-Tax Ref. No. 142 of 1965, D/- 9-5-1968.

(A) Income Tax Act (1922), S. 10 (2) (vi) — Income Tax Rules (1922), R. 8 Prov. 2 — (Note under Item III) — Depreciation — Seasonal factories working triple shifts — Provision of extra shift depreciation is not applicable to seasonal factories.

An assessee running a seasonal factory would be entitled to the normal depreciation under Sec. 10 (2) (vi) as if its machinery and plant had been in use throughout the previous year. However the note to Item III of R. 8 of the Income-tax Rules makes it quite clear that the maximum of the extra depreciation allowable for working double shift is 30 per cent while that of triple shift is 100 per cent of the normal depreciation calculated for the whole year. To this maximum is to be applied the proportion of the actual number of days for which the plant and machinery had been working extra shift to 300, 300 being taken as the normal number of working days in any year. It is made expressly clear that this principle would apply to all concerns whether the general rate or any special rate applies to them. Therefore, there is no scope for the application of the principle of the second proviso to the main R. 8 in calculating the allowance for extra shift depreciation in the case of seasonal factories. (Para 8)

(B) Income Tax Act (1922), S. 10 (2) (xv) — Capital expenditure, should bring enduring benefit — Contribution for building road — Contributions given by Sugar Mills and cane growers — Road built would be an enduring benefit to the assessee Mill — Contribution by assessee Mill held capital expenditure and not deductible under S. 10 (2) (xv).

Where sugar mills in a certain area were experiencing difficulty either in obtaining cane or despatching finished product, and at a tripartite conference between the State Government, the owners of the sugar mills and the representatives of the cane growers, it was decided to form a co-operative society to whom contributions would be made by the Sugar Mills to develop and build roads which would be used both by the mills and by the cane growers and would facilitate the movement of both cane and sugar and the expenditure brought into existence a new asset, viz., the road which facilitated the carrying on of the assessee's business.

Held that the use of the roads would be of enduring benefit to the mill's business and therefore mill's claim for deduction of the amount contributed by it under Sec. 10 (2) (xv) could not stand. (1968) 68 ITR 301 (Cal), Dist. AIR 1965 SC 1201 (1205) and AIR 1966 SC 1053, Rel. on. (Para 12)

Cases Referred: Chronological Paras (1968) 1968-68 ITR 301 (Cal), Commr. of Income Tax, West Bengal v.

Hindustan Motors Ltd. 9
(1966) AIR 1966 SC 1053 (V 53)=
1966-60 ITR 52, India Cements Ltd.
v. Commrs. of Income-tax, Madras 9

(1966) 1966 AC 295, Strick v. Regent Oil Co., Ltd. 11

(1965) AIR 1965 SC 1201 (V 52)=
1965-56 ITR 52, Bombay Steam Navigation Co., (1953) Private Ltd. v. Commr. of Income Tax, Bombay 9

(1955) AIR 1955 SC 89 (V 42)=
1955-27 ITR 34, Assam Bengal Cement Co., Ltd. v. Commr. of Income Tax, West Bengal 10

Dr. D. Pal with P. L. Khaitan, for Applicant; B. L. Pal with Dipak Sen, for Respondent.

K. L. ROY, J.:— By this Reference under Section 66 (1) of the Indian Income-tax Act, 1922, the Income-tax Appellate Tribunal has referred the following two questions to this Court, namely:—

"1. Whether on the facts and in the circumstances of the case, the Tribunal was right in holding that extra shift depreciation allowance in the case of the assessee company must also be calculated with reference to the actual number of days on which the extra shifts had worked during the previous years to the assessment years 1958-59 and 1959-60?

2. Whether on the facts and in the circumstances of the case, the Tribunal was right in holding that the contribution of Rs. 10,220/- made by the assessee company towards road development was a capital expenditure and as such not admissible as an expenditure in computing its business income for the assessment year 1959-60?"

2. The assessee is a company deriving income from certain sugar Mills in the Uttar Pradesh. The assessment years involved are 1958-59 and 1959-60, the corresponding previous years being the years ending on the 31st October, 1957 and the 31st October 1958 respectively. For both these years the assessee company claimed extra shift depreciation allowance equal to the normal depreciation in respect of the machinery and plant utilised in the sugar manufacturing business. There is no dispute that the assessee's factories are seasonal factories which worked only

during that part of the year when sugar cane is available. The Income-tax Officer disallowed Rs. 12,259 in the first year and Rs. 15,898 in the second year out of this claim for extra shift allowance. The disallowance was upheld in appeal by the Appellate Assistant Commissioner and also on further appeal by the Tribunal.

3. For the assessment year 1959-60, the assessee claimed deduction of a sum of Rs. 19,220, being the amount contributed by the assessee company to a Co-operative Society for the purpose of development of the roads giving access to the factories of the assessee company as well as other sugar mills of the locality. The Tribunal has stated that as a result of a conference of the representatives of the State Government, the cane growers and the sugar factory owners held at Nainital sometime in June 1954, a co-operative Society was formed for the purpose of taking up development of roads in the area. These roads were constructed by the Co-operative Society partly on land owned by the assessee company but were meant for common use by the cane growers as well as for transport purposes of the factory owners.

4. The claim for deduction of this amount was rejected by the Income-tax Officer as he was of the opinion that the expenditure was a capital expenditure. But he allowed rebate under Section 15B of the Act. The Appellate Assistant Commissioner, on appeal by the assessee, concurred with this view of the Income-tax Officer. On further appeal by the assessee to the Tribunal, the Tribunal was of the opinion that as the roads were of substantial construction and as, on the assessee's own admission, at least a part of such net-work of roads fell within the area comprising the assessee's mills, though the roads might not literally belong to the assessee, the contributions made towards the development of such roads were evidently of a capital nature. The Tribunal accordingly rejected the assessee's appeal.

5. At the instance of the assessee the questions mentioned above have been referred to this Court by the Tribunal.

6. Allowance for depreciation for plant and machinery used for the purposes of the business is provided for in Section 10 (2) (vi) of the Act. In respect of depreciation of such buildings, machinery, plant or furniture, being the property of the assessee, a sum equivalent to such percentage on the written down value thereof as may in any case or class of cases be prescribed is allowable as deduction. The conditions for the allowance and the percentages are prescribed in Rule 8 of the Indian Income-tax Rules, 1922 which is as follows:—

"8. The allowance under Section 10 (2) (vi) of the Act in respect of depreciation

of buildings, machinery, plant or furniture shall be at percentages of the written down value or original cost, as the case may be, equal to one-twelfth the number shown in the corresponding entry in the second column of the following statement:

Provided that if the buildings, machinery, plant or furniture have been used by the assessee in his business for not less than two months during the previous year, the percentage shall be increased proportionately according to the number of complete months of user by the assessee:

Provided further that in the case of a seasonal factory worked by the assessee during all the working seasons of the previous year the percentage shall be increased as if the buildings, machinery plant or furniture had been in use throughout the period the assessee was the owner thereof during the previous year."

7. In Item III, which provides for the percentage of depreciation on machinery and plant, there is a note allowing depreciation for double and triple shift working of the machinery and plant. The note provides that

"an extra allowance up to a maximum of 50 per cent of the normal allowance will be allowed by the Income-tax Officer where a concern claims such allowance on account of double shift working and satisfies the Income-tax Officer that the concern has actually worked double shift. An extra allowance up to a maximum of 100 per cent of the normal allowance instead of 50 per cent will be allowed in the assessments for five years commencing with the assessment for the year 1949-50, where a concern proves that there has been triple shift working. The calculations of the extra allowances for double shift and for triple shift shall be made separately, 'proportionate to the number of days during which there was only double shift working' and during which there was triple shift working. For the purpose of granting this extra allowance the normal number of working days throughout the year will be taken as 300. This applies to all concerns whether the general rate or any special rate applies to them. (underlining (here in' ') by us).

Explanation—For this purpose the normal allowance means the amount of depreciation allowance for the year calculated in accordance with Rule 8, but excluding the extra depreciation allowance for multiple shift working or for new plant and machinery."

8. Dr. Pal submitted that as the assessee's factory is a seasonal factory, the second proviso to Rule 8 would apply to the assessee's case and the assessee would be entitled to the normal depreciation

under Section 10 (2) (vi) as if its machinery and plant had been in use throughout the previous year. So far there is no dispute. Dr. Pal further submitted that this principle which was applicable to seasonal factories should also be applied while computing the extra shift depreciation allowance and the maximum of 50 per cent of the normal depreciation should be allowed irrespective of the number of days in which the assessee's plant and machinery had been worked. We are unable to accept this contention of Dr. Pal. The note to Clause III of Rule 8 makes it quite clear that the maximum of the extra depreciation allowable for working double shift is 50 per cent while that of triple shift is 100 per cent of the normal depreciation calculated for the whole year. To this maximum is to be applied the proportion of the actual number of days for which the plant and machinery had been working extra shift to 300, 300 being taken as the normal number of working days in any year. It is made expressly clear that this principle would apply to all concerns whether the general rate or any special rate applies to them. Therefore, there is no scope for the application of the principle of the second proviso to the main Rule 8 in calculating the allowances for extra shift depreciation in the case of seasonal factories. The authorities below and the Tribunal was right in disallowing the assessee's claim to the full amount of 50 per cent of the normal depreciation as extra shift allowance and the first question must be answered in the affirmative and against the assessee.

9. Dr. Pal submitted that the second question referred was covered by a very recent decision of this Court in Commissioner of Income-tax, West Bengal v. Hindusthan Motors Ltd., (1968) 68 ITR 301 (Cal). In that case the assessee, which was manufacturing motor cars, had its factory near Uttarpara. There was an approach road connecting the factory to a main trunk road. The approach road was a public road belonging to the State Government but on account of lack of repairs for a long period the condition of the road had deteriorated and caused transportation difficulties to the assessee. The Government was not prepared to meet the expenses for the repairs of the road unless the assessee had contributed towards the costs of such repairs. The assessee paid an amount of Rs. 39,770/-, being the amount of such repairs, to the Government, as a consequence of which the road was repaired. This amount was claimed by the assessee as a deduction under Section 10 (2) (xv). This Court observed:—

"The money was spent not so much to bring about any asset or advantage of enduring benefit to itself but to run the

business efficiently and conveniently, that is to say, by not being hampered by slow and possibly dangerous locomotion of cars, produced in the factory, while moving on a disrepaired and ill-conditioned road. As a matter of business prudence, there was justification on the part of the assessee to expend this amount so as to induce the Government to repair the road, which it could not itself repair, not being the owner of the road. ... If the road was the own road of the assessee, Mr. Gupta in his fairness did not dispute, the annual expenditure for its repair would have been revenue expenditure. We do not think that because the road was not its own, the moneys spent for inducing the owner of the road to repair the same would turn out to be capital expenditure."

Dr. Pal submitted that in this case also neither the road nor the land on which the road was constructed belonged to the assessee. He contended that in this case also the money was spent by the assessee for the "development" of the road as in the case of Hindusthan Motors. Dr. Pal referred to the decision of the Supreme Court in Bombay Steam Navigation Co. (1953) Private Ltd v. Commissioner of Income-tax, Bombay, (1955) 56 ITR 52=(AIR 1955 SC 1201) and relied on the following observation at pages 59-60 (of ITR)=(at p. 1205 of AIR):—

"Whether a particular expenditure is revenue expenditure incurred for the purpose of business must be determined on a consideration of all the facts and circumstances, and by the application of principles of commercial trading. The question must be viewed in the larger context of business necessity or expediency. If the outgoing or expenditure is so related to the carrying on or conduct of the business, that it may be regarded as an integral part of the profit-earning process and not for acquisition of an asset or a right of a permanent character, the possession of which is a condition of the carrying on of the business, the expenditure may be regarded as revenue expenditure."

Dr. Pal submitted that the expenditure incurred by the assessee in this case was an expenditure incurred to facilitate the carrying on of the assessee's business in that the supply of raw cane to the assessee's factory by the cane-growers as well as the delivery by the assessee of the finished product would be accelerated. The development of the road was so related to the carrying on and the conduct of the assessee's business that it might be regarded as an integral part of the profit-earning process and so the expenditure must be held to be revenue in nature. Dr. Pal pointed out that the above exposition of the law by the Sup-

reme Court was reaffirmed in its decision in *India Cement Ltd. v. Commissioner of Income-tax, Madras*, (1966) 60 ITR 52= (AIR 1966 SC 1053).

10. Mr. B. L. Pal, learned Counsel for the Revenue, on the other hand submitted that as by this expenditure a system of roads came into existence, the assessee acquired an asset of enduring nature and as such the expenditure was a capital expenditure, Mr. Pal referred to the following observation of Lord Cave in *Atherton's case* which had been quoted with approval by the Supreme Court in *Assam Bengal Cement Co. Ltd. v. Commissioner of Income-tax, West Bengal*, (1955) 27 ITR 34=(AIR 1955 SC 89), namely:—

"But when an expenditure is made, not only once and for all, but with a view to bringing into existence an asset or an advantage for the enduring benefit of a trade, I think that is very good reason (in the absence of special circumstances leading to an opposite conclusion) for treating such an expenditure as properly attributable not to revenue but to capital."

11. Mr. Pal argued that in order to constitute a capital expenditure it is not necessary that a tangible material asset belonging to the assessee would come into existence. So long as by the expenditure the assessee acquires an advantage which gives an enduring benefit to his business the expenditure would be within the above test for capital expenditure. It was further submitted that "enduring" does not mean for ever. The Supreme Court in *Assam Bengal Cement Co.'s case* (supra) observed that the expression "enduring benefit" had been judicially interpreted and after referring to several English and Australian decisions it held that the payment made in that case which freed the assessee from any competition for a certain number of years was an enduring benefit for the whole of the business of the assessee and came well within the test laid down by Viscount Cave, L. C. A very recent decision of the House of Lords in *Strick (Inspector of Taxes) v. Regent Oil Co. Ltd.*, 1966 AC 295 was also cited where Lord Reid rejected the contention that the word enduring had come to be interpreted so as to include any benefit which lasted for more than one year. He was of the opinion that as the quality of the asset is different in different cases, all relevant factors must be considered in each particular case to determine the nature of an "enduring benefit".

12. We are unable to accept the contention of Dr. Pal that as the roads and the land on which the roads were built did not belong to the assessee the case came within the ratio of the decision in

Hindusthan Motors' case (supra). In *Hindusthan Motors' case* there was a public road already in existence which the assessee and the members of the general public were entitled to use as of right. Due to neglect and want of repairs the condition of the road deteriorated to such an extent that the assessee found it difficult to convey the cars manufactured by it to the main road. The assessee had to contribute an amount in order to induce the Government to repair the road and this Court held that by this expenditure no asset or enduring benefit came into existence and the expenditure was incurred in the usual course of the assessee's business. In the case before us the sugar mills in a certain area were experiencing difficulty either in obtaining cane or despatching finished product. At a tripartite conference between the State Government, the owners of the sugar mills and the representatives of the cane growers, it was decided to form a co-operative society to whom contributions would be made by the sugar mills to develop and build roads which would be used both by the mills and by the cane growers and would facilitate the movement of both cane and sugar. Here the expenditure brought into existence a new asset, viz., the roads which facilitated the carrying on of the assessee's business. The use of the roads would be of "enduring benefit" to the assessee's business in the sense that the expression has been interpreted both by the Supreme Court and by the House of Lords and the assessee's expenditure would be a capital expenditure within the ratio of Lord Cave's definition in *Atherton's case* (supra). The authorities below and the Tribunal were, therefore, justified in rejecting the assessee's claim for deduction of the amount of Rs. 19,220 under Section 10 (2) (xv) for the assessment year 1959-60 and the second question referred must also be answered in the affirmative and against the assessee. The assessee is to pay the costs of this reference.

13. S. P. MITRA, J.:— I agree.
BDB/D.V.C. Reference answered.

AIR 1969 CALCUTTA 95 (V 56 V 18)

D. BASU, J.

Ranjit Kumar Chatterjee, Petitioner v. Union of India and others, Respondents.

C. R. Nos. 1330 and 1864 (W) of 1967,
D/- 28-6-1968.

(A) Constitution of India Arts. 311 (2), 12, 298, 72, 102 — Employees of Durgapur Steel Plant, appertaining to Hindustan Steel Ltd., a non-statutory company registered under Companies Act, do not hold civil post under Government of the

GL/IL/D78/68

Union — Tests to see whether employee holds civil post under Government indicated — Companies Act (1956) Ss. 617, 34, 38.

The person holding the post of General Manager and the person holding under contract the post of Superintendent Coke and Oven Department, of the Durgapur Steel Plant appertaining to Hindustan Steel Ltd., do not hold civil posts under the Government of the Union within the meaning of Art. 311, so as to attract Clause (2) thereof. (Para 9)

The Hindustan Steel Ltd., is a Company formed under the Companies Act, 1956, of which all the shares are owned by the President of India and his two secretaries and no private individual can acquire its shares. AIR 1963 Cal 421, Ref. (Para 11)

A company registered under the Companies Act has a legal entity of its own, separate from that of its shareholders whoever they may be. AIR 1963 SC 1811, Ref. (Para 13)

It makes no difference where the entirety of the capital is subscribed by the Government or the company is controlled by the Government and run, in substance, as a Government Department. AIR 1963 SC 1890 and AIR 1964 SC 1486 and AIR 1963 SC 1811, Ref. (Para 14)

It cannot be said that when a statutory corporation exercises statutory powers, it is identified with the Government or Government Department; on the other hand, it comes under the expression 'other authority' in the definition given in Art. 12 and that is because it exercises statutory powers conferred by the State, affecting private individuals just as any other State action might do. But the question under Art. 311 is not whether a corporation exercises statutory powers, but whether its employees can be held to be holding their posts or offices under the Union or a State Government. AIR 1967 SC 1857, Expl. (Para 15)

A statutory corporation maintains its separate juristic entity even where it exercises statutory powers or is controlled by the Government. AIR 1966 SC 1364, Ref. (Para 15)

Hindustan Steel Ltd., is however a non-statutory corporation or company which exercises no statutory powers. AIR 1967 Cal 231, Ref. (Para 15)

Even where a company is a 'Government Company' within the meaning of S. 617 of the Companies Act, 1956, the juristic character of the Company does not change and it is not identified with the State and its employees do not become holders of civil posts under the Union or a State Government. (1948) 16 Factories and Labour Report 289 (290); AIR 1968 Cal 322, Ref. (Para 16)

Even service under a statutory corporation is not service under the Govern-

ment, even where Government control over such corporation and employment under it are obvious. AIR 1958 Mad 343 and AIR 1964 Mad 335 and AIR 1966 SC 1364, Ref. (Para 17)

Once it is held that a company registered under the Companies Act is not the State or a Department or agent thereof, the fact that its employees are appointed or removed by the President cannot make such employees holders of civil posts under the Union within the purview of Art. 311 (2). Even though appointed by the President, the employees remain the employees of the Company and not of the Government. AIR 1957 Pat 10 and AIR 1958 Pat 418, Ref.; AIR 1963 Mys 66 and AIR 1958 Mad 345, Distinguished. (Paras 18, 19)

The effect of the amendment of Article 298 by Constitution 7th Amendment Act 1956 is not to convert a commercial function of the Government into a governmental function. (Para 19)

Technically speaking, Art. 72 (2) of the Constitution applies when the President's action is an executive action of the Government of India, and where the President exercises some function, not by virtue of any provision of the Constitution, but in his personal capacity, under a private treaty, e.g., the Articles of Association of a Company, it would be desirable to get his acts authenticated by an officer of his personal establishment and not by an officer of a Ministry in the Government of India. (Para 19)

There is a distinction between the expression 'office of profit under the Government' in Art. 102 and the expression 'holder of a post or service under the Government' in Arts. 309, 314. AIR 1964 SC 254, Expl. & Dist. (Para 20)

The distinction between these different juristic concepts is no doubt fine and somewhat intriguing, but in the troubled waters of Jurisprudence, one has often to steer clear shoals. The test for the application of Art. 311 (2), in short, is whether there is a master and servant relation between the Government and the employee concerned. Hence, when a person is a member of the staff of a Company which is a juristic entity other than the Government, he cannot be said to be holding a post under the Government, whatever may be the mode of appointment and removal of such person. AIR 1956 SC 285 and AIR 1967 SC 884, Ref. (Para 21)

The question of the legal status and liability of non-governmental bodies which have impact upon the rights of private individuals has arisen in recent times both in England and in India on account of the nature of their functions as well as their number, in a welfare State. There is however a marked difference in the manner and extent in

which this question has been raised in these two countries: (Difference indicated). (Para 24)

Since the Hindusthan Steel Ltd., is a non-statutory joint-stock company, the principle applied in England, to statutory bodies exercising governmental functions, cannot be invoked. (Para 28)

Under the law as it exists today, thus, whether in England or in India, it is impossible "to pierce the veil" in the case of a non-statutory company, such as the Hindusthan Steel Ltd. It is, however, not possible for the Courts to overturn the juristic personality of corporations whether statutory or non-statutory, without some progressive legislation which is yet to come. (Para 29)

Observations:

The desirability of some such safeguards as in Article 311 (2) in the case of the employees of the statutory and non-statutory corporations can hardly be over-emphasised when it is realised that a very large proportion of the educated population is now engaged in these establishments in the public sector and their number is sure to be going on increasing with the expansion of the economic activities of the welfare State; just as a security of tenure is necessary to attract men of the right calibre to the Government Departments so is it necessary to secure the proper personnel to these large establishments entrusted with the public welfare; loss of employment to a modern man means no less than what loss of a zemindary meant to a feudal owner in mediaeval times.

If, however, some such legislation is carried through some day, Government may lose the incentive of setting up such companies or corporations, for, it is obvious that such bodies are set up only to avoid Governmental liability for their acts or the liability towards their personnel. That, however, is a matter for the political world; the Courts are powerless to legislate and must hold, so long as such legislation does not see the light, that the employees of a Government Company like the Hindusthan Steel Ltd., are not employees of the Government, or, to be more precise, they do not hold 'civil posts under the Union or a State' so as to attract Art. 311 of the Constitution. (Paras 31, 32)

(B) Constitution of India, Art. 311 (2), 226, 132 — Not applicable to enforce contract of service with Govt. which is still subsisting — Whatever the grievance of the employee he must seek his remedy under general law and not under Article 226 in the absence of any statutory right or liability even where the contract is with the Government. (The question though of public importance was not one which came within terms of

Art. 132 — Leave refused.) AIR 1953 SC 250 and AIR 1968 SC 292 and AIR 1962 SC 1320, Ref. (Paras 39, 41)

(C) Constitution of India, Arts. 132, 311 (2) — Employee of Durgapur Steel Plant held does not hold civil post under the Union — Question already decided by Supreme Court — Certificate for leave to appeal refused. (Para 39)

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R. Chowdhury, S. C. Bose and B. P. Banerjee (In C. R. No. 1330 (W) of 1967); Arun K. Dutt (2) and Amar Nath Dhole, (In C. R. No. 1864 (W) of 1967); for Petitioner; Ajit Kumar Dutt and S. K. Dutt, for Respondent.

ORDER:—Common questions of law have been raised by these two petitions brought by two employees of the Durgapur Steel Plant appertaining to the Hindusthan Steel Ltd.

2. In C. R. 1330, the Petitioner was the General Manager, who was appointed on 9-4-65 by the order of the President of India, which is at Annexure A. The Petitioner alleges that in the first week of July, 1967, he was verbally asked to resign by Sri Rao, Chairman of the Hindusthan Steel Ltd., (Respondent No. 4). On the 17th July, he was handed over the impugned letter at Ann. B, by the Chairman. This letter states that—

(a) Government "have decided to terminate your services with effect

from the forenoon of the 19th July, 1967";

(b) The Petitioner had, however, the option of submitting resignation, which would be readily granted;

(c) The Petitioner might also terminate the contract with the Hindusthan Steel by sending a notice with a leave application before the 19th July, in which case he would be granted all the leave that was due to him and thereafter his services would stand terminated on the expiry of that leave or on the expiry of three months from 19-7-68, whichever was later.

3. The Petitioner was asked to intimate his option as to the three alternatives aforesaid, and was also told that the Relieving Officer would take over charge from the Petitioner on 19-7-68 and at that time deliver to the Petitioner the formal order of the President. The Petitioner came to Court the next day and obtained this Rule, challenging the validity of the impugned letter.

4. The Petitioner's case is that the Hindusthan Ltd., is a Government Company and that he holds a civil post under the Union of India, so that his services cannot be terminated without complying with the requirements of Article 311 (2) of the Constitution and that if Paragraph 97 (a) of its Articles of Association says anything to the contrary, the said Article should be held to be ultra vires Article 311 (2) of the Constitution.

5. In C. R. 1864 (W)/67, the Petitioner was initially appointed to the post of Assistant Superintendent, Coke Ovens Department, on a contract of November, 1957, for a period of 5 years (vide Annexure A to the Petition). The Petitioner's case is that that contract has been renewed and was still subsisting at the material time and is due to expire on 8-2-68. In the year, 1965, he was promoted by the General Manager to the post of Chief Superintendent. He was served with the Chairman's letter dated 17-7-67 (Annexure D), which is in substance similar to that served upon the Petitioner in the other case, and he was asked to hand over charge to Sri Mohan on 19-7-67. Annexure E is the formal order upon Sri Mohan to take over charge from the Petitioner, with copy to the Petitioner. He was also served with an undated order at Annexure E1. The facts are thereafter complicated by the fact that this Petitioner exercised his option of tendering resignation. He offered resignation 'provisionally', by the letter at Annexure F, and prayed for granting full leave due to him. The resignation was accepted by the Chairman by the letter at Annexure H, of 22-7-67, which gave him the leave due from 19-7-67 and stated that the resignation would

take effect from the expiry of that leave. The Petitioner changed his mind and by the letter at Annexure I, issued through his lawyer, he stated that his letter of resignation was obtained from him under official coercion and that he had not tendered resignation; he also urged that his services had not been terminated in terms of his letter of appointment.

6. By the letter at Annexure K, dated 11-8-67, the General Manager wrote that the undated order at Annexure E1 was withdrawn and instead, he was granted leave for three months from 19-7-67 to 18-10-67 and that his resignation would be effective from the date of expiry of that leave.

7. In response to the Petitioner's representation, by the letter dated 19-8-67, the Petitioner was informed by the Senior Personnel Officer that instead of three months, he had been granted, as a special case, six months' leave from 19-7-67 to 14-1-68, and to this extent, the order at Annexure K was modified.

8. The Petitioner however reported to duty on 21-8-67 cancelling the leave, and successive days, and on the refusal of the Respondents to allow him to join he came to Court on 13-9-67 and obtained this Rule.

9. The question common to both the Petitions is whether the posts held by the Petitioners under the Hindusthan Steel Ltd., can be held to be 'civil posts under the Union' within the meaning of Article 311, so as to attract Clause (2) thereof.

10. Though the cases were ably argued on behalf of the Petitioners, the question appears to have already been decided by the Supreme Court in the negative, in various decisions.

11. From the Articles of Association produced before me, it appears that the Hindusthan Steel Ltd., is a Company formed under the Companies Act, 1956, of which all the shares are owned by the President of India and his two Secretaries and no private individual can acquire its shares. Extensive powers regarding management and control are given to the President of India (e.g., Articles 11, 44, 47, 50, 96) and powers of appointment and removal of superior officers of the Company, such as the General Manager, are conferred on the President (Article 97).

12. Since the special features of this Company are fully dealt with by P. B. Mukharji, J., in *Varghese v. Union of India*, AIR 1963 Cal 421 at p. 424, I need not go into further details.

13. I. Little authority is required for the proposition that a company registered under the Companies Act has a legal entity of its own, separate from that of

its shareholders whoever they may be, *Tata Engineering Co. v. State of Bihar*, AIR 1965 SC 40; *State Trading Corpn. v. Commercial Tax Officer*, AIR 1963 SC 1811 at p. 1822. The reason is quite patent, namely, that the Company is a juristic 'person'. — its personality emerging from the incorporation.

14. II. The question is whether it makes any difference where the entirety of the capital is subscribed by the Government or the company is controlled by the Government and run, in substance, as a Government Department. The question has been answered in the negative by the Supreme Court in the case of *Valjibhai v. State of Bombay*, AIR 1963 SC 1890 at p. 1894. This case related to the State Transport Corpn., a Company similar to the Hindusthan Steel Ltd., in its composition and management, and it was held that it was a separate legal entity and not a Department of the Government, even though it might be controlled by the Government and if the Corporation was wound up, its assets would go to the Government — see also *Andhra Pradesh State Road Transport Corpn. v. Income-tax Officer*, AIR 1964 SC 1486 at p. 1493; AIR 1963 SC 1811 at pp. 1848-9.

15. III. Mr. Dutt, on behalf of the Petitioners, relies strongly upon the fact that in the recent case of *Rajasthan State Electricity Board v. Mohan Lal*, AIR 1967 SC 1857 at pp. 1861-3, the Supreme Court has held that a statutory corporation, such as a State Electricity Board, which exercises statutory powers, even though it may be carrying on commercial functions, should be held to be 'State' within the definition of that term in Article 12 of the Constitution, for the purpose of enforcement of Fundamental Rights against them, — a position which had not been acknowledged by the High Court so long. But this decision does not help the Petitioners in the instant cases inasmuch it has not been held by the Supreme Court in the cited case that when a statutory corporation exercises statutory powers, it is identified with the Government or a Government Department; on the other hand, the decision of the Court is that it comes under the expression 'other authority' in the definition given in Article 12 and that is because it exercises statutory powers conferred by the State, affecting private individuals just as any other State action might do. But the question under Article 311 is not whether a corporation exercises statutory powers, but whether its employees can be held to be holding their posts or offices under the Union or a State Government. That question has not been answered nor could it be answered in favour of the Petitioners in view of the other decisions of the Supreme Court where it has been held that

a statutory corporation maintains its separate juristic entity even where it exercises statutory powers or is controlled by the Government cf. *Mafatlal v. Divisional Controller*, AIR 1966 SC 1364 at p. 1365. Above all, it cannot be forgotten that the instant cases before me relate to a non-statutory corporation or a Company, which exercise no statutory powers—vide *Kartick v. West Bengal Small Industries Corporation Ltd.*, AIR 1967 Cal 231 at p. 234. Hence, the cited decision of the Supreme Court relating to Article 12 is of no avail to the Petitioners in the instant cases.

16. IV. Even where a company is a 'Government Company' within the meaning of Section 617 of the Companies Act, 1956, the juristic character of the Company does not change and it is not identified with the State and its employees do not become holders of civil posts under the Union or a State Government as has been held by me in *A. B. Biswas v. Hindusthan Cables Ltd.*, (1968) 16 Fac. LR 289 at p. 290 (Cal), or by the Division Bench of this Court in *S. K. Deb-nath v. Mining & Allied Machinery*, (1967) 72 Cal WN 144 at p. 150 (AIR 1968 Cal 322 at p. 326). The reason is that the separate treatment of this category of companies in Section 617 of the Companies Act is only to place them under a certain special system of control (e.g., under Section 619) and to confer upon them certain privileges, for the purposes of the Companies Act. But, as pointed out in the last cited decision of the Division Bench, if the President so permits, it is possible for a Government Company to be converted into an ordinary private company, transferring the entire share capital to private owners.

17. For the same reason, even service under a statutory corporation has been held not to be service under the Government, even where Government control over such corporation and employment under it are obvious—*Narayanawamy v. Krishnamurthi*, AIR 1958 Mad 343; *Ramiah v. State Bank of India*, AIR 1964 Mad 335, AIR 1966 SC 1364 at p. 1365. In the instant case, however, we need not go so far as this is a case of a company as distinguished from a statutory corporation, having statutory powers.

18. Once it is held that a company registered under the Companies Act is not the State or a Department or agent thereof, the fact that its employees are appointed or removed by the President cannot make such employees holders of civil posts under the Union within the purview of Article 311 (2), as has been held in *Subodh Ranjan v. Sindri Fertilisers*, AIR 1957 Pat 10. Even though appointed by the President, the employees remain the employees of the company and not of the Government (*ibid*) see also *Baleswar*

v. State Bank of India, AIR 1958 Pat 418.

19. V. As against the mass of decisions so far discussed, the learned Advocate for the Petitioner has relied upon the following:

(i) *Hutche Gowda v. State of Mysore*, AIR 1963 Mys 66. This decision is of no assistance in the instant case, because there it was held that by virtue of the provisions of the Bombay State Road Transport Order, 1956 and Section 109 of the States Reorganisation Act, followed by an order of Mysore Government, the employees of the Statutory Road Corporation of Bombay had become the employees of the Mysore Government to which all the rights and liabilities of the Statutory Corporation had been transferred by the States Reorganisation Act.

There is no such situation here.

(ii) The observations at para 29 of AIR 1958 Mad 343 are also of no application to the instant cases, because the observations were made in relation to a corporation 'created under a statute' and not a company formed under the Companies Act.

(iii) Mr. Dutt, for the Petitioner relied strongly upon the provision in Art. 298, as amended by the Constitution (Seventh Amendment) Act, 1956, to argue that when Government takes up a business, it does so in the exercise of its 'executive power' and, therefore, whatever be the agency through which Government may carry on a business, that is identified with the Government.

This argument, however, overlooks the object and scope of the Amendment of the Article. Prior to this amendment, it was held in some cases that since there was no express provision empowering the Government to enter into a trade, this could not be done without legislative sanction—*Moti Lal v. State of U. P.*, AIR 1951 All 257 (FB). This view was overruled by the Supreme Court in the case of *Ram Jawaya v. State of Punjab*, (1955) 2 SCR 225=(AIR 1955 SC 549) and the Amendment of 1956 simply codifies the effect of the decision in *Ram Jawaya's* case, 1955-2 SCR 225=(AIR 1955 SC 549) namely, that legislation is not required to empower a Government to carry on a business, it can do so in the exercise of its executive power, except, of course, where a law is required by some other provision of the Constitution, say, Article 19 (6). But the effect of the amendment is not to convert a commercial function of the Government into a governmental function. It is to be noted that even where a State Government carries on a business, it cannot be treated as a governmental function to claim immunity from Union taxation, without a declaration by Parliament by law, under Art. 289 (3)—vide AIR 1964 SC

1486 at p. 1492. If the Central Government carries on a business, it can never be treated as a governmental function to claim immunity from State taxation because Article 285 (1) simply speaks of 'the property of the Union' and no business.

It has been held by the Supreme Court that even when the Government carries on a business departmentally, as in the case of a Railway, it cannot be treated as a 'sovereign function' for the purpose of 'suability'. But that principle would not apply for the purpose of determining the status of its employees under Article 311. When the business is carried on by a Department of the Government, as in the case of a Railway, obviously, the employees hold under the Government and not under any separate juristic entity, and so it has been held in numerous cases cf. *Parshottam v. Union of India*, AIR 1958 SC 36; *Moti Ram v. N. E. F. Rly.*, AIR 1964 SC 600. The reason is obvious, namely, where the employer is a Department of the Government, no question of a separate legal entity arises.

The question, however, becomes different, where the business is carried on through a separate legal person, e.g., a statutory corporation or a company — vide AIR 1966 SC 1364, because in such a case, the employee is a servant of a legal entity other than the Government.

(iv) On behalf of the Petitioner, in C. R. 1330 much reliance is placed upon the fact that under Article 97 (a) of the Articles of Association of the Company, the power to appoint and remove a General Manager is vested in the President of India and that the Petitioner's appointment letter has, in fact, been issued by a Deputy Secretary to the Government of India.

Upon the latter fact, it has been argued that if the President's act, in this context, be contended to be an act of the President in his personal capacity, the letter should have been issued by the President's Secretary and not a Secretary to the Government of India, and that since the latter course has been adopted, the appointment must be held in law to be an appointment by the Government. Technically speaking, Article 77 (2) of the Constitution applies when the President's action is an 'executive action of the Government of India', and where the President exercises some function, not by virtue of any provision of the Constitution, but in his personal capacity, under a private treaty, e.g., the Articles of Association of a Company, it would be desirable to get his acts authenticated by an officer of his personal establishment and not by an officer of a Ministry in the Government of India. Respondents might do well to take note of this for future

action. The converse, however, does not necessarily follow, viz., that because the order has been signed by a Deputy Secretary to the Government, the act of appointment must be held to be an executive action of the Government of India. When the President appoints a person in exercise of powers conferred by the Articles of Association of the Company, he does so as a limb of the Company and not by virtue of any powers under the Constitution and the person who is appointed does not become a servant of the Government instead of the Company by the mere fact that the letter is issued by the Ministry.

20. In this context, it has been argued vehemently on behalf of the Petitioners that the fact of appointment and removal has been applied as a test by the Supreme Court for determining whether a person holds 'an office of profit under the Government of India or of a State' (to) constitute a disqualification for membership of the Legislature under Article 102 or Article 191. On this point, the decision in *Guru Gobinda v. Sankari Prasad*, AIR 1964 SC 254 is apparently encouraging to the Petitioner, inasmuch as it was a case relating to the Hindusthan Steel Ltd., itself and certain other 'Government Companies'. Under the provisions of the Companies Act, the auditors of Government Companies are appointed and removed by or with the approval of the Government of India (pp. 256-7, *ibid.*). It was held that an Auditor, so appointed, was the holder of an 'office of profit' under the Government of India and was thus disqualified to be a member of Parliament. But it would appear, on a close reading of this decision, that it is against the Petitioner before me instead of being in his favour, because in that case, the Court had clearly made out a distinction, between the expression 'office of profit under the Government' in Article 102 and the expression 'holder of a post or service under the Government' in Articles 309-314. It cannot be overlooked that the tests applied in the case of disqualification for membership of the Legislature are bound to be wider because the object of such disqualification is to maintain the independence of members of the Legislature from any sort of Government control or influence. When, therefore, Government has a say in the matter of appointment or removal of a person, he should not be allowed to sit in the Legislature even though by such appointment, a relation of master and servant is not constituted between the Government and such person. In cases under Articles 309-311, on the other hand, the test is the relationship of master and servant between the Government and such person and it can hardly be overlooked that the provisions of the Constitution in Part XIV

are, in fact, modifications of the common law relating to master and servant which have been engrafted because of the fact that where the master is the Government, such modifications were considered necessary by the makers of the Constitution. I would like to reproduce the following words of the unanimous Court in *Guru Gobinda's case*, AIR 1964 SC 254 at p. 258, *ibid.*—

"We agree with the High Court that for holding an office of profit under the Government, one need not be in the service of Government and there need be no relationship of master and servant between them. The Constitution itself makes a distinction between 'the holder of an office of profit under the Government' and 'the holder of a post or service under the Government'; see Articles 309 and 314....."

21. The distinction between these different juristic concepts is no doubt fine and somewhat intriguing, but in the troubled waters of Jurisprudence, one has often to steer clear of shoals. The test for the application of Article 311 (2), in short, is whether, there is a master and servant relation between the Government and the employee concerned—*Pradyat Kumar v. Chief Justice of Calcutta High Court*, (1955) 2 SCR 1331 at p. 1350 = (AIR 1956 SC 285 at p. 293); *State of Assam v. Kanak Chandra*, Civil Appeal No. 254 of 1964, D/- 3-10-1966 = (reported in AIR 1967 SC 884). Hence, when a person is a member of the staff of a Company, which is a juristic entity other than the Government, he cannot be said to be holding a post under the Government, whatever may be the mode of appointment and removal of such person.

22. The difficulty in the way of the Petitioners before me, in fact, is the theory of juristic personality of a company in Jurisprudence and so long as that theory is not curbed by legislation, as I shall presently show, the Petitioners cannot succeed in the case made in the instant proceedings.

23. VI. Mr. Dutt draws inspiration, most strongly, from certain observations of P. B. Mukharji, J., in AIR 1963 Cal 421, which was also a case of termination of the service of an employee of the Durgapur Steel Project, under the Hindustan Steel Ltd. Though the Rule was discharged on other grounds, his Lordship made the following observation:

"In an appropriate case in future it may be necessary to re-examine and thoroughly consider how far the doctrine of incorporation making the company a legal entity creates a veil that cannot be pierced and extends to prevent service under such company from being a service under the State....., specially in such companies like the Hindustan Steel Ltd.,

where it is admittedly a complete Government owned company, with all the funds of the capital and all the shares owned by the Government....."

24. The question of the legal status, and liability of non-governmental bodies which have impact upon the rights of private individuals has arisen in recent times both in England and in India on account of the nature of their functions as well as their number, in a welfare State. There is however a marked difference in the manner and extent in which this question has been raised in these two countries:

(i) In England, the question has presented itself in connection with statutory corporations and not in respect of non-statutory companies. In India, cases have come up in relation to both and it is, therefore, necessary to remember the essential juristic differences between these two kinds of corporate bodies.

(ii) While in England, the question has arisen from the point of view of Crown privileges, — as to whether these could be claimed by statutory corporations, in India, it is in the context of the liabilities of such bodies that the question has mostly come up before the Courts, namely, whether their action should be regarded as 'State action' for the purpose of enforcement of fundamental rights against them under Article 12; or whether their servants may be regarded as civil servants for the application of the procedural safeguards under Article 311.

25. In England, it is now established that to decide whether a particular statutory corporation would be entitled to claim Crown privilege in litigation or whether it would be bound by a statute it is to be determined whether the corporation in question may be held to be a servant or agent of the Crown — *Tamlin v. Hannaford*, (1949) 2 All ER 327. Of course, no difficulty arises where the statute which creates the corporation expressly states that it shall act on behalf of the Crown—cf. *Glasgow Corpn. v. Central Land Board*, 1956 SLT 41 = (1956) SC (HL) 1.

26. Where, however, the statute makes no express provision, the Courts have applied the test of the nature of functions of the corporation to answer the question:

(a) If it is merely a commercial corporation, it cannot claim Crown immunity or privilege, even though it may be controlled by the Government—*Central Control Board v. Cannon Brewery*, (1919) AC 744 at p. 757; (1950) 1 KB 18; *British Broadcasting Corpn. v. Johns*, (1965) Ch 32. The reason, as explained in *Tamlin's case*, 1949-2 All ER 327 = 1950-1 KB 18 is that the personality of the corporation is separate from that of the Crown or any Department of the Government, — since

the Corporation is the owner of the property vested in it by the statute and is answerable in law for its acts like any other private person, subject, again to the limitations imposed by the relevant statute or statutes.

(b) But the Courts have refused to apply the foregoing principle where the statutory corporation which exercises a governmental function or carries out a public service of the Crown, e.g., a Territorial Force Association — Territorial & Auxiliary Forces Assocn. v. Nichols, (1948) 2 All ER 432, or a Hospital Board or Committee — Nottingham Hospital Management Committee v. Owen, (1957) 3 All ER 358; Pfizer Corp. v. Minister of Health, (1965) 1 All ER 450. The principle upon which this distinction is made is that where a statutory body exercises a governmental function, e.g., matters connected with the defence of the realm, it is, in essence, an agent of the Crown and therefore holds property in trust for the Crown — Bank Voor Handel v. Slatford, (1953) 1 QB 248.

27. Whatever be the logic according to which the separate juristic personality of a statutory corporation belonging to this latter group has been ignored in England, it is to be noted that it has never been applied to a non-statutory joint stock company and not even to a statutory corporation which carries on commercial functions, such as the British Transport Corporation or the British Broadcasting Corp., (1965) Ch 32, even though it may be presided over by a Minister of the Crown. In fact, Tamlin's case, 1949-2 All ER 327=1950-1 KB 18 (ibid.) was decided on the analogy of a limited liability joint-stock company.

28. Since the Hindusthan Steel Ltd., is a non-statutory joint-stock company, the principle applied in England, to statutory bodies exercising governmental functions, cannot be invoked in the cases before me.

29. Under the law as it exists to-day, thus, whether in England or in India, it is impossible "to pierce the veil" in the case of a non-statutory company, such as the Hindusthan Steel Ltd. The obiter of P. B. Mukharji, J., in AIR 1964 Cal 421 at p. 427 was made in the hope of building up a 'new jurisprudence'. I, too, join with him so far as the object is concerned. It is, however, not possible for the Courts to overturn the juristic personality of corporations whether statutory or non-statutory, without some progressive legislation which is yet to come.

30. As has been pointed out by the Supreme Court in the Tata Engineering Co., case, AIR 1965 SC 40 at p. 46, the Legislature has already been obliged to make certain exceptions to the doctrine of separate personality of a corporation as a result of the impact of complex eco-

nomic factors in the world, and these may grow in number in course of time. Thus, Article 311 of the Constitution itself may some day be amended to provide that the employees of statutory corporations or 'Government Companies' should be deemed to be holders of posts under the Union or a State, as the case may be. Or, the Legislature may pass an appropriate statute to extend to such employees all the safeguards which have been deduced by the Courts from the expression 'reasonable opportunity' in Article 311 (2), in which case, these employees will get similar protection in Courts of law, without invoking the Constitution.

31. The desirability of some such safeguards as in Article 311 (2) in the case of the employees of these statutory and non-statutory corporations can hardly be over-emphasised when it is realised that a very large proportion of the educated population is now engaged in these establishments in the public sector and their number is sure to be going on increasing with the expansion of the economic activities of the welfare State; that just as a security of tenure is necessary to attract men of the right calibre to the Government Departments so is it necessary to secure the proper personnel to these large establishments entrusted with the public welfare; that loss of employment to a modern man means no less than what loss of a zemindary meant to a feudal owner in mediaeval times.

32. I am afraid, however, that if some such legislation is carried through some day, Government may lose the incentive of setting up such companies or corporations, for, it is obvious that such bodies are set up only to avoid Governmental liability for their acts or the liability towards their personnel. That, however, is a matter for the political world; the Courts are powerless to legislate and must hold, so long as such legislation does not see the light, that the employees of a Government Company like the Hindusthan Ltd., is not an employee of the Government, or, to be more precise, they do not hold 'civil posts under the Union or a State', so as to attract Article 311 of the Constitution.

33. That finding is sufficient to discharge both the Rules before me.

34. In C. R. 1864 (W) of 1967 there is another ground for failure of the Petitioner in the instant proceeding.

35. The admitted case of the Petitioner is that his service is founded on a written contract which is still subsisting. It is settled since the case of Satish Chandra v. Union of India, AIR 1953 SC 250 that neither Article 311 (2) nor Article 226 is applicable to enforce a contract of service. Whatever be the grievance

of the employee, he must seek his relief under the general law and not under Art. 226 — vide *Boothchand v. Kurukshetra University*, AIR 1968 SC 292 at p. 298 in the absence of any statutory right or liability, even where the contract is with the Government: *Burmah Construction Co. v. State of Orissa*, AIR 1962 SC 1320.

36. Both the Rules are, accordingly, discharged, but without prejudice to the right, if any, of the Petitioners to pursue other remedies before any other appropriate forum. I make no order as to costs.

37. As prayed for on behalf of the Petitioners, the operation of this Order shall remain stayed for a period of six weeks from this date.

38. (1-7-1968) Mr. Dutt, on behalf of the Petitioner, has made a verbal application for a certificate for leave to appeal to the Supreme Court under Article 132 of the Constitution on the ground that the case involves a substantial question as to the interpretation of Art. 298 of the Constitution. Article 298 has, of course, been referred to on behalf of the petitioner in course of the argument and its scope has been dealt with in the judgment of this Court but the real question upon which the petitioner sought relief in this case was two-fold, namely, that Art. 311(2) of the Constitution was attracted to the case of his employment but was not complied with, and secondly, that there was no termination of his service in terms of the clauses of the service contract.

39. So far as Article 311 (2) of the Constitution is concerned, his contention was that his service under the Hindusthan Steel Limited, which was a Government company within the meaning of Section 617 of the Companies Act, 1956, should be deemed to be a service or a post under the Union of India so as to attract Art. 311(2) of the Constitution. This contention has been negatived by this Court on the primary ground that "the question appears to have already been decided by the Supreme Court in the negative, in various decisions," and the judgment is an elaboration of this proposition. If that be so, the question is no longer substantial.

40. The other ground on which this case has been discharged is that the admitted case of the petitioner is that his service is founded on the written contract which is still subsisting and that, accordingly, neither Art. 311 (2) nor 226 was applicable to enforce the contract of service and that whatever might be the grievances of the petitioner, he must seek his relief under the general law and such remedy has been preserved by the judgment. On this alternative ground, therefore, which

does not involve a constitutional question, the petitioner is not entitled to any relief.

41. In these circumstances, though the question might be one of public importance with which contention I have agreed in the judgment itself, it cannot be said to come under the terms of Article 132 of the Constitution.

42. The certificate prayed for, cannot, therefore, be granted and is refused.

RGD

Certificate for leave to appeal, refused.

AIR 1969 CALCUTTA 104 (V 56 C 19)

D. N. SINHA, C. J. AND

A. K. MUKHERJEA, J.

Manickchand Durgaprosad & Bros., Appellant v. Balukidas Baheti, Respondent.

A. F. O. D. No. 373 of 1959, D/- 17-3-1967 against judgment and decree of Judge, 3rd Bench, City Civil Court, Calcutta, D/- 30-5-1959.

(A) Houses and Rents — West Bengal Premises Tenancy Act (12 of 1956), Ss. 26 (2), (4) and 21 — Scope — Powers of Deputy Registrar — Neither the Controller nor the Deputy Registrar can correct the rent challans.

The Deputy Registrar being a functionary appointed by notification in exercise of the powers conferred on the Government under S. 26 (2) of the West Bengal Premises Tenancy Act, he is a creature of the statute and can only exercise those functions which are given to him by the statute. Under S. 26 (4) of the Act, the Deputy Registrar can exercise only such functions of the Controller relating to the rent deposited under S. 21 of the Act as may be delegated to him by the Controller in writing. (Para 8)

Neither the Deputy Registrar nor even the Controller can make corrections in challans and vary the appropriation of the rent to a month other than what is mentioned in the application. It is so because the Act clothes these applications with some amount of sanctity and inviolability and under S. 21 (4) of the Act an authenticated copy of the application is admissible in evidence in all Courts of law. (Paras 8 & 9)

(B) Houses and Rents — West Bengal Premises Tenancy Act (12 of 1956), Ss. 21 (1) & 4 — Scope and applicability — Conditions for valid deposit.

It is only when the deposit is made in the prescribed manner and also in the circumstances specified in S. 21 that the deposit is a valid deposit and can be treated as a deposit of rent. A deposit is permitted only under two circumstan-

ces, first where the landlord does not accept any rent tendered by the tenant within the time referred to in S. 4 and secondly where there is a bona fide doubt as to the person or persons to whom rent is payable. These are conditions precedent which must be satisfied for a deposit of rent to be valid. (Para 10)

Therefore, in a case where the tenant deposited amounts representing rents into Court without first tendering them to the landlord, it was held that there having been no refusal on the part of the landlord to receive rents, the deposits were invalid and of no effect, so much so, the tenant must be held to have committed default in payment of rents. (1960) 64 Cal WN 342, Ref. A. F. O. D. No. 450 of 1960 (Cal), Foll. (Paras 10 & 12)

Cases Referred: Chronological Paras

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| (1960) 64 Cal WN 342=ILR (1960) | |
| 2 Cal 304, Bengal Tent Factories Ltd. v. Amiya Prova Das Gupta | 10 |
| (1960) A. F. O. D. No. 450 of 1960 (Cal), Kabiraj Srinarayan Sarma v. Baijnath Bhartia | 11 |
| Lala Hemanta Kumar, Brijmohan Bagaria and Jaimangal Prosad Srivastava, for Appellant; C. C. Ganguli, Amiya Kumar Chatterjee, for Respondent. | |

ARUN K. MUKHERJEA, J.:— This is a landlord's appeal against a judgment and decree dated 30th May, 1959, of the Judge, Third Bench of the City Civil Court at Calcutta by which the plaintiffs' suit for eviction of the tenant-defendant on the ground of default in payment of rent was dismissed.

2. The facts of the case are as follows: The defendant was a monthly tenant under the plaintiffs in respect of one room namely room No. 52 on the fourth floor of premises No. 5, Jadunath Mullick Road, Calcutta, at a monthly rental of Rs. 33/-. The tenancy was according to the Hindi Sambat Calendar month and it ran from Badi 1 to Sudi 15 of each such month. The plaintiffs complained that the defendant was a habitual defaulter and in any event had made default in payment of rent for four months within a period of twelve months since the month of "Jeth, S. Y. 2014". The plaintiffs determined the tenancy of the defendant by a notice of ejectment dated 5th May, 1958, addressed by their Solicitor Mr. B. M. Bagaria. By that notice the defendant was asked to quit, vacate and deliver up peaceful possession of the room "with the expiry of the next month" i.e., Ashar Sudi 15, S. Y. 2015. Thereafter when the defendant failed and neglected to deliver up peaceful possession of the room the plaintiffs filed the suit.

3. The defendant in his written statement contends that there was in fact no default. He says that he paid rent to the plaintiffs directly upto the month of

Chaitra, 2012-13 S. Y., i.e., upto Chaitra Sudi 15, 2013 S. Y. Subsequent to that payment there was, he complains, some dispute between himself and the plaintiffs who refused to accept rents direct from the defendant by presentation of bills. The defendant then remitted the rent for the month of Baisakh, 2013 S. Y., by money order and the same was accepted by the plaintiffs. The defendant then remitted rent for the month of Jaistha, 2013 S. Y. on 28th June, 1956 for which, however, he did not receive the postal receipt. Nor did the money come back to him. As the defendant was not sure whether the money had reached the plaintiffs he, in order to protect his interest under law, deposited rent for the months of Jaistha and Ashar, 2013 S. Y. in the office of the Rent Controller, Calcutta, on 1st September, 1958 and continued depositing rents month by month. In the meantime, the defendant came to know after a correspondence with the postal authorities that the remittance made by the defendant on 28th June, 1956, had been delivered to the plaintiffs on 30th June, 1956. Therefore, there was really a case of double payment of rent for the month of Jaistha, 2013 S. Y. After the filing of the suit the defendant deposited the rent for the month of Shravan, 2015 S. Y. in Court within time after service of summons upon him. The defendant claims that by way of adjustment all deposits made by him in the office of the Rent Controller are to be treated as deposits for the months next to the months for which the deposits are purported to have been made. Therefore, though the defendant deposited rents in the office of the Rent Controller upto the month of Ashar, 2015 S. Y. in fact those deposits should be treated as deposits upto the month of Shravan, 2015 S. Y. On these facts the defendant claims that he cannot be treated as a defaulter.

3-A. The following issues were framed for determination:—

1. Is there any relationship of landlord and tenant between the parties?
2. Is the defendant a defaulter in payment of rent from Jeth 2014 S. Y. (May/June, 1957)?
3. Has the defendant's tenancy been determined by a legal and valid notice to quit? Is the said notice legal, sufficient and operative in law?
4. Are the plaintiffs entitled to a decree prayed for?

4. At the first hearing of the suit on 30th April, 1959 the defendant filed a petition for adjournment of the suit. The defendant told the learned Judge that he wanted to get the challans which had been sent up by the Rent Controller to be rectified by him. The rectification that the defendant sought was in accord-

ance with the suggestion made by the defendant in his written statement that all deposits of rent with the Rent Controller were to be regarded as deposits of rents for the months next to the months for which they had purportedly been made. These corrections, the defendant says, were necessary to adjust the double payment that he had made for Jaistha, 2013 S. Y. The learned Judge adjourned the case in pursuance of the defendant's request and observed as follows:—

"The legal effect of correction, if the challans are corrected, would be considered in due course. For the present, I am giving this opportunity to defendant in terms of his petition."

5. It appears that the challans were sent back to the Rent Controller for correction and that they were subsequently received back by the Trial Judge after correction. Thereafter the suit was heard. Durgaprosad Saraogi gave evidence for the plaintiffs and complained that the defendant had defaulted in payment of rent from Jaistha, S. Y. 2014. He admitted that he had received the rent for Jaistha, 2013 S. Y. by money order and also that he had withdrawn money from the Rent Controller upto Baisakh Sudi, 2014 S. Y. The defendant himself gave evidence and said that he had remitted rent for Jaistha, 2014 S. Y. and that the plaintiff had accepted it. He tendered the postal receipt dated 6th June, 1956 (Exht. B) to show that the plaintiffs had received

this sum. The defendant says that he again deposited rent for the same month not knowing that the plaintiffs had got it in time and thereafter the defendant deposited all subsequent rents regularly before the Rent Controller and got challans therefor. In cross-examination he says that he remitted rent for Baisakh, S. Y. 2013 by money order as the plaintiffs had not accepted it amicably. He also says that he deposited the rent for Jaistha, 2013 S. Y. as this also the plaintiffs had refused to accept. The learned Trial Judge found Issue No. 1 and Issue No. 3 in favour of the plaintiffs but he came to a finding that the defendant was not a defaulter.

6. The facts about payment are, more or less, admitted. The only point in controversy is the legal effect of the later corrections in the challans. The learned Judge has accepted the corrections and has appropriated the payments of rent notionally to the months that have been inserted in the challans by the corrections. On the basis of such corrections and adjusted appropriations, the learned Judge came to the finding that the defendant was not a defaulter and that on the other hand the defendant had deposited rents in advance. Before coming to this conclusion the learned Judge had found on the facts and on the basis of the challans, as they stood before correction, that if no allowance be made for the double payment for Jaistha, 2013 S. Y., there would be the following defaults:—

Month	Measure of default
Jaistha, 2014 S. Y. (May/June, 1957)	28 days.
Shravan, 2014 S. Y. (July/August, 1957)	10 days.
Bhadra, 2014 S. Y. (August/September, 1957)	3 days.
Pous, 2014 S. Y. (December, 57/January, 58)	11 days.
Magh, 2014 S. Y. (January/February 1958)	14 days.
Falgun, 2014 S. Y. (February/March 1958)	14 days.
Chaitra, 2014 S. Y. (March/April), 1958)	12 days.

7. The learned Judge thought that by adjusting the double payment for Jaistha, 2013 S. Y. i.e., by appropriating the second payment for Jaistha, 2013 S. Y. towards the month of Ashar of that year and consequently the payments for Ashar, Shravan, Bhadra, etc., towards the months of Shravan, Bhadra, Aswin respectively and so on for all successive months, the defaults would automatically be wiped out because each subsequent payment would have to be appropriated to a month preceding the month for which the rent had actually been paid. By these notional adjustments defaults would be transformed into advance payments.

8. With great respect to the learned trial Judge we do not see under what law the learned trial Judge could allow the notional adjustments. The adjustments

were, of course, made on the basis of the corrected challans. The challans, we are told, had been corrected by the Deputy Controller. Exhibits C and C(1) to C(23) are the twenty-four challans which had been tendered in evidence before the learned trial Judge. The challans are not in paper book but the facts recorded in the challans have been summarised in a tabular form and appear in the paper book from pages 7 to 17. In the column relating to the period to which a particular deposit of rent relates the name of the month originally inserted in each of the challans was penned through and the name of the next month inserted therein. The corrections are alleged to have been made by the Deputy Registrar's order dated 18th May, 1959. There is nothing on record to show who authorised the Deputy Registrar to make these

corrections in the challans. Under Section 26 (2) of the West Bengal Premises Tenancy Act, 1956, (hereinafter referred to as "the Act") the State Government may by notification appoint any person to be a Registrar or Deputy Registrar for any area to which this Act extends. Presumably, the 'Deputy Registrar' referred to in the corrections made on the challans is the functionary appointed by notification in exercise of the powers conferred upon Government under Section 26 (2) of the Act. There can be no doubt that the Deputy Registrar is a creature of the statute and can only exercise those functions which have been given to him by the statute. Under Section 26 (4) of the Act a Deputy Registrar can exercise only such functions of the Controller relating to the rent deposited under Section 21 of the Act as may be delegated to him by the Controller in writing. Therefore, before we can rely on the corrections made by the Deputy Registrar it is necessary to have evidence that an order had been passed by the Controller delegating this function to the Deputy Registrar. No such order has been produced before us on behalf of the respondent though we adjourned this matter and gave time to him to produce evidence of such delegation. We even offered to send a subpoena from the Court if the respondent could give us particulars of such an order of delegation. In any case, any order of delegation even if such order existed would, in our opinion, be useless, for, there is nothing in the Act which gives any power even to the Controller himself to make corrections in challans and vary the appropriation of the rent to a month other than what is mentioned in the application. Rents, before they can be deposited with the Rent Controller, have always to be accompanied by applications showing certain particulars which are specified in Sub-section (2) of Section 21 of the Act which runs as follows:—

"(2) The deposit shall be accompanied by an application supported by an affidavit by the tenant stating—

(a) the premises for which the rent is deposited with the description sufficient for identifying the premises;

(b) the period for which the rent is deposited;

(c) the name and address of the landlord, or the person or persons claiming to be entitled to such rent;

(d) the reasons and circumstances for the application for deposit of the rent;

Provided that in the case of deposits of rent for successive months during any continuous period, no affidavit in support of applications shall be required after the first deposit if the reasons and circumstances which led the tenant to make the first deposit remain the same."

9. The period for which rent is deposited on any particular occasion has to be specifically mentioned in the application. Under the provisions of sub-section (4) of Section 21, an authenticated copy of such application is admissible in evidence in all Courts of law. Obviously, the Act clothes these applications with some amount of sanctity and inviolability. The applications cannot, therefore, be changed or altered by the Deputy Registrar or by any other party. Indeed, it is not the case of anybody in this appeal that the applications of the respondent have been corrected or changed. Some of the applications are to be found in the second part of the Paper Book at pages 18 to 25. They do not show any corrections. It is not appreciated, therefore, how without making corrections in the applications, corrections or changes can be made in the challans. I would think, however, that even the applications cannot be corrected by the Deputy Registrar. In any event, I cannot imagine the Deputy Registrar correcting these applications ex parte in the absence of the landlord where the landlord is vitally interested in the data appearing on the applications and where under the Act itself the applications are admissible in evidence in all Courts of law. To say that the Controller could have the power of merely correcting the challans without correcting the applications and that too on the unilateral application of the tenant is, according to me, an absurd suggestion. Therefore, I have not the slightest doubt that there was no justification for the learned trial Judge in accepting the corrections of the challans and changing by an artificial fiction the character of the defaults made by the tenant and investing them with the character of 'advance deposits'. These are not, however, the only difficulties that face the respondent in regard to these corrected challans. There are still more formidable legal difficulties in allowing the device adopted by the respondent and allowed by the learned trial Judge in wiping out the defaults. I now pass on to this aspect of the case.

10. Let us assume that the Deputy Registrar could at the instance of the tenant correct the challans and make revised appropriations of the deposits of rent. In the instant case, the deposit made for Jaistha, 2013 S. Y. has been reappropriated towards the month of Ashar of that year and the rent for Ashar was reappropriated towards Shravan and so on for all succeeding months. We shall assume that the revised appropriations could be done. In that case the position would be this that the rent for the month of Ashar was deposited some time in Ashar instead of being deposited in Shravan and the rent of Shravan was

deposited in the month of Shraavan instead of being deposited in Bhadra, though, the rent for any month was really due to be paid on the next following month. These deposits could not have been legal and valid, for the rent for Ashar was deposited without initial tender of the same to the landlords and the landlords' refusal to accept it in terms of sub-section (1) of Section 21 of the Act. After all, under the ordinary law a tenant cannot go and deposit rent before the Rent Controller or before any other person and claim that he has discharged his obligation towards the landlord in the matter of payment of rent. It is only because of the provisions of the Act that a tenant can in certain circumstances deposit his rent with the Rent Controller in a prescribed manner. It is only when the deposit is made in the prescribed manner and also in the circumstances specified in Section 21 that the deposit is a valid deposit and can be treated as a deposit of rent. A deposit of rent is permitted only under two circumstances, first, where the landlord does not accept any rent tendered by the tenant within the time referred to in S. 4 and, secondly, where there is a bona fide doubt as to the person or persons to whom the rent is payable. In the instant case, the tenant does not say that he has any doubt as to the person to whom he has to pay the rent. Therefore, the only other circumstance which would have justified and validated his payment of rent to the Controller would be the circumstance in which the landlord refused to accept the rent tendered by the tenant within the time referred to in Section 4. That is a condition precedent which must be satisfied in order to render a deposit of rent valid—see, *Bengal Tent Factories Ltd. v. Amiya Prova Das Gupta*, (1960) 64 Cal WN 342. In the instant case, even if the reappropriations are allowed the defendant cannot say that there was any refusal on the part of the plaintiffs to accept rent. It is not the defendant's case that the plaintiffs had refused the rent for Jaistha. On the contrary, the defendant's case is that the plaintiffs had accepted the rent for Jaistha and that the postal acknowledgment receipt had not reached him in time. Therefore, since there was no refusal on the part of the plaintiffs to accept rent, the defendant could not have made a valid deposit of rent. I am quite alive to the fact that if the reappropriations were to be allowed, the first deposit of rent would notionally become a deposit of rent for Ashar. But even so, it is not the defendant's case that he had tendered the rent for Ashar. Indeed, not one deposit in this case has followed a previous tender of rent to the plaintiffs and refusal on the part of the plaintiffs to accept such tender. Besides, if the re-

appropriations are to stand, all the tenders would automatically become tenders of rent in advance. A landlord is under no obligation to accept payment of rent in advance. Even the time when the tender has to be made is specified in Section 21 (1) of the Act. From all points of view, therefore, the condition in Section 21 (1) has not been satisfied and all the deposits on the basis of the reappropriations and adjustments made after the corrections of the challans would automatically become invalid deposits. That is an additional and, in my opinion, fatal defect of the tenant's case.

11. I must, however, refer to another circumstance which demolishes the defendant's case completely. In our view it would not have been enough for the defendant to show that initially there had been a refusal on the part of the landlords to accept rent for a particular month and that thereafter he, the defendant, started depositing rents. We have recently held in *Kabiraj Srinarayan Sarma v. Baijnath Bhartia*, A. F. O. D. No. 450 of 1960 (Cal.) that before the deposit of rent for any month can be accepted as valid deposit there must in each case be a valid tender of rent by the tenant and refusal of the same by the landlord. In this case, of course, far from there being a previous tender of rent and landlord's refusal of that tender for every month, there was not such a tender and refusal even for the first month before the series of deposits had started. The defendant himself says that when the rent for the month of Baisakh, 2013 S. Y. had been sent by money order, the plaintiffs had accepted it. Even the rent for Jaistha, 2013 S. Y. is now admitted by the defendant to have been accepted by the plaintiffs though for some time the defendant was under the misapprehension that the plaintiffs had not accepted it. Therefore, there is not one instance of the landlords having refused to accept the rent tendered by the defendant.

12. In this view of the matter we have no manner of doubt that the defendant had committed defaults in payment of rent practically for all months subsequent to Jaistha, 2013 S. Y. From whatever angle we consider the circumstances of the case, that is to say, whether we accept the subsequent corrections of the challans as legal and valid or whether we reject them as invalid, it is impossible for the defendant to escape being a defaulter in payment of rents for four months within a period of twelve months before the filing of the suit. The defendant was not, therefore, entitled to protection from eviction under the Act.

13. In the result we hold that the learned Judge was wrong in finding in

favour of the defendant on Issue No. 2. We, therefore, order as follows: The appeal is allowed. The judgment and decree dated 10th June, 1959 of the learned trial Judge are set aside. There will be a decree in favour of the plaintiffs for khas possession of room No. 52 on the fourth floor of premises No. 5, Jadunath Mullick Road, Calcutta. The plaintiffs will get the costs of the appeal as well as the costs in the suit in the Court below.

14. **SINHA, C. J.**— I agree.
TVN/G.G.M. Appeal allowed.

AIR 1969 CALCUTTA 109 (V 56 C 20)

**P. N. MOOKERJEE AND
A. K. DUTT, JJ.**

M/s. Surajmull Ghanshyamdas, Petitioner v. Samadarshan Sur, Opposite Party.

Civil Revn. Case No. 3505 of 1964, D/- 9-5-1968.

(A) **Tenancy Laws — Calcutta Thika Tenancy Act (2 of 1949), S. 4 — Ejectment notice — Tenancy for manufacturing purpose — Six months' notice under S. 106 of the Transfer of Property Act and not one month's notice under S. 4 is to be given — (Transfer of Property Act (1882), S. 106).**

To terminate a lease for manufacturing purpose, a six months' notice under S. 106 of the Transfer of Property Act and not the one month's notice under S. 4 of the Calcutta Thika Tenancy Act is required. (Para 8)

The Act is supplementary to the Transfer of Property Act imposing certain restrictions on the landlord's ejectment rights under the general law or under the lease contract. It does not confer any additional right on him. A tenancy, in any event, has to be determined under the Transfer of Property Act or under the contract of lease but in addition, the requirements of the Act have also to be complied with. Therefore, where the notice period under the Transfer of Property Act is less but it is more under the Act, the longer period will prevail and where the period under the Transfer of Property Act is more and that under the Act is less, the former alone will govern. As such, to terminate a manufacturing lease, a six months' notice under the Transfer of Property Act and not the one month's notice under the Act is necessary. AIR 1967 SC 1419, Foll. (Para 8)

(B) **Transfer of Property Act (1882), S. 106 — Ejectment notice — Service by registered post, under certificate of posting and in person — Held on facts, all the three modes were bad — (Evidence Act (1872), S. 114.)**

Where an ejectment notice was served by registered post but it was returned with the remark "left" and when served personally, though the notice was affixed to the door no attempt was made to find out the addressee's representatives or agents before so affixing, and the delivery entry in peon's book was found in the middle of the page but the peon's remark was found at the end of the page :

Held, the postal service was not valid as there was no tender to the addressee. The personal service also was bad and in the context of such a postal and personal service, the presumption available for service under the certificate of posting also should not be given effect to. (1966) 70 Cal WN 262, overruling (1947) 51 Cal WN 650, Foll. (Paras 9, 10, 11 and 12)

(C) **Civil P. C. (1908), S. 115 — Ejectment of tenant ordered — Revision — Setting aside such order — Discretion — (Tenancy Laws — Calcutta Thika Tenancy Act (2 of 1949), S. 4.)**

Where in revision against an order ejecting the tenant, the tenancy is held not to have been determined due to insufficiency of the ejectment notice and invalidity of its service and the tenant had been in default for a long time, held the petition could be allowed only subject to the tenant depositing arrears of rent. (Para 15)

Cases Referred: Chronological Paras

(1967) AIR 1967 SC 1419 (V 54)=

(1967) 1 SCJ 503, Manujendra Dutt v. Purnendu Prosad Roy Chowdhury 8

(1966) 70 Cal WN 262, Hare Krishna Das v. Hahnnemann Publishing Co., Ltd. 10

(1947) 51 Cal WN 650, Sita Nath Mondal v. Soleman Molla 9

Lala Hemanta Kumar and Mrityunjoy Palit, for Petitioner; Bankim Chandra Dutt and Malay Kumar Bose, for Opposite Party.

P. N. MOOKERJEE, J.— This Rule is directed against a concurrent order of the two Courts below, allowing the landlord opposite party's application for eviction of the petitioner on the allegations inter alia that the petitioner was a thika tenant under him, who had forfeited his tenancy right under an appropriate notice of ejectment and had also no protection under the Calcutta Thika Tenancy Act, which governed the instant case.

2. The eviction was sought for on various grounds namely, (1) on the ground of default in payment of rent; (2) on the ground of the landlord's reasonable requirement of the disputed holding for development purposes; and (3) on the ground that the tenant petitioner was guilty of unlawful subletting and failure to occupy the major portion of the same.

3. The landlord's case was that the petitioner's tenancy had been duly determined by an appropriate notice of ejectment, which had been duly served upon the petitioner, and that, because of the above grounds, the petitioner had forfeited its claim of protection under the Calcutta Thika Tenancy Act.

4. The landlord's claim was opposed and objected to by the petitioner, who contended inter alia that its tenancy, if any, under the opposite party was not a Thika Tenancy but had to be governed by other Acts. There was an extreme contention that the petitioner was not the tenant under the opposite party. It was also alleged that the petitioner was not guilty of defaults, so as to be liable to ejectment; that the landlord's case of reasonable requirement was untrue; and that the petitioner was not guilty, also, of any subletting and not certainly of subletting to the extent that it failed to occupy the major portion of the disputed holding.

5. All the above objections were overruled by the two tribunals below and the landlord opposite party's claim for ejectment was allowed. Against this concurrent order, the present Rule was obtained by the petitioner.

6. For our present purpose, it will not be necessary to go into the grounds under the Calcutta Thika Tenancy Act, as, in our view, the opposite party's claim for eviction, in the instant case, would fail on the ground of insufficiency and invalidity of the notice of ejectment and on the further ground that there has been no due or proper service of any notice of ejectment according to law. This, however, in the circumstances of this case, as we shall indicate presently, must be made on terms and we will specify the terms, on which we will be inclined to interfere in the instant case, even though the petitioner would otherwise be entitled to a reversal of the orders of the two tribunals below.

7. On the question of notice, it appears that the notice, given in the instant case, complied with the provision of one month's notice but did not comply with a six months' notice, as found by the learned Lower Appellate Tribunal. That tribunal, also, appears to be of the view that the tenancy in this case was for a manufacturing purpose. That view seems to be correct on the facts before us. But the lower appellate tribunal was of the opinion that, having regard to the provisions of Section 4 of the Calcutta Thika Tenancy Act, one month's notice would be enough even for a manufacturing tenancy, which was governed by the Calcutta Thika Tenancy Act; in other words, the learned lower appellate tribunal was of the opinion that the Cal-

cutta Thika Tenancy Act, while providing, in Section 4, for a one month's notice, was overriding the corresponding provision under the Transfer of Property Act, which required, in the case of manufacturing leases, six months' notice; in other cases, fifteen days'. While, to the extent, the latter cases are concerned, the view may be substantially correct inasmuch as the notice for the lesser period, required under the Transfer of Property Act in these cases, would be sufficiently substituted by the notice for the longer period, as provided in Section 4 of the Calcutta Thika Tenancy Act; the same would not be true with regard to the former class of cases.

8. Indeed, the provision for notice under the Calcutta Thika Tenancy Act would be a requirement, which had to be complied with, but such compliance must be in the light of or in addition to the corresponding provision under the Transfer of Property Act. In the light of the decision of the Supreme Court, reported in *Manjiendra Dutt v. Purnendu Prosad Roy Chowdhury*, (1967) 1 SCJ 503 at p. 508=AIR 1967 SC 1419 at p. 1423, the Calcutta Thika Tenancy Act must be held to be really in the nature of a supplementary legislation, supplementing the Transfer of Property Act, imposing certain restrictions on the landlord's right to eject his tenant under the general law or under the contract of lease and not conferring any additional right on the landlord. The tenancy has to be determined, in any event, under the Transfer of Property Act or under the contract of lease with this addition that the requirements under the Calcutta Thika Tenancy Act, also, would have to be complied with. The position, then, is that, where the Transfer of Property Act requires the notice for a lesser period, the longer period under the Calcutta Thika Tenancy Act would ultimately prevail or govern, and, where the Transfer of Property Act prescribes the longer period for the relevant notice, the lesser period under the Calcutta Thika Tenancy Act would be of no consequence; or, in other words, in the instant case, a six months' notice was necessary for terminating the petitioner's tenancy and, admittedly, such a notice has not been given.

9. Moreover, the notice of ejectment, on the opposite party's own case, was served by three processes: (i) by registered post; (ii) under certificate of posting; and (iii) by personal service. So far as service by registered post is concerned, the postal peon's return is "left". The tribunals below, however, have accepted the same as good service on the authority of a decision of this Court, reported in *Sita Nath Mondal v. Soleman Molla*, 51 Cal W. N. 650.

10. In our view, this is erroneous as the said decision has already been explained and practically explained away or overruled by a Bench decision of this Court, reported in Hare Krishna Das v. Hahnnemann Publishing Co. Ltd., 70 Cal. WN 262. Indeed the word "left" itself shows that there was no tender, and, unless there was a tender to the addressee, on no conceivable principle, can service by registered post be accepted as good service. The service by registered post, in the instant case, must, therefore, be rejected.

11. As regards personal service, this has been sought to be proved by an employee of the solicitor's firm, which issued the notice in question. According to the said employee, he went to the disputed premises and, not having found anybody authorised to receive the petitioner's notice, the proprietors or partners of the petitioner firm or the persons in charge of the same not being there, he affixed the said notice to the entrance of the disputed premises. It is significant to note that the peon book entry, which has been exhibited for this purpose, discloses that the alleged report of the peon was written at the bottom of the page, while the entry of delivery to the said peon is to be found in the middle. This feature ought to have attracted the attention of the tribunals below but it does not appear to have been considered by them at all. It also appears that there was no attempt to find out the petitioner's representatives or agents before affixing the notice, as aforesaid. In such circumstances, the alleged personal service cannot be accepted as good service in law.

12. In the context of the postal peon's report, again, that the addressee was not to be found at the address, strengthened by the report of the peon, who was alleged to have effected the personal service, as aforesaid, to the same effect, the instant case is hardly a case, where the presumption, arising under certificate of posting, should be given effect. In this view we would hold that this service, also of the notice of ejectment has not been established, with the result that no valid service of the notice of ejectment has been proved in the instant case.

13. On the above grounds, the petitioner's disputed tenancy must be held not to have been validly determined and, upon that view, the instant proceeding for ejectment would fail.

14. In the premises, if no other consideration had intervened, this Rule had to be made absolute unconditionally and the petitioner would have been entitled to an absolute order of dismissal of the opposite party's claim for eviction and the latter would have suffered serious

prejudice on account of their defective handling of the ejectment notice.

15. As, however, the matter is before us in revision, we would not, having regard to the admitted circumstance that the petitioner is in default for a long time, be inclined to exercise our discretionary revisional power in favour of the petitioner except on this term, namely, that the petitioner will deposit, with the Controller concerned, to the credit of the opposite party, a sum of Rs. 85,000/- (Rs. eightyfive thousand), less amounts, if any, deposited by it with the said Controller on account of rents since Baisakh 135 B.S. (sic), within four months from this date. In default, this Rule will stand discharged. If the above deposit is made, as directed herein, this Rule will be made absolute and the opposite party's present proceeding for eviction will stand dismissed on the ground of defective notice of ejectment and/or defective service of such notice.

16. The above deposit, if made, will be withdrawable by the opposite party without furnishing any security therefor and without prejudice to the rights and contentions of the parties under the law. Such withdrawal, however, will be subject to adjustment according to law as against the legal claims of the opposite party against the petitioner on account of the disputed tenancy, at the instance of either party.

17. There will be no order for costs in this Rule.

18. A. K. DUTT, J.:— I agree.

JRM/D.V.C.

Petition allowed.

AIR 1969 CALCUTTA 111 (V 56 C 21)

P. N. MOOKERJEE AND
BIJAYESH MUKHERJI, JJ.

Bireswar Sen and another, Appellants
v. Ashalata Ghose and another, Respondents.

A. F. O. D. No. 96 of 1955, D/- 12-8-1968.

T. P. Act (1882), S. 122 — Gift by a person to his counsel's wife — Validity — Proof of spontaneity eliminates proof of independent legal advice.

The spontaneity of the gift by the client to his pleader's wife can be proved by, amongst other circumstances, the very idea originating from the donor as a token of his gratitude, the transaction bearing the stamp of righteousness and naturalness, and far from being an improvident act, by which the donor was not landed in penury, but still having enough and to spare, the donor having been really at loss for an object of boun-

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ty, his near and dear ones having become the most distant ones, animated by the worst of feelings against him, the donor abiding by the gift, the simple nature of the transaction: a gift simpliciter he may be determined to make, and has every right to make. And once the spontaneity of the gift is proved, the necessity of independent legal advice eliminates itself.

(Para 63)

The object of bounty by the client being the pleader's wife instead of being the pleader makes no difference. Because there is no distinction between a gift to a solicitor and one made to his wife.

(Para 68)

Court would not interfere with merely trifling gifts and set them aside upon the mere fact of confidential relation and the absence of proof of competent and independent advice. But when a gift is made by a man with so ample a fortune, it must be trifling to him. Where what the donor gives is much less than what he had, and what he had, after the gift, was much more than what he could need, the gift was mere trifle to him.

(Para 75)

There are many classes of influence in which the donee may from his position be presumed to be likely to have exercised special influence over the mind of the donor. But the governing principle is the same, though its application will vary according as the position of confidentiality is strong or weak. There is no difference between solicitor and client on the one hand, and parent and child, on the other.

(Para 75)

Where the pleader gains for himself the pecuniary advantage in the gift of the house, not by availing himself of such fiduciary character, the gift having been a voluntary, spontaneous and deliberately conceived intention of the donor, and before, or at the time of the gift the interests in the house gifted are the interests of the donor alone, the circumstances, in which the interests of the donee, are, or may be, adverse to those of the donor, are missing and S. 88 of the Trusts Act, whether by its first part or second does not apply.

(Paras 81 to 86)

Some of the requirements of independent legal advice are — one, is the pleader who advises is independent of the pleader who takes?

Two, in order to earn competence to give proper advice, one who advises must be in possession of full facts — all that is worth knowing in the matter.

Three, one who advises must give real advice. Merely asking the donor: "why such gift"; is not to do duty expected of an advising lawyer.

(Para 93)

Cases Referred: Chronological Paras

(1963) AIR 1963 SC 1279 (V 50)=

(1964) 1 SCR 270, Ladli Parshad v. Karnal Distillery Co. Ltd.

- (1962) AIR 1962 Andh Pra 49 (V 49)=(1961) 2 Andh WR 196 (FB), C. Kotalah v. Venkata Sub-baiah 87
- (1956) 1956-1 WLR 965=100 SJ 566, Subramaniam v. Public Prosecutor 25
- (1955) AIR 1955 Cal 21 (V 32)= 53 Cal WN 1008, Sital Chandra Koley v. Mahilal Koley 92
- (1947) 51 Cal WN 383, Sri Sri Gopal Jew v. Baldeo Narain Singh 86
- (1945) AIR 1945 PC 8 (V 32)=49 Cal WN 55, Tungabai v. Yeshwant Dinkar Jog 75
- (1943) AIR 1943 Cal 417 (V 30)= 47 Cal WN 557 (FB), Ali Hussain Mian v. Rajkumar Haldar 92
- (1934) 1934-1 KB 380=103 LJKB 129, Lancashire Loans Ltd. v. Black 75
- (1932) AIR 1932 Cal 451 (V 19)= 36 Cal WN 153, Mohini Debi v. Purna Sashi Gupta 92
- (1931) AIR 1931 Cal 144 (V 18)= 52 Cal LJ 492, Amrita Lal v. Pratap Chandra 84
- (1929) AIR 1929 PC 3 (V 16)= 1929 AC 127=1929 Mad WN 105, Inche Noriah v. Shaik Allie 62, 63, 75, 93
- (1927) AIR 1927 PC 148 (V 14)= 39 Mad LT 105, Daing Soharah Binte Daing Todaleh v. Chabak Binte Lasaliho 75
- (1924) AIR 1924 PC 34 (V 11)=51 Ind App 24=29 Cal WN 491=ILR 51 Cal 299, Nagendrabala Das v. Dinanath Mahish 83
- (1924) AIR 1924 PC 60 (V 11)=51 Ind App 101, Raghunath Prasad v. Sarju Prasad 78
- (1923) AIR 1923 Cal 63 (V 10)= ILR 49 Cal 345=35 Cal LJ 175, Jogendra Krishna Roy v. Kurpal Harshi and Co. 24
- (1911) 1911-1 Ch 723=80 LJ Ch 399, Coomber v. Coomber 75
- (1903) 1903-1 Ch 27=72 LJ Ch 138 =51 WR 196, Wright v. Carter 75, 93
- (1900) 1900-1 Ch 243=69 LJ Ch 164, Powell v. Powell 62
- (1895) 1895-2 QB 679=73 LT 428, Liles v. Terry 67, 73, 74, 75
- (1893) 1893-1 Ch 736=62 LJ Ch 515, Morley v. Laughnan 75
- (1888) 36 Ch D 145=56 LJ Ch 1052, Allcard v. Skinner 75
- (1882) 8 QBD 587=50 LJQB 460, Mitchell v. Homfray 70, 73, 74, 75
- (1877) 3 AC 254, McPherson v. Watt 68
- (1877) 6 Ch D 638=36 LT 948, Morgan v. Minett 72, 73, 74, 75
- (1874) 5 PC 516, Pisani case, Henry Peter Pisani v. Attorney General for Gibraltar 72, 79
- (1868) 6 Eq 655=37 LJ Ch 674, Lyon v. Home 75
- (1866) 1 Ch A 252=35 LJ Ch 267, Rhodes v. Bate 75

to the work of all the firms, that the same was the information regarding the factory premises at Kalkaji, that he had reasons to believe that the documents which were necessary for the purposes of his investigation into the alleged offence, which he was conducting, could not normally be found anywhere else except at the office premises or the factory premises, and he was convinced that the said documents were to be found at the two premises mentioned in the Grounds of Search, that he was also satisfied that the party would not produce, when asked for, any incriminating documents and particularly the disfigured name plates of manufacturers of air-compressors supplied by M/s. Kirloskar Pneumatics and other firms, that he was further satisfied that if the searches were not conducted immediately, and if the accused came to know that the police were looking for the discarded name plates and other documentary evidence, the incriminating documents and things would be done away with, that, in the circumstances, it was necessary for him to conduct immediate searches on 1-1-1968, (1) he stated clearly the reasons for the search, and that the record prepared by him under Section 165 (1), therefore, complied strictly with the requirements of law. He further stated that he had sent the Grounds of Search prepared by him under Sec. 165 (1), Criminal Procedure Code, to Shri R. N. Mehrotra, who was one of the Magistrates, having jurisdiction to try SPE cases that Shri N. L. Kakkar had not till then taken over as Special Magistrate, and at that time he did not know that the record should be sent to Shri N. L. Kakkar and not to Shri R. N. Mehrotra, that the record prepared by him under Section 165 (1), Criminal Procedure Code, on 1-1-1968 and sent to Shri R. N. Mehrotra, was placed before the latter on 1-1-1968 at about 10-00 A. M., that a photostat copy of the record sent to the learned Magistrate with his endorsement thereon, dated 1-1-1968, was filed as Annexure R-2 to this affidavit, that the record prepared by him under Section 165 (1) was thus sent forthwith to the learned Magistrate empowered to take cognizance of the offence, that he was further advised that although an offence under Section 5 (2) of the Prevention of Corruption Act, Act II of 1947, is triable by a Special Judge, there is no bar to the Magistrate taking cognizance of the said offence, that the learned Magistrate, after making the endorsement, had returned the record with the instructions that it may be sent to the competent Court, that since in the record prepared by him under section 165 (1), Criminal Procedure Code, he clearly mentioned that simultaneous searches would be taken at two different places, it was strictly not necessary in accordance with law to prepare a separate record under Section 165 (3) or to forward the same to the nearest Magistrate, that the record under Section 165 (1), Criminal Pro-

cedure Code, covered both the aspects and it was a composite record, that the record, sent to the Magistrate, Shri R. N. Mehrotra, was placed before the Magistrate at about 10-00 A. M., and the actual commencement of the search (at Kalkaji) was also commenced at 10 A. M. and went on till about 10-30 P. M., that S. N. Punj was present at the time of the search and a copy of the search memo. was delivered to him and his acknowledgment was taken, that 2nd January was a holiday and thereafter he proceeded to Bombay on Government work on the morning of 3rd January, 1968, and returned to Delhi on the afternoon of 9th January, 1968, that on 10-1-1968 he placed before Shri N. L. Kakkar the following documents :—

(1) Papers returned by Shri R. N. Mehrotra for being placed in the Court of the Special Magistrate;

(2) His requisition in writing to Shri Jethanand, Dy. S. P. to conduct the searches; and

(3) possession memo; and that he had thus complied with the requirements of Section 165, Criminal Procedure Code, and had acted in the discharge of his duties as a public servant in a bona fide manner.

13. Shri A. S. R. Chari, the learned counsel for the petitioners, urged before us the three contentions raised in the writ petitions which have already been set out above. The first contention is that the search and the seizure made by the 1st respondent in the factory premises at Kalkaji were illegal in that the first respondent did not record in writing the grounds of his belief as required by Section 165 (1) of the Criminal Procedure Code, and in that the said factory was not one of the premises to be searched, mentioned in the record made by him under sub-section (1) of Section 165, Criminal Procedure Code. Section 165 (1) runs as under:

"165 (1) — Whenever an officer in charge of a police-station or a police-officer making an investigation has reasonable grounds for believing that anything necessary for the purposes of an investigation into any offence which he is authorised to investigate may be found in any place within the limits of the police-station of which he is in charge, or to which he is attached, and that such thing cannot in his opinion be otherwise obtained without undue delay, such officer may, after recording in writing the grounds of his belief and specifying in such writing, so far as possible, the thing for which search is to be made, search, or cause search to be made, for such things in any place within the limits of such station."

14. As pointed out by the Supreme Court in *State of Rajasthan v. Rehman*, AIR 1960 SC 210, there are four groups of sections in the Criminal Procedure Code regulating the searches authorised under

it. One of the said groups appears in Chapter XIV of the Code which provides for searches by a police officer during the investigation of a cognizable offence. The power to search given under this Chapter is incidental to the conduct of investigation which the police officer is authorised by law to make. A reading of sub-section (1) of S. 165 shows that it laid down two requirements which are to be fulfilled before the said power is exercised. They are—

(1) The police Officer should have reasonable grounds for believing—

(a) that anything necessary for the purposes of an investigation into an offence may be found in any place; and

(b) that such thing cannot, in his opinion, be otherwise obtained without undue delay; and

(2) he should record in writing the grounds of his belief specifying in such writing, so far as possible, the thing for which search is to be made.

15. The Supreme Court pointed out in the aforesaid decision that search is a process exceedingly arbitrary in character, and that, therefore, the above two requirements are imposed as conditions on the exercise of the power to search since they are conditions for the exercise of the power conferred by the section, they should be complied with by the police officer before he exercises the power to search given to him under the section. Even if the said two requirements of section 165 (1) are regarded, not as conditions for the exercise of the power, but as the mode or the manner in which the power conferred on the police officer is to be exercised, the said power has still to be exercised in the manner provided in the section and in no other way, as pointed out by the Privy Council in *Nazir Ahmad v. King Emperor*, 63 Ind App 372; AIR 1936 PC 253 (2) in which their Lordships of the Privy Council observed at p. 381 (of I.A.): (at p. 257 of AIR) that—

"Where a power is given to do a certain thing in a certain way, the thing must be done in that way or not at all."

Therefore, whether the requirements of section 165 (1) are regarded as conditions for the exercise of the power to search conferred by the section or as the manner in which the said power has to be exercised by the police officer, the said requirements have to be fulfilled by the police officer before he exercises the power to search conferred by the section. The question then arises as to whether the two requirements are mandatory or directory, i.e. whether they should be fully and strictly fulfilled or whether it would be sufficient if they are fulfilled substantially.

16. The significance and the effect of the two terms "mandatory" and "directory" are now well settled. As stated in 'Maxwell' on Interpretation of Statutes (Eleventh Edition) at page 364—

"The general rule is, that an absolute enactment must be obeyed or fulfilled exactly, but it is sufficient if a directory enactment be obeyed or fulfilled substantially."

17. A Full Bench of the High Court of Andhra Pradesh observed to the same effect in *Satyanarayana v. Venkata Subbiah*, AIR 1957 Andh Pra 172. Therefore, if the provisions in section 165 (1), Criminal Procedure Code, are regarded as mandatory, the requirements therein have to be fully and strictly fulfilled. On the other hand, if they are regarded as directory in nature, substantial compliance with them would be sufficient. We have, therefore, to see whether the said provisions in section 165 (1) of the Criminal Procedure Code are mandatory or directory.

18. As pointed out by the Supreme Court in *Raza Buland Sugar Co. Ltd. v. Municipal Board, Rampur*, 1965 (1) SCR 970, at p. 975: (AIR 1965 SC 895 at p. 899), the question as to whether a particular provision of a statute is mandatory or directory cannot be resolved by laying down any general rule. In the words of the Supreme Court, it—

"depends upon the facts of each case and for that purpose the object of the statute in making the provision is the determining factor. The purpose for which the provision has been made and its nature, the intention of the legislature in making the provision, the serious general inconvenience or injustice to persons resulting from whether the provision is read one way or the other, the relation of the particular provision to other provisions dealing with the same subject and other considerations which may arise on the facts of a particular case including the language of the provision, have all to be taken into account in arriving at the conclusion whether a particular provision is mandatory or directory."

19. As already pointed out above, the requirements in section 165 (1) were characterized by the Supreme Court in AIR 1960 SC 210 at p. 212, as conditions imposed on the exercise of power. In that case, the Supreme Court was not concerned, as such, with the question as to whether the provisions in Section 165 of the Code of Criminal Procedure are mandatory or directory. It cannot, therefore, be said that by the above mentioned observation, the Supreme Court laid down or decided that the provisions in Section 165 of the Criminal Procedure Code are mandatory in the strict sense of the

term. It has also to be noted that at page 213, the Supreme Court observed that the recording of reasons required by sub-section (1) of Section 165 of the Criminal Procedure Code does not confer jurisdiction to make a search, though it is a necessary condition for making the search, that the jurisdiction or the power to make a search is conferred by the statute and not derived from the record of reasons, and that—

"section 165 of the Code lays down various steps to be followed in making a search. The recording of reasons is an important step in the matter of search and to ignore it is to ignore the material part of the provisions governing searches. If that can be ignored, it cannot be said that the search is carried out in accordance with the provisions of the Code of Criminal Procedure: it would be a search made in contravention of the provisions of the Code."

In that view, the Supreme Court upheld the conclusion of the High Court that the respondent before the Supreme Court had a right to prevent the police officer from making the search. Thus, the said decision of the Supreme Court cannot be regarded as a ruling that the provisions in section 165 (1) of the Criminal Procedure Code are mandatory in the strict sense of the term. All that the Supreme Court pointed out in that case was that the recording of reasons required in section 165 (1) is an important step in the matter of search and should not be ignored.

20. The object of the legislature in imposing the requirements or conditions upon the power to make a search under section 165 (1) is to provide a safeguard against any mala fide, whimsical or arbitrary searches of the property of a citizen or the invasion of the liberty or the privacy of the people by police officers. The said object is in no way affected or defeated by regarding the provisions in section 165 (1) as directory. The power to make a search is an essential and important instrument in the hands of the police for conducting an investigation into an alleged offence and securing evidence regarding the offence, and that is why the power is conferred upon the police officers by this section. If the requirements or conditions provided in section 165 (1) of the Criminal Procedure Code are held to be mandatory, they will have to be fully and strictly complied with, and any slight departure from or non-compliance with the procedure prescribed in section 165 (1) would render the entire search illegal and ineffective, and thus the very purpose in conferring the power to search upon the police officers under section 165 (1) would be defeated. On the other hand, as held

in Jagdish Chandra Gupta v. Union of India, AIR 1965 Punjab 129—

"even a directory provision is intended to be obeyed, and it does not authorise its deliberate and conscious violation or breach; it does not purport necessarily to confer an absolute discretion to do or not to do the thing directed. Directory provision no doubt calls for obedience but a failure to obey the direction, may not render the thing otherwise duly done but in disobedience of it, an absolute nullity or non est which the judicial eye must decline to see."

21. On a consideration of all the above mentioned aspects and the language of sub-section (1) of section 165 of the Criminal Procedure Code, we are of the opinion, and we hold, that the provisions in the said sub-section (1) are only directory and not mandatory, and consequently substantial compliance with the requirements in the said sub-section (1) would be sufficient. This view of ours gives effect to both the object of the legislature in conferring the power to search upon the police officers under section 165 (1), and the object to provide safeguards or protection against any mala fide, whimsical or arbitrary searches by the police officers.

22. In Maingal Singh v. Ghulam Mohd., AIR 1939 Lah 280 (282, 284), the High Court of Lahore held that the provisions of section 165 to the effect that before making a search a police officer should record in writing the grounds of his belief etc., are directory and not mandatory.

23. In a subsequent decision, Emperor v. Mohd. Shah, AIR 1946 Lah 456, Marten, J. and Bhandari, J. held that—"the simple safeguards incorporated by the legislature in section 165, Criminal Procedure Code, are mandatory, not directory, and must be carried out immediately and fully, or as nearly so as they can be in the exigencies and circumstances of each case. Unless this is done, the search is without jurisdiction and bad in law."

It has to be noticed that though the learned Judges characterized the safeguards in section 165 as mandatory, they still observed that the said safeguards must be carried out immediately and fully or

"as nearly so as they can be in the exigencies and circumstances of each case".

The learned Judges thus, in effect, held that substantial compliance with the provisions in section 165 would be sufficient, and that it is only when there is not even such substantial compliance, the search would be bad in law. The decision in Maingal Singh's case, AIR 1939 Lah 280 cannot, therefore, be

regarded to have been overruled or differed from in this decision.

24. In *Nava v. State of Mysore*, AIR 1957 Mys 24, it was held that—

"section 165 does, of course, cast an obligation on the police officer to express in writing as to what led him to make the search without a warrant, and this is to some extent a safeguard against the possibility of wanton annoyance and needless harassment caused by a search. Disregard of the provisions amounts to a default in doing what is enjoined by law. But, the direction contained in the section cannot be treated as imperative and independent of the circumstances of the case. When the authority for the search does not appear to be made use of as a cover for harassment and malicious interference with peace and privacy a person is accustomed to, in his residence and the materials gathered are incriminating, want of conformity to the section is to be regarded as unessential."

25. In some decisions, it was held that the non-recording of reasons for search under section 165 (1) of the Code of Criminal Procedure makes the search illegal to the extent that the person whose house was searched would escape with impunity in case of an obstruction to that illegal search, and that the illegality of the search, however, does not make the evidence of seizure inadmissible, though the Court may be circumspect to closely scrutinise the evidence of seizure. (See *State v. Satyanarayan*, AIR 1965 Orissa 136, *Radha Kishan v. State of Uttar Pradesh*, AIR 1963 SC 822 and *Cochan Velayudhan v. State of Kerala*, AIR 1961 Ker 8 (FB)). In some decisions it was held that the contravention of the provisions in section 165 of the Code of Criminal Procedure only enjoins the Court to look into the matter closely, but does not vitiate the trial if there is no miscarriage of justice or any prejudice to the accused (See AIR 1963 SC 822; *Pyl Yaccob v. The State*, AIR 1953 Trav-Co. 466, *Rulla v. The State*, (1963) 65 Pun LR 1128 and *Guljar Singh v. The State*, (1962) 64 Pun LR 403.) These decisions are not of assistance as the questions with which we are concerned, viz. whether section 165 of the Code of Criminal Procedure is mandatory or directory and whether substantial compliance with the provisions of the section is sufficient, were not, as such, involved or considered in them.

26. In *Commr. of Commercial Taxes, Board of Revenue, Madras v. Ramkishan Shrikishan Jhaver*, AIR 1968 SC 59, the Supreme Court observed at page 67 as follows:

"as to the accounts etc. said to have been seized, it appears to us that the

safeguards provided under section 165 of the Code of Criminal Procedure do not appear to have been followed when the search was made for the simple reason that everybody thought that the provision was not applicable to a search under sub-section (2) (of section 41 of the Madras General Sales Tax Act 1 of 1959). Therefore, as the safeguards provided in section 165 of the Code of Criminal Procedure were not followed, anything recovered on a defective search of this kind must be returned."

It has to be noticed that in the said case before the Supreme Court, there was no compliance at all with the requirements of section 165 of the Code of Criminal Procedure, and yet the Supreme Court characterized the search only as a "defective" search. Further, the Supreme Court was not concerned, as such, with the question as to whether the provisions in section 165 are mandatory or directory, or with the question as to whether a substantial compliance with the said provisions would be sufficient.

27. In AIR 1963 SC 822, the Supreme Court observed as follows:

"So far as the alleged illegality of search is concerned, it is sufficient to say that even assuming that the search was illegal the seizure of the articles is not vitiated. It may be that where the provisions of sections 103 and 165, Code of Criminal Procedure, are contravened, the search could be resisted by the person whose premises are sought to be searched. It may also be that because of the illegality of the search, the Court may be inclined to examine carefully the evidence regarding the seizure. But beyond these two consequences, no further consequence ensues."

Thus, in this decision also the Supreme Court was not concerned, as such, with the question as to whether the provisions in section 165 are mandatory or directory, and the question as to whether substantial compliance with the provisions would be sufficient.

28. Thus, while the decisions of the Supreme Court referred to above do not lay down anything to the contrary, the decisions of the High Courts of Lahore and Mysore are in line with the view taken by us that the provisions in section 165 (1) are not mandatory or imperative, but only directory, and substantial compliance with the said provisions would be sufficient.

29. *Shri A. S. R. Chari* referred to an unreported judgment of a Division Bench (*Bakshi and Thakor, JJ.*), of the High Court of Gujarat, dated 11/13-10-1967, in *New Swadeshi Mills of Ahmedabad Ltd. v. Shri S. K. Rattan, Spl. Civil Appln. No. 1198 of 1967 (Guj)*, filed under Article 226 of the Constitution of

India. In that case also the search made by the respondents therein under S. 165 of the Code of Criminal Procedure was challenged as illegal on the ground that the provisions in section 165 were not complied with, and a return of the documents etc. seized during the search was prayed for. The learned Judges, after setting out the relevant provisions of the Code of Criminal Procedure, pointed out that the provisions in section 165 are safeguards for the protection of the private rights of a subject in whose property a police officer purports to search for things necessary for the purposes of an investigation into an offence that the said provisions are conditions which are required to be fulfilled before a search can be made under the section, that if the said conditions are not fulfilled or ignored, it would mean that an important provision of law has not been followed, and such provisions intended and meant for the safeguard of the rights of the subject cannot be held to be merely directory in nature. Then, after referring to a passage in the decision of the Supreme Court in *Collector of Monghyr v. Keshav Prasad Goenka*, AIR 1962 SC 1694, wherein the provisions of section 5 (A) of the Bihar Private Irrigation Works Act were held to be mandatory, and the factors to be considered in deciding the question as to whether any requirement is mandatory or directory, the learned Judges observed:

"if such provisions are not considered to be mandatory, it would result practically in removing the safeguards that have been placed by the legislature on the indiscriminate use of powers of search and seizure by a police officer. We are, therefore, of the view that the provisions of sub-section (1) of S. 165 which provide for certain requirements which should be satisfied before a search could be started under that sub-section are mandatory in nature".

Then, after examining in detail the provisions in section 165, the learned Judges observed as follows:

"We have seen what are the requirements of the section which must be complied with before a police officer conducting an investigation could validly institute a search of the nature mentioned in section 165. We have also seen that these provisions must be strictly and substantially complied with. Now let us see on the facts of the present case how far these provisions have been complied with."

Thus, the learned Judges held that the provisions of section 165 are mandatory on the ground that they are important safeguards against interference with the rights of a subject by the police, and are conditions which should be fulfilled

before a search under section 165 of the Code of Criminal Procedure could be made. All the same, the learned Judges stated in the last passage quoted above that the provisions must be strictly and substantially complied with. With great respect to the learned Judges, we have to state that there is a well-settled distinction between a mandatory requirement and a directory requirement, namely, while the former has to be fulfilled strictly, the latter may be substantially complied with, and if it is sufficient that a requirement is substantially complied with, it would mean that the said requirement is directory and not mandatory. While we respectfully agree with the observation of the learned Judges that it would be sufficient if the provisions in section 165 (1) are complied with substantially, we cannot agree with the observation of the learned Judges that the said provisions are to be characterized as mandatory and not directory. Further, it is well settled that even a requirement which is directory has to be obeyed and fulfilled, and it is not as if the requirement, merely because it is directory, may be ignored or violated. In the above decision, it seems to have been assumed that if a provision or requirement is directory, its fulfilment is discretionary and not obligatory. That is why, perhaps, the learned Judges, after stating that the provisions in section 165 are important safeguards or conditions which should be fulfilled before a search can be made, characterized them as mandatory and not directory. In our opinion, for the reasons already stated above, the provisions in sub-section (1) of section 165 of the Code of Criminal Procedure are directory and not mandatory, and it would be sufficient if they are complied with substantially.

30. As already stated above, the conclusion of ours that the provisions in S. 165 (1) are directory does not mean that the police officer has a discretion to fulfil or not to fulfil the requirements of the said sub-section. The said requirements should be fulfilled at least substantially before any police officer seeks to exercise the power to search under the section. If in a case there is no such substantial fulfilment of the requirements of the section, the search made by the police would not be one in accordance with the provisions of the section, and would, therefore, be irregular in law.

31. Now, the contention of Shri A. S. R. Chari, as already stated, is that the first respondent did not record in writing the grounds of his belief as required by section 165 (1) of the Criminal Procedure Code, and that the factum premises was not one of the premises to be searched, mentioned in the

record made by him under sub-section (1) of section 165. Sub-section (1) of section 165 lays down two requirements, viz.—

(1) that the police officer should have reasonable grounds for believing—

(a) that anything necessary for the purpose of investigation into an offence may be found in any place; and

(b) that such thing cannot, in his opinion, be otherwise obtained without undue delay; and

(2) he should record in writing the grounds of his belief specifying in such writing, so far as possible, the thing for which search is to be made.

The first requirement itself consists of two parts, viz.—

(i) a belief, for reasonable grounds, that a thing necessary for the investigation may be found in a particular place; and

(ii) an opinion that the said thing cannot otherwise be obtained without undue delay.

The second requirement is that the grounds for the belief (mentioned in the first part of the first requirement) should be recorded in writing, specifying, so far as possible, the said "thing" for which search is to be made.

In the present case, the record made by the first respondent is Annexure 'A' (Annexure R-II), and the same has already been set out above in extenso. In that record, the first respondent stated that certain documents and things enumerated by him in the said record were said to be in the possession of M/s Lloyd Electric & Engineering Company, M-13 Connaught Place, New Delhi, at their office premises in Connaught Place and in their factory premises at Kalkaji, that he had reasons to believe that the firms (referred to by him in the record) were not likely to produce the said documents or things when asked for, and they were likely to be tampered with or otherwise disposed of and that it was not possible to obtain the said documents and things, without undue delay, otherwise than by an immediate search of the premises of the said firm referred to in the record. Thus, he mentioned the necessity of the documents and things for the purposes of the investigation, the places in which they may be found, and his opinion that the said documents and things could not be otherwise obtained without undue delay. There was thus a compliance, or at any rate a substantial compliance, with the aforesaid two parts of the first requirement in sub-section (1) of section 165.

The argument of Shri A. S. R. Chari is that the first respondent did not set out the reasons for his belief that the documents and things may be found in the places mentioned in the record. It is

true that the first respondent wrote in the record only that the documents and things were "said to be" in the possession of M/s Lloyd Electric & Engineering Co., etc. . . . In other words, the reason given by the first respondent for his believing that the documents and things may be found in the possession of M/s. Lloyd Electric & Engineering Co. at their office and factory premises in Connaught Place and Kalkaji, was that they were "said to be" in the possession of the company at the aforesaid premises. Shri Chari argued that it was a mere statement that the documents and things are "said to be" in the possession of the company, and that it was not a sufficient compliance with the requirement that the grounds of his belief should be recorded in writing. We find it difficult to accept this argument of Shri Chari. By using the words "said to be", the first respondent clearly implied that he had information from some source that the documents and things were in the possession of M/s. Lloyd Electric and Engineering Company at their office and factory premises in Connaught Place and Kalkaji, and that he believed the same. The information which he received was the reason or ground for his belief and the same was stated by him in writing. It may be that he could have stated the same reason or ground in a more elaborate manner. But, merely because he chose to be brief and used the words "said to be", it cannot be said that he did not set out the grounds for his belief. The contention of Shri Chari that the first respondent did not record in writing the grounds of his belief as required by section 165 (1) of the Criminal Procedure Code, cannot, therefore, be accepted.

32. The argument of Shri Chari that the factory premises at Kalkaji was not one of the premises to be searched as mentioned in the record made by the first respondent under sub-section (1) of section 165, cannot also be accepted. In sub-section (1) of section 165, the place where the search is to be made is mentioned only in the context of prescribing that the police officer should have reasonable grounds for believing that a thing necessary for investigation may be found in any place. The last part of the sub-section in which the requirement that the police officer should record in writing the grounds of his belief is contained, does not refer to the place in which the search is to be made. The police officer is required to record in writing only the grounds of his belief, and the thing for which the search is to be made. There is thus no specific requirement in that part of sub-section (1) of section 165 that the place in which search is to be made should also be

recorded in writing. As already stated, the place has to be mentioned incidentally in recording the grounds of the belief of the police officer. But, it would not be correct to say that the place in which the search is to be made has to be recorded in writing as a condition or requirement under the sub-section (1) of section 165, and that any vagueness in so recording the place of search would render the search bad in law. However, in the present case, the first respondent did mention clearly in the record the places in which search was to be made. In the first part of the record, Annexure 'A', he stated that the documents and things were "said to be" in the possession of M/s. Lloyd Electric & Engineering Co., M-13, Connaught Place, New Delhi, "at their office premises in Connaught Place and in their factory premises at Kalkaji, New Delhi". In item 5 of the list of documents and things set out in the record, annexure 'A' (Annexure R-II), the first respondent stated as follows:

"5. All correspondence files of M/s. Lloyd Electric & Engineering Co., M/s. Punj Sons (P) Ltd., M/s. Fedders Lloyd Corporation (P) Ltd., M/s. Fedders Lloyd Sales Corporation of the period 1965 to date in respect of manufacture and sale of air-conditioners, purchase of accessories in the above manufacture with other firms and between themselves also."

He thus made a clear reference to the four firms in item 5. In items 6 to 10, 12 and 16 also the first respondent mentioned the documents and things of or relating to the said firms. He next stated that he had reason to believe that "the said firms" were not likely to produce the documents and things when asked for, that the said documents and things were likely to be tampered with, or otherwise disposed of, and it was not possible to obtain the said documents and things, without undue delay, otherwise than by "an immediate search of the premises of the said firms referred to below", that he was, therefore, "conducting simultaneous searches u/s 165 (1), Cr. P. C. at the following premises of the said firms on this day the 1st of January, 1968, immediately for seizure of the said documents and things to be found therein for purposes of the above investigation". He then set out the premises to be searched as—

- "(1) Office premises of M/s Punj Sons (P) Ltd., M/s. Fedders Lloyd Corporation (P) Ltd., M/s Lloyd Electric & Engineering Co. at M-13, "Punj House", Connaught Place, New Delhi; and
- (2) Factory premises of M/s Punj Sons (P) Ltd., and M/s Fedders Lloyd Sales Corp. at Kalkaji, New Delhi."

He thus made a clear mention of the five firms and the office premises at Connaught Place and the factory premises at Kalkaji. Reading the document Annexure 'A' as a whole, it is clear that the first respondent did record in writing the places or premises to be searched. Shri Chari then pointed out that in the First Information Report, the alleged offence was stated to have been committed by M/s Lloyd Electric & Engineering Company, that in the earlier part of Annexure 'A' reference was made to the office premises at Connaught place and the Factory premises at Kalkaji as belonging to M/s Lloyd Electric & Engineering Company, while in the last part of Annexure 'A', the office premises at Connaught Place were stated as belonging to three of the five firms, viz., M/s Punj Sons (P.) Ltd., M/s Fedders Lloyd Corporation (P.) Ltd., and M/s Lloyd Electric and Engineering Co., and the factory premises at Kalkaji as belonging to M/s Punj Sons (P.) Ltd., and M/s Fedders Lloyd Sales Corporation at Kalkaji.

It is true that in mentioning the names of the firms to which each of the premises to be search belonged, the first respondent was not quite consistent. But, in considering the question as regards compliance with the requirements of sub-section (1) of section 165 of the Criminal Procedure Code, the ownership and the names of the owners of the various premises to be searched are not as material as the places or premises. The question is as to whether the premises to be searched were clearly mentioned in the record made by the police officers under sub-section (1) of Section 165 of the Criminal Procedure Code. Reading Annexure 'A' (Annexure R-II) as a whole, it is clear, that the premises to be searched under section 165 (1) were clearly stated to be the office premises of three of the five firms at M-13, Punj House, Connaught Place, and the factory premises of the other two of the five firms at Kalkaji. He also clearly set out the documents and things for which search was to be made. We cannot, therefore, accept the argument of Shri Chari that the factory premises was not one of the premises to be searched mentioned in the record made by the first respondent under sub-section (1) of section 165 of the Criminal Procedure Code.

33. In the affidavits of the first respondent, it was stated that he had information to the effect that the five petitioner-concerns were all sister concerns of the Punj family, which was carrying on business under the name and style of and is controlling the said five concerns, that the said associate

concerns were all run by the same family members, that the accounts were inter-linked and the said firms were located in one premises at Connaught Place and, in fact, the same clerks used to attend to the work of all the firms, that the same was the information regarding the factory premises at Kalkaji, and that he had reasons to believe and was convinced that the documents and the things which were necessary for the purposes of his investigation into the alleged offence, which he was conducting, were to be found at the office premises and factory premises. Shri Chari argued that these reasons should have been given, if at all, in the record made under sub-section (1) of section 165 of the Criminal Procedure Code before the search was made, and that the giving of the said reasons in the affidavits at the present stage does not amount to a compliance with the requirements of sub-section (1) of section 165 of the Criminal Procedure Code. There is force in this argument of Shri Chari. But, without taking into consideration the aforesaid reasons or grounds as given in the affidavits, we have come to the conclusion that the reason for his belief, the places or premises to be searched, and the documents and the things for which search was to be made were all clearly stated in the record, Annexure 'A' and that the requirements of sub-section (1) of section 165 of the Criminal Procedure Code were complied with fully, or at any rate substantially. We, therefore, reject the first contention urged by Shri Chari that the search and the seizure made by the first respondent in the factory premises at Kalkaji were illegal, and that they were made in violation of the provisions in sub-section (1) of S. 165 of the Criminal Procedure Code.

34. The second contention of Shri Chari is that the search and the seizure made by the 2nd respondent in the office premises at Connaught Place were illegal on the ground that they were contrary to the mandatory provisions of sub-section (3) of section 165, Criminal Procedure Code, in that the first respondent did not make any order in writing recording his reasons for his being unable to conduct the search himself in person, and in that the first respondent did not deliver an order in writing to respondent No. 2 specifying therein the place to be searched and the things for which the search was to be made, and the second respondent did not have any such order as is contemplated by section 165 (3), Criminal Procedure Code, nor did he show any such order to the petitioner.

Sub-sections (2) and (3) of section 165 provide as follows:

"(2) A police officer proceeding under sub-section (1) shall, if practicable, conduct the search in person;

(3) if he is unable to conduct the search in person, and there is no other person, competent to make the search present at the time, he may after recording in writing his reasons for so doing require any officer subordinate to him to make the search, and he shall deliver to such subordinate officer an order in writing specifying the place to be searched and, so far as possible, the thing for which search is to be made; and such subordinate officer may thereupon search for such thing in such place." Sub-section (2) requires that it is the police officer who is proceeding under sub-section (1) that should, if practicable, conduct the search in person, but, sub-section (3) provides that if he is unable to so conduct the search in person, and there is no other person competent to make the search present at the time, the police officer may require any officer subordinate to him to make the search after recording in writing his reasons for so doing, and he should deliver to such subordinate officer an order in writing specifying the place to be searched and the thing for which the search is to be made. The argument of Shri Chari is that the first respondent did not make any order in writing recording his reasons for his being unable to conduct the search himself in person, that he did not deliver any order in writing to respondent No. 2 specifying therein the place to be searched and the things for which the search was to be made, and that the second respondent did not have any such order with him, nor did he show any such order to the petitioners. Averments to that effect were made by the petitioner in the writ petition. (After considering the affidavit and counter-affidavits, their Lordships continued).

We, therefore, believe the version of the respondents that the first respondent did pass the order, Annexure 'A', under section 165 (3) on 1-1-1968 and that V. P. Punj was in fact, shown the the order of requisition under S. 165 (3), Criminal Procedure Code, at the time of the search made by the second respondent in the office premises at Connaught Place.

35. The criticism that the first respondent did not set out the reasons for not conducting the search himself in person in the office premises at Connaught Place is again incorrect. (After repelling this contention their Lordships proceeded:) For the foregoing reasons, we hold that there is no substance in the second contention urged by Shri A. S. R. Chari on behalf of the petitioners.

36. The third contention of Shri A. S. R. Chari is that the searches and the seizures made by the two respondents were contrary to law and illegal for the reason that the copies of the record made under sub-sections (1) and (3) of section 165, Criminal Procedure Code, were not sent forthwith to the nearest Magistrate empowered to take cognizance of the offence as required by sub-section (5) of section 165 of the Criminal Procedure Code.

37. Section 165 (5) runs as under:

"(5). Copies of any record made under sub-section (1) or sub-section (3) shall forthwith be sent to the nearest Magistrate empowered to take cognizance of the offence and the owner or occupier of the place searched shall on application be furnished with a copy of the same by the Magistrate.

Provided that he shall pay for the same unless the Magistrate for some special reason thinks fit to furnish it free of costs".

Thus, sub-section (5) requires that copies of the records made under sub-section (1) and sub-section (3) should be sent forthwith to the nearest Magistrate empowered to take cognizance of the offence. As observed by Newbould and B. B. Ghose, JJ. in *Lal Mea v. Emperor*, AIR 1926 Cal 663, the provision in sub-section (5) of section 165, which was introduced by amendment of the section in 1923, is intended as an extra safeguard to protect individuals against general or roving searches. The safeguard consists in that the search, when the record is sent forthwith to the Magistrate as provided in sub-section (5) of section 165, Criminal Procedure Code, would be in the knowledge of the Magistrate, who, if he considers it necessary, might even be present at the place of search and see that the search is made in accordance with law. It is thus an important and valuable safeguard, and the requirement in sub-section (5) should be fulfilled by the police officer. If the police officer omits to send the record made under sub-sections (1) and (3) forthwith to the nearest Magistrate, the search made by him would not be one in accordance with the provision in the section of the Code, and would, therefore, be irregular in law.

38. Here also, the question arises as to whether the provision in sub-section (5) of section 165 is mandatory or directory. It is true that the word "shall" is used in sub-section (5). But, having regard to the object or the purpose of section 165 as a whole and of the provision in sub-section (5) of section 165, the provision in sub-section (5) of section 165 cannot be regarded as mandatory. The entire object in conferring the power to search upon a police officer under

section 165 is, as already stated, to enable the police officer to secure evidence regarding an offence which is being investigated by him. It is quite possible that there may be a situation in which, for reasons beyond his control, the police officer may not be able to send the record forthwith to the nearest Magistrate. Even in such a case, the search would become bad in law, if the provision in sub-section (5) is regarded as mandatory, and the entire purpose of conferring the power to search upon the police officer by section 165 would be defeated. Such a contingency would not have been intended by the legislature. Therefore, in our opinion, the provision in sub-section (5) of section 165, Criminal Procedure Code, has to be regarded as directory. This again does not mean that the police officer has a discretion to fulfil or not to fulfil the requirement of sub-section (5). The said requirement has to be fulfilled by a police officer who seeks to exercise the power to search under section 165. One consequence of the provision in sub-section (5) being directory is, that in a case in which the police officer is not able to fulfil the requirement in the sub-section for reason beyond his control or for other justifiable reasons, the search would not be regarded as bad in law merely because of the non-fulfilment of the requirement in sub-section (5).

39. In the present case, it was alleged in the writ petition that the records made under sub-sections (1) and (3) were not sent to the nearest Magistrate who was empowered to take cognizance of the offence in question. In the affidavit of the first respondent, dated 14-1-1968, filed by him in the petition C.M. No. 113 of 1968 for directions, it was stated by him in paragraph 7 that copies of the records were made under sub-sections (1) and (3) to "the Special Magistrate". The name of the Special Magistrate was not, however, stated. But, in the affidavit of the first respondent, dated 21-1-1968, filed by him in reply to the writ petition, it was stated in paragraph 9 that "copy of the record made under section 165 (3), Criminal Procedure Code and copies of the seizure list were also sent to the Magistrate, 1st Class, Delhi, though there was some delay as the same was sent on 10-1-1968 when the deponent returned from tour which he had to undertake on Government duty immediately after the search and seizure on 1-1-1968, though the record prepared under section 165 (1) Criminal Procedure Code, was sent to the Magistrate on the day of the search". Thus, the record made under sub-section (1) was stated to have been sent to "the Magistrate" on 1-1-1968, while the record made under sub-section (3)

was stated to have been sent to "the Magistrate, 1st Class, Delhi", on 10-1-1968. But, it was stated by the 1st respondent in Annexure R-1, the order of requisition made by him under sub-section (3) on 1-1-1968, that the record made under sub-section (1) was sent to "the Magistrate, 1st Class, Delhi".

40-44. (Their Lordships considered the affidavits and counter-affidavits and proceeded:)

45-46. So far as the record made under section 165 (1) is concerned, it was sent to Shri R. N. Mehrotra, Magistrate, 1st Class, on 1-1-1968 itself. The criticism levelled against it by Shri A. S. R. Chari is that while the First Information Report was forwarded to Shri M. S. Joshi, Special Judge, Delhi, the record made under section 165 (1) was sent to the Magistrate, 1st Class, Delhi, who was not the Magistrate who could take cognizance of the offence which was being investigated into. In answer to the said criticism, Shri Prakash Narain, the learned counsel for the respondents, pointed out that the offence which was being investigated into was alleged to be under section 120B, Indian Penal Code, read with section 420, Indian Penal Code, and section 5 (2) of the Prevention of Corruption Act No. II of 1947, that there is a distinction between the trial of an offence and the taking of cognizance of an offence, that under sub-section (5) of section 165, Criminal Procedure Code, the records made under sub-sections (1) and (3) of section 165 have to be sent to the nearest Magistrate empowered to take cognizance of the offence, that the offence under the above mentioned sections of the Indian Penal Code and the Prevention of Corruption Act could be taken cognizance of by the Magistrate, 1st Class, Delhi, and that, therefore, the record made under sub-section (1) of section 165 was sent forthwith to the nearest Magistrate empowered to take cognizance of the offence within the meaning of sub-section (5) of Section 165. In our opinion, the said answer of Shri Prakash Narain has to be accepted.

47. The offence that was being investigated into was alleged to have been committed under section 120B, Indian Penal Code, read with section 420, Indian Penal Code, and section 5 (2) of Act II of 1947. So far as the offence under Section 420 of the Indian Penal Code is concerned, the Magistrate, 1st Class, Delhi, could take cognizance of the same by virtue of the provisions in Section 190 of the Criminal Procedure Code. But, under Section 7(1) of the Criminal Law Amendment Act, 1952, notwithstanding anything contained in the Code of Criminal Procedure or in any other law, the offence under section 5 (2) of

the Prevention of Corruption Act, and the offence of conspiracy (section 120B) to commit the offence under section 5 (2) of the Prevention of Corruption Act, (sic) Under Section 8 of the Prevention of Corruption Act, the Special Judge may take cognizance of the offences under the Prevention of Corruption Act without the accused being committed to him for trial. The argument of Shri A. S. R. Chari is that since in the present case the offence under section 120B, Indian Penal Code, read with section 5 (2) of the Prevention of Corruption Act is triable only by a Special Judge, who may also take cognizance of the said offence, the records made under sub-sections (1) and (3) of section 165, Criminal Procedure Code, should have been sent under section 165 (5), Criminal Procedure Code, to the Special Judge, and not to the Magistrate, 1st Class, Delhi. This argument ignores the fact that section 7(1) of the Criminal Law Amendment Act speaks of a "trial" by the Special Judge, while sub-section (5) of section 165, Criminal Procedure Code, refers to a Magistrate empowered "to take cognizance of the offence". It is true that section 8 of the Criminal Law Amendment Act provides that the Special Judge may take cognizance of the offence without the accused being committed to him for trial. But, a plain reading of the said section 8 shows that though a Special Judge may take cognizance of the offence without there being any committal proceedings, section 8 does not deprive a Magistrate of his power to take cognizance of such an offence under section 190, Criminal Procedure Code, though he would not have the power to try the offence. The scheme of the Criminal Procedure Code and the various provisions therein relating to the taking cognizance of an offence and the trial of a criminal case, show that there is a distinction between the taking of the cognizance of an offence and the trial of the said offence. The stage of trial has to be distinguished from the stage of taking cognizance of an offence. Under section 7 (1) of the Criminal Law Amendment Act, the exclusive jurisdiction given to the Special Judge is only as regards the trial of the offence. As regards the jurisdiction to take cognizance of the offence, section 8 no doubt conferred the same on the Special Judge, but did not make it the exclusive jurisdiction of the Special Judge. Therefore, so far as the taking of cognizance of the offence is concerned, a Magistrate as well as the Special Judge can take cognizance of the offence. A similar view was taken by Gokhale and Miabhoy, JJ. in *State v. Shankar Bhanrao*, AIR 1959 Bom 437. On a careful and elaborate consideration of the various aspects and the

various provisions in the Criminal Procedure Code bearing on this question, the learned Judges held, in terms of the head-note 'A' to the report—

"A magistrate, who is empowered to take cognizance of any offence upon a report in writing by any police officer, has got jurisdiction to take action on a report submitted to him under S. 174, Criminal Procedure Code, by a police officer after completing investigation with reference to offences which are exclusively triable by a Special Judge under section 7 (1) of the Criminal Law Amendment Act, 1952".

With respect, we agree with the reasoning of the learned Judges in the said decision. In the present case, the record made under sub-section (1) of S. 165, Criminal Procedure Code, was sent to Shri R. N. Mehrotra, Magistrate, 1st Class, Delhi, on 1-1-1968. There was, therefore, full compliance with the requirement under sub-section (5) of section 165, Criminal Procedure Code, so far as that record is concerned.

48. As regards the record made under sub-section (3) of section 165, Criminal Procedure Code, it was submitted to Shri N. L. Kakkar, Special Magistrate, 1st Class, Delhi, by the first respondent for the first time on 10-1-1968. The first respondent gave an explanation that 2-1-1968 was a holiday, that he left for Bombay on 3-1-1968 on Government duty, and returned only in the afternoon of 9-1-1968, and that he submitted the record on 10-1-1968 to Shri N. L. Kakkar, Special Magistrate. Even if this explanation is accepted, the fact still remains that the record made under sub-section (3) of Section 165, Criminal Procedure Code, was submitted to Shri N. L. Kakkar, Special Magistrate, only on 10-1-1968 i. e. after the search was completed. There is no explanation forthcoming as to why the record was not sent on 1-1-1968 itself or at least before the search was completed. We have pointed out above that the sending of the record forthwith to the Magistrate under sub-section (5) of Section 165 is an important and valuable safeguard against general or roving searches, and that the safeguards consist in that the Magistrate would, if necessary, be able to watch the search and satisfy himself that it is in accordance with law. Therefore, this safeguard and the very purpose of the provision in sub-section (5) of section 165 were defeated by the submission of the record made under sub-section (3) of section 165 to the Special Magistrate on 10-1-1968 after the search was completed. It follows that the search made by the second respondent in the office premises in Connaught Place on 1-1-1968 was not at all in accordance with the provisions

of sub-section (5) of section 165, Criminal Procedure Code, and was, therefore, irregular in law.

49. We, therefore, hold that the search and the seizure made by the first respondent in the factory premises at Kalkaji on 1-1-1968 were quite in accordance with the provision in section 165, Criminal Procedure Code, and were valid in law, and that the search made by the second respondent in the office premises at Connaught Place on 1-1-1968 was not in accordance with the provisions of sub-section (5) of section 165, Criminal Procedure Code, and was, therefore, irregular in law.

50. The question then is as to what the effect of the said irregular search is? Shri A. S. R. Chari referred us to an observation of the Supreme Court in, AIR 1968 SC 59 at p. 67, that—

"as the safeguards provided in section 165 of the Code of Criminal Procedure were not followed, anything recovered on a defective search of that kind must be returned."

In that case, the High Court of Madras struck down sub-sections (2) and (3) of section 41 of the Madras General Sales-tax Act, No. 1 of 1959, on the ground that they were unreasonable restrictions on the right to hold property and to carry on trade. The reasons given by the High Court were that there was no safeguard provided for search made under the said sub-sections, and that section 165 of the Code of Criminal Procedure did not apply to searches made under sub-section (2) of the said Act. The Supreme Court held that the High Court was in error in assuming that section 165 of the Code of Criminal Procedure would not apply to searches under sub-section (2) of the Act, and that the proviso to the sub-section (2) itself provided clearly that all searches made under the sub-section, so far as may be, shall be made in accordance with the provisions of the Code of Criminal Procedure. Thus, the Supreme Court held that section 165 and the safeguards therein apply to searches made under sub-section (2) of the Madras General Sales-tax Act. Their Lordships then enumerated the safeguards provided in section 165. It may be mentioned here that though their Lordships did not specifically refer to sub-section (1) of section 165, the safeguards enumerated in the judgment were only those contained in sub-section (1) of section 165. Their Lordships then observed that the said safeguards apply to the search made under sub-section (2) of the General Sales-Tax Act, and that therefore, the power to search given under sub-section (2) was not arbitrary and consequently the restriction, if any, on the right to hold property and to carry on trade, by the search provided in sub-

section (2) cannot be said to be an unreasonable restriction keeping in view the object of the search, namely, prevention of evasion of tax. In that view, the question arose as to what order should be passed regarding the seizure made in that particular case by the departmental authorities under sub-section (3) of section 41 of the Madras General Sales-tax Act. The High Court of Madras had held that the warrant for search issued in that case was bad for the reason that the Magistrate did not apply his mind to the question of issuing the search warrant, apart from its decision that sub-sections (2) and (3) of section 41 of the Madras General Sales-Tax Act, were ultra vires. The said conclusion of the High Court that the search was defective was not challenged in the Supreme Court. Thus, the finding of the High Court that the search was defective remained. Since the Supreme Court upheld the validity of sub-sections (2) and (3), and the search was held to be defective, the question arose as to what order should be passed in the appeals before the Supreme Court. In considering the said question, their Lordships made the observation relied upon by Shri A. S. R. Chari. It has to be noted that the effect of the non-fulfilment of the requirement in sub-section (5) of section 165, Criminal Procedure Code, was not, as such, in question before the Supreme Court in that case. Further, sub-section (3) of section 41 of the Madras General Sales-tax Act provides that the officer who makes the search under sub-section (2) may seize accounts, of the concerned dealer, and also that the said accounts, etc. so seized shall be retained by such officer so long as may be necessary for their examination and for any enquiry or proceeding under the Act. It was in those circumstances that their Lordships made the observation relied upon by Shri A. S. R. Chari.

51. The said decision of the Supreme Court cannot, therefore, be regarded as having laid down as a general rule that in every case of search in which the requirements in sub-sections (1) and (5) of section 165, Criminal Procedure Code, are not fulfilled, the documents or things recovered in such defective search must necessarily be returned to the aggrieved party. It is true that in the case of such a defective search, the Court has the power to direct the return of documents or things seized during such defective search. But, it cannot be said that the Court must do so or is bound to do so in every case. The Court has to consider the circumstances of each and pass such order as it might consider proper.

52. As already pointed out above, it has been held in some decisions that even though a search is not made in ac-

cordance with the requirements of section 165 of the Code of Criminal Procedure, it does not vitiate the seizure and does not make the evidence of seizure inadmissible, and also that it does not vitiate the trial or conviction if there is no miscarriage of justice or any prejudice to the accused. (See AIR 1965 Orissa 136; AIR 1963 SC 822 at p. 824, AIR 1961 Ker 8 (FB); 1953 Trav-Co. 466; (1963) 65 Pun LR 1128; and (1962) 64 Pun LR 403). So also, it has been held that the failure to comply with the provisions in section 165 (5) does not vitiate the trial or conviction, if the failure to comply was bona fide and not mala fide. (See AIR 1959 Mad 544). Thus, when in a case a defective search is made, and the case is still at the stage of investigation, and has not reached the stage of trial or conviction, it is open to the Court to take into consideration the said circumstance, as well as the legal position that notwithstanding that the search is defective because of the failure to comply with the provision in section 165 (5), Criminal Procedure Code, the evidence of seizure would not be inadmissible and the trial of the case would not be vitiated, and to refuse to direct the return of the documents and things seized in the course of the said defective search, provided, of course, the court is satisfied that the search and the failure to comply with section 165 (5), Criminal Procedure Code, were not mala fide.

53. In the present case, no doubt, no explanation is forthcoming as to why the record made under sub-section (3) of section 165, Criminal Procedure Code, was not sent forthwith to the nearest Magistrate on 1-1-1968 itself, and the explanation given by the first respondent was only as regards his absence from Delhi from 3-1-1968 till 9-1-1968. But, there is nothing on the record which shows that the said failure to comply with the provision in section 165 (5) Criminal Procedure Code, was mala fide. Further, in the present case, the investigation is not yet completed, and it is represented by the learned counsel for the respondents that the documents and things seized from the office premises at Connaught Place also are required for the purposes of the investigation. We are, therefore, of the opinion that on the facts of this case, the documents and things need not be directed to be returned to the petitioners, in the exercise of our discretion under Article 226 of the Constitution. A similar view was taken by a Division Bench (I. D. Dua, C. J. and S. N. Shankar, J.) of this Court, to which one of us was a party, in *P. Dharam Singh & Co. (P) Ltd. v. Inspector-General of Police*, (1968) Cr. Writ No. 83 of 1967 (Delhi). On the ground that the investigations into the complaint

registered by the police were pending, the Division Bench, in their judgment, dated 19-2-1968, declined to exercise their discretion to accede to the prayer of the petitioner for a direction to the respondents in that case to return the documents etc. seized from the petitioner-company.

54. For the above reasons, the five writ petitions fail, and are dismissed.

RGD

Petitions dismissed.

**AIR 1969 DELHI 45 (V 56 C 10)
FULL BENCH**

**S. K. KAPUR, HARDAYAL HARDY
AND T. V. R. TATACHARI, JJ.**

Mohd. Iqbal, Petitioner v. Superintendent, Central Jail, Tehar, New Delhi and others, Respondents.

Criminal Writ No. 2 of 1968, D/- 17-5-1968.

(A) Public Safety — Preventive Detention Act (1950), S. 3 (1) (a) — Subjective satisfaction of detaining authority subject to certain exceptions, is not justiciable — Such satisfaction cannot be tested by objective tests—Grounds on which order can be struck down, stated.

The order under section 3 (1) (a) is to be made on the subjective satisfaction of the detaining authority. That subjective satisfaction is, subject to certain exceptions not justiciable. The detenu cannot, therefore, ask the Courts to test the satisfaction of the detaining authority by application of objective tests. The subjective satisfaction is in certain aspects open to judicial review but the area thereof is limited. For instance, the detenu may contend that the grounds supplied to him could not possibly lead a reasonable mind to the conclusion arrived at by the detaining authority. In testing such a contention, the Courts cannot go into the inadequacy of the materials on which the satisfaction is founded. The Court can strike down the detention order if,

(a) the grounds furnished to the detenu are found to be extraneous or irrelevant in the sense that they are foreign and not germane to the matters which fall to be considered under the relevant statute; or

(b) the grounds furnished are such as deprive the detenu of the constitutional right of making a representation against the order as guaranteed by Article 22 (5) of the Constitution; or

(c) the order is mala fide; or

(d) there is a violation of the constitutional provisions such as supply of all the grounds on which the order of detention has been made; or

(e) there has been a non-application of mind by the detaining authority.

(Para 9)

In support of the plea that the authority concerned has not applied his mind or the order is mala fide, a detenu can legitimately contend that on the facts on which the detention order has been based no reasonable mind could have come to the conclusion that detention was necessary. Further the validity of the satisfaction of the detaining authority has to be considered on the facts and circumstances of each case. Held on facts that reliance on past activities of petitioner was not invalid as his existing membership of the syndicate etc., would be a factor proximate in point of time to justify the making of an order of detention. Moreover, the nature of the activities alleged were of the type that if they were carried on in 1963-1964 they could not be termed as so remote as to be destructive of the validity of the order. AIR 1964 SC 334 and AIR 1964 SC 1120 and AIR 1964 SC 1128 Ref.

(Paras 10 and 13)

(B) Public Safety—Preventive Detention Act (1950), S. 3 (1) (a) and (b) — Provisions have to be read independently—S. 3 (1) (b) authorises detention of a foreigner with a view to regulate his continued presence in India — Provision of S. 3 (1) (b) is not ultra vires the legislature and is well within Entry 9 List III and Entry 3 List I of Seventh Schedule to the Constitution. (Para 14)

(C) Public Safety — Preventive Detention Act (1950), S. 3 (1) (a) and (b) — Detention order — Validity — Vagueness of some of the grounds would render the order invalid.

If some of the grounds served on the detenu are vague and do not convey proper particulars to enable the detenu to make a representation, the detention would be illegal being violative of the constitutional right of making an effective representation. One of the grounds in the detention order stated that the detenu had been coming to India at regular intervals without valid passport documents. In the additional facts supplied it was stated that he started coming to India "from the end of 1963 onwards" without giving the dates or when precisely he came to India without valid passport documents. Again another ground omitted to give any particulars on the basis of which the detenu could make an effective representation. The State having claimed privilege under Article 22 (6) from disclosing the grounds, Held that provisions of Art. 22 (5) were violated since the detenu was not in a position, having regard to the facts, to make an effective representation. The said two grounds being vague the detenu was entitled to succeed subject to the

State's claim for privilege under Art. 22 (6). AIR 1968 SC 1303 and AIR 1951 SC 157 Rel. on.

(Para 17)

Requirements of Art. 22 (5) are two (i) the authority making the detention order shall, as soon as may be, communicate to such person the grounds on which the order has been made; and (ii) shall afford him the earliest opportunity of making a representation against the order. Implicit in the requirement to afford the earliest opportunity of making a representation is the requirement to supply particulars and facts on which the detention order has been based. If in a case proper particulars are not furnished, the detaining authority may supply him further particulars and the requirements of Article 22 (5) would be met if the further particulars are supplied within such time as not to take away the earliest opportunity of making a representation. It follows logically that supply of further facts is also the requirement of Article 22 (5). Under clause (6) of Article 22 the detaining authority has been given a privilege to withhold facts the disclosure of which would, in the opinion of such authority, be against public interest. Further supply of further particulars would also, therefore, be a requirement of clause (5) of Article 22 and consequently by reason of the overriding nature of Article 22 (6) the right to claim privilege will extend as much at the time of supplying further particulars as at the time of the initial stage. The detaining authority can at the time of supplying further particulars say that having regard to the public interest it could only disclose to a certain extent. That would be so because by virtue of clause (6) of Article 22 "nothing in clause (5) shall require the authority making any such order as is referred to in that clause to disclose facts which such authority considers to be against the public interest to disclose." In short the right of non-disclosure will overlie the mandates of Article 22 (5) as to supply of the particulars in the grounds of detention and at a subsequent stage. Held on facts that privilege was validly claimed. AIR 1956 SC 531, Dist. (Para 18)

(D) Public Safety — Preventive Detention Act (1950), S. 3 (1) (b) — Validity — Provisions do not give unlimited power to executive to pick and choose any foreigner for being subjected to preventive detention — Provisions do not violate Art. 14 of the Constitution.

Section 3 (1) (b) of the Preventive Detention Act does not give unlimited powers to the Executive to pick and choose any foreigner for being subjected to preventive detention. This clause applies to all foreigners and there are sufficient guiding principles governing the

exercise of power by the Executive. Such a detention is authorised only with a view to regulating the continued presence in India of a foreigner within the meaning of the Foreigners Act, 1946 or with a view to making arrangement for the expulsion of such foreigner from India. The detaining authority has to apply his mind to the facts and is required, as soon as may be but not later than five days from the date of detention, to communicate to him the grounds on which an order has been made. Provision is also made for the earliest opportunity of making a representation against the order to the appropriate Government. In the face of these safeguards, it cannot be said that sub-section (1) of section 3 of the Act is hit by Article 14.

(Para 23)

Cases Referred: Chronological Paras
(1968) AIR 1968 SC 1303 (V 55) =
Criminal Appeal No. 183 of 1967,
D/- 1-12-1967, Rameshwar Lal v.
State of Bihar 15, 15B
(1965) Cri Writ Petn. No 48-D of
1965 D/- 10-5-1968 (Punj) 2, 3
(1964) AIR 1964 SC 334 (V 51) =
1964 (1) Cri LJ 257, Rameshwar
Shaw v. Dist. Magistrate, Burd-
wan 10, 11A
(1964) AIR 1964 SC 1120 (V 51) =
1964 (2) Cri LJ 217, Makhan Singh
v. State of Punjab 11, 11A
(1964) AIR 1964 SC 1128 (V 51) =
1964 (2) Cri LJ 222, Godavari
Shamrao v. State of Maharashtra 11
(1956) AIR 1956 SC 531 (V 43) =
1956 SCR 382 = 1956 Cri LJ 935,
Lawrence Joachim Joseph D'souza
v. State of Bombay 18
(1951) AIR 1951 SC 157 (V 38) =
52 Cri LJ 373, State of Bombay
v. Atma Ram 15B
Harjinder Singh and Ravinder Nath,
for Petitioner; Bishamber Dayal and
V. D. Misra, for Respondent.

S. K. KAPUR, J.: The petitioner, who is a Pakistan national, was arrested by the Customs Authorities on 18th October, 1964, in pursuance of a raid at D-115, Defence Colony, New Delhi, under section 104 of the Customs Act. He was produced before the Additional District Magistrate on 19th October, 1964, and ordered to be released on bail.

2. Regarding the amount of bail there is a controversy between the parties as, according to the petitioner, he was ordered to furnish a bail bond in the sum of Rs. 3,000/- which was subsequently increased to Rs. 5,000/-, but, according to the supplementary affidavit of the respondents, the bail amount was Rs. 20,000/- with one surety which was enhanced by the learned Sessions Judge to Rs. 30,000/- with two sureties. Before the petitioner could be actually released from jail by furnishing bail bond he

was served with an order under cl. (g) of sub-section (2) of section 3 of Foreigners Act (31 of 1946). The petitioner challenged the said order by a writ petition filed in the Punjab High Court which was dismissed on 26th November, 1964. The petitioner again challenged his detention by another writ petition (Criminal Writ Petn. No. 48-D of 1965 (Punj)) before the Punjab High Court, but that was also dismissed on May 10, 1968. The petitioner was also proceeded under section 5 of the Registration of the Foreigners Act. He pleaded guilty and was sentenced to two months rigorous imprisonment.

On 28th June, 1965, a complaint was filed against the petitioner under section 182/109, Indian Penal Code, and he was ordered to pay a fine of Rs. 200/-. On 19th August, 1965, an order was made against the petitioner under sub-section (1) of section 4 of the Foreigners Act when the petitioner was in detention under section 3 (2) (g) of the said Act, inter alia, directing that the detenu shall not be taken out of the jail for any purpose without the previous permission of the Administrator of Delhi. The petitioner then made an application to the Court of the Additional District Magistrate praying that he should be allowed to withdraw the personal bond of Rs. 5,000/- and be remanded to judicial custody.

3. There is another application, dated 31st May, 1965, by the petitioner in the case A. C. Customs v. Mohd. Iqbal, under section 104/135, Customs Act, 1962, against him, inter alia stating—

"In the above-noted case my personal bond may be cancelled as I do not want to remain on bail any more in the above-mentioned criminal case."

It is alleged by the petitioner that upon his application before the Additional District Magistrate, a regular challan was directed to be put in against the petitioner, as early as early as possible. The petitioner's application for special leave to appeal against the decision of the Punjab High Court in Criminal Writ No. 48-D of 1965 (Punj) and a petition under Article 32 of the Constitution challenging his detention were dismissed by the Supreme Court. From paragraph 9 of the petition it appears that he filed one more special leave petition against the judgment of the Punjab High Court which was also dismissed on 31st March, 1966, but since nothing turns on those decisions so far as the present case is concerned, it is unnecessary to go into further details thereof.

4. On the petition of the petitioner under section 561-A of the Criminal Procedure Code in which the petitioner had inter alia prayed for a direction

that the challan be filed against him in the criminal case, H. R. Khanna, J. in his order dated January 3, 1966, observed—

"The detention order has been made to enable the Customs Authorities to complete enquiries into the various activities of the petitioner, and Mr. Bishamber Dayal, on behalf of the respondents, states that every effort is being made to expedite the matter. According further to him, the Customs Authority would finalise the matter and file a complaint against the petitioner within about three months."

Khanna J. dismissed the petition with the above observations and a complaint was filed against the petitioner under section 135 of the Customs Act, S. 23 (1) (A) of the Foreign Exchange Regulation Act and section 120B, Indian Penal Code, which is pending and in which there are in all 43 persons accused. It is pertinent to point out that the petitioner made two confessional statements on 18th October, 1964, and 19th October, 1964, giving detailed version of his activities regarding smuggling of the gold which, according to the petitioner, he was forced to make under coercion. On 30th October, 1967, the petitioner made an application in the Court of Shri H. L. Sikka, Magistrate First Class, praying that he was willing to plead guilty and, therefore, his case be separated from that of the other accused persons and he be convicted and sentenced according to law. This petition was also signed by the petitioner's counsel, Mr. Harjinder Singh.

There is still another application, Annexure 'O' (Cr. Misc. No. 486 of 1967) to the State's supplementary affidavit made by the petitioner in this Court praying that the criminal case against the petitioner be separated from the case of the other accused persons and the Magistrate be directed to record the petitioner's confession. On 8th January, 1968, the order of detention of the petitioner under section 3 (2) (g) of the Foreigners Act was rescinded and that order along with the impugned order of detention was served on the petitioner on 9th January, 1968, in jail. The impugned order is dated 9th January, 1968, made by the Administrator, Union Territory of Delhi, directing the detention of the petitioner under clause (b) of sub-section (1) of S. 3 of the Preventive Detention Act with a view to regulating the petitioner's continued presence in India. The grounds of detention were served on the petitioner on 12th January, 1968, which it is necessary to reproduce—

"1. That, acting on the information that you, under the assumed name Lachman, were receiving and disposing of smuggled gold at your premises, No. D/-115-Defence Colony, your premises

were searched by Customs officials on 18-10-1964.

2. That, at the time of search, Jasbir Singh, Kartar Singh, Krishan Chand and Ram Chand were found besides you, in that house. Before the identity of Kartar Singh could be established he managed to escape from the premises. The identity of Kishan Chand was established as Mahoob Ali S/o Ali Bux, House No. 686, Bazar Simran, inside Bhatigate, Lahore (Pakistan). The identity of Ram Chand was established as Akhtar Ishitiaeque son of Nazir Hassan, House No. 9-Mustaffa Welfare Town, Habib Ganj, Lahore.

3. That you are an important executive of a powerful gold smuggling syndicate of Lahore engaged in smuggling of gold from Pakistan to India and the transfer of sale proceeds of the smuggled gold in foreign currency out of India. In connection with your smuggling business, you have been coming to India at regular intervals without valid passport documents.

4. That in connection with the smuggling business, you have devised a Code and a key to disguise the messages sent and received in connection with the receipt of contraband gold and with the help of Indians purchased cars with great cavities designed therein.

5. That you were arrested under the Customs Act and granted bail, you were also detained under the provisions of section 3 (2) (g) of the Foreigners Act by the Ministry of Home Affairs, but that order has now been rescinded.

6. That your being at large will be a constant danger to the economy of India by continuing to act as agent to the operation and extending their contacts and activities.

7. That I am satisfied that you are likely to continue to act in furtherance of your aforesaid activities and that it is necessary to regulate your presence in India. With a view, therefore, to regulate your continued presence in India, I have passed the order of your detention under clause (b) of sub-section (1) of section 3 of the Preventive Detention Act, 1950 (IV of 1950)."

The petitioner made in representation against his detention and in paragraph 8 (3) thereof he, inter alia, stated that—

"In fact it is not clear to the petitioner, as to what 'syndicate' signifies? However, the petitioner has been challenged for smuggling of gold and on account of detention, he is prepared to plead guilty to the charges."

In paragraph 8 (4) he said—

"As regards ground No. 4, it is absolutely wrong and denied."

4A. The learned counsel for the petitioner informs us that before the Advisory Board the petitioner stated that the

grounds of detention served on him were vague and the Government expressed willingness to furnish further facts to the petitioner. The Advisory Board, therefore, adjourned the proceedings and the petitioner was supplied with further facts. In the memorandum signed by the Administrator conveying further facts to the petitioner, it is said—

"I am satisfied that it is against the public interest to disclose to you facts and particulars regarding the quantity of gold smuggled, the names of other members of the gang of which Shri Mohd. Iqbal is an associate, the dates, places and persons whom he contacted, the nature of his activities, the assistances, communications made, persons, agents and means employed or otherwise, other than those which have already been mentioned, as also the details of the cars purchased."

This memorandum is not dated but it was not argued before us that further facts were supplied to the petitioner late in derogation of his right under clause 5 of Article 22 of being given earliest opportunity of making representation. The petitioner's detention was, however, confirmed by the Advisory Board. The further particulars supplied to the petitioner are—

"1. In ground No. 1 the premises D/115, Defence Colony, were in occupation of Shri Mhd. Iqbal.

2. In ground No. 2 S/Shri Jasbir Singh, Kartar Singh, Kishan Chand and Ram Chand are the associates of Shri Mohd. Iqbal. It may be mentioned here that Kishan Chand is the alias of Mehboob Ali, and Ram Chand is the alias of Akhtar Ishitiaeque, both of whom are Pakistani nationals.

3. In ground No. 3 the Gold Smuggling Syndicate mentioned therein is headed by one Mohd. Aslam who has an Oil Factory on Multan Road in Lahore. In regard to the coming of Shri Mohd. Iqbal to India at regular intervals without valid passport documents, it may be mentioned that he started coming to India from the end of 1963 onwards.

4. In ground No. 4 the Indians mentioned therein are the same as are mentioned in ground No. 2 and who are the associates of Sh. Mohd. Iqbal." As will appear from this judgment later we are more concerned with ground Nos. 3 and 4. The said grounds will, when further particulars are incorporated therein, read as under:

"(3) That you are an important executive of a powerful gold smuggling syndicate of Lahore engaged in the smuggling of gold from Pakistan to India and the transfer of sale proceeds of the smuggled gold in foreign currency out of India and the said syndicate is headed by one Mohd. Aslam who has an oil factory at

Multan Road in Lahore. In connection with your smuggling business, you have been coming to India at regular intervals without valid passport documents, and you started coming to India from end of 1953 onwards.

(4) That in connection with the smuggling business, you have devised a Code and a key to disguise the messages sent and received in connection with the receipt of contraband gold and with the help of Indians purchased cars with great cavities designed therein. The Indians mentioned above are the same as we mentioned in ground No. 2 and who are associates of Sh. Mohd. Iqbal."

5. Having continuously remained in jail since 18th October, 1964, and having failed in various attempts to secure his release or even his conviction in the case pending under section 135 of the Customs Act the petitioner filed the present petition challenging the order of detention dated 9th January, 1968, under clause (b) of sub-section (1) of section 3 of the Preventive Detention Act. The learned counsel for the petitioner vehemently contended that the petitioner was willing to confess his guilt in the pending case and willing to suffer the imprisonment which may extend up to a maximum of five years and fine, but still he was being detained under the Preventive Detention Act, for ulterior motives. This in short is the history of petitioner's struggle to secure his release and now we have been called upon to pronounce upon the validity of the impugned order.

6. The petition came up for hearing before my Lords Hardy and Tatachari, JJ. who by order dated 21st February, 1968, referred it to a larger Bench. The two contentions that persuaded Hardy and Tatachari, JJ. to refer the matter to a larger Bench were—

(1) Whether sections 3 (1) (a) and 3 (1) (b) of the Preventive Detention Act should be read together or independently; and

(2) The prejudicial activities on which the detaining authority purported to base his satisfaction were more than three years old and too remote in point of time to have any rational connection with the conclusion reached by the authority that the detention of the petitioner was necessary.

Subsidiary to the second contention was the contention that the service of the order of detention was not valid as at that time the petitioner was already in jail and, therefore, incapable of indulging in any prejudicial activities. This is how the matter has come before us.

7. There is difference of opinion between the parties on the question whether the bail order in favour of the petitioner

still subsists or not. According to the petitioner it is not, inasmuch as he was arrested by the Customs Authorities before the presentation of the challan under section 104/135, Customs Act, and a fresh bail was required after the challan had been presented and, in any case, the challan against the petitioner was not only under section 135 but also under section 23 (1) (A) of the Foreign Exchange Regulation Act and section 120B, Indian Penal Code. According to the supplementary affidavit of the respondents, however, "the bail order still remains in force". Even in ground No. 5 of the grounds of detention it is said "that you were arrested under the Customs Act and granted bail." The petitioner not having placed sufficient materials before us on this aspect, I would proceed on the assumption that the bail order is in force. In the circumstances that obtain in this case it calls for more than ordinary care lest the activities alleged against the petitioner should induce any prejudice against dispassionate scrutiny. Courts recognise and adhere to the principle that where rule of law thrives, fears and suspicions perish. The prison walls in this country are not indices of either arbitrariness or suppression of liberties of persons within our country but of our determination to maintain the rule of law and suppress disorder. There may be errors or overzealousness on the part of the executive but the Courts endeavour to rectify both and maintain the dignity of persons under the protection of our laws. With full consciousness of the fact that constitutionalism has never been more important than today, I proceed to examine the rival contentions of the parties.

8. The high traditions of the Bar as partners in the administration of justice have been amply demonstrated in this case by industry and fairness in the presentation of the case by both the learned counsel. The learned counsel for the petitioner raised the following contentions.

(1) When a person is confined in jail the freedom of his activities is controlled and there cannot be a valid order made under section 3 of the Preventive Detention Act or served on him when in jail custody.

(2) When a person is detained for specific offence no order under the Preventive Detention Act can validly be passed as it would be circumventing the provisions of the Criminal Procedure Code and denying to the detenu the statutory right of supervision by the Court.

(3) The grounds furnished are vague and indefinite and some of them are irrelevant and non-existent thereby depriving the petitioner of his constitu-

tional right of effective representation as envisaged by Article 22 (5) of the Constitution.

(4) The detention order has been passed for a collateral purpose and is mala fide. The detaining authority appears to have acted mechanically on the advice of the Customs Authorities who want to punish the petitioner for past acts and to extort a confession in pending cases to be used against persons who are standing trial with the petitioner in the criminal case.

(5) The detention of the petitioner has no rational or direct connection with the purpose set out in Section 3 of the Preventive Detention Act and is, therefore, illegal and outside the scope of the Act. Section 3(1) (b) must be read with Section 3 (1) (a) of the Act and in that situation the petitioner could be detained under Section 3 (1) (b) only if the detaining authority was satisfied that it was necessary to prevent him from acting in any manner prejudicial to the various matters set out in sub-clauses (i), (ii) and (iii) of clause (a) of Section 3. If Section 3 (1) (a) and 3 (1) (b) are read independently, Section 3 (1) (b) will be unconstitutional being outside the competence of the Parliament as it would not be a Legislation falling under entry 9 of list 1 of the Seventh Schedule to the Constitution and entry 3 of the Concurrent List in the said Schedule, and

(6) Section 3 (1) (b) is ultra vires the Constitution as it gives unlimited power to the executive to pick and choose any foreigner out of foreigners similarly situate thereby violating Article 14 of the Constitution.

9. As to the first contention, the learned counsel for the petitioner was more emphatic about the illegality in the service of the detention order on the petitioner during his custody than on the making thereof. So far as making of the order is concerned, I do not see how in the circumstances of the present case, it can be seriously objected to. The order under section 3 (1) (a) is to be made on the subjective satisfaction of the detaining authority. That subjective satisfaction is, subject to certain exceptions, not justiciable. The detenu cannot, therefore, ask the Courts to test the satisfaction of the detaining authority by application of objective tests. That subjective satisfaction is in certain aspects open to judicial review but the area thereof is limited. For instance, the detenu may contend that the grounds supplied to him could not possibly lead a reasonable mind to the conclusion arrived at by the detaining authority. In testing such a contention, the Courts cannot go into the inadequacy of the materials on which satisfaction is founded. The Court can strike down the detention order if

(a) the grounds furnished to the detenu are found to be extraneous or irrelevant in the sense that they are foreign and not germane to the matters which fall to be considered under the relevant statute; or

(b) the grounds furnished are such as deprive the detenu of the constitutional right of making a representation against the order, as guaranteed by Article 22 (5) of the Constitution; or

(c) the order is mala fide; or

(d) there is a violation of the constitutional provisions such as supply of all the grounds on which the order of detention has been made; or

(e) there has been a non-application of mind by the detaining authority.

10. In support of the plea that the authority concerned has not applied his mind or the order is mala fide, a detenu can legitimately contend that on the facts on which the detention order has been based, no reasonable mind could have come to the conclusion that detention was necessary. The learned counsel for the petitioner relying on *Rameshwar Shaw v. District Magistrate, Burdwan*, AIR 1964 SC 334, said that the past activities which are alleged against the petitioner in the grounds of detention are too remote in point of time and have no rational connection with the conclusion arrived at by the detaining authority that the detention of the petitioner was called for. The learned counsel also said that in this case, like *Rameshwar Shaw's case*, AIR 1964 SC 334 the petitioner was an under-trial prisoner confined in jail without any bail order in force and, therefore, the detention order could neither be made nor served on the petitioner. In *Rameshwar Shaw's case*, AIR 1964 SC 334, their Lordships of the Supreme Court said—

"In this connection, it is, however, necessary to bear in mind that the past conduct or antecedent history of the person on which the authority purports to act, should ordinarily be proximate in point of time and should have a rational connection with the conclusion that the detention of the person is necessary. It would, for instance, be irrational to take into account the conduct of the person which took place ten years before the date of his detention and say that even though after the said incident took place nothing is known against the person indicating his tendency to act in a prejudicial manner, even so on the strength of the said incident which is ten years old, the authority is satisfied that his detention is necessary. In other words, where an authority is acting bona fide and considering the question as to whether a person should be detained, he would naturally expect that evidence on which

the said conclusion is ultimately going to rest must be evidence of his past conduct or antecedent history which reasonably and rationally justified the conclusion that if the said person is not detained he may indulge in prejudicial activities. We ought to add that it is both inexpedient and undesirable to lay down any inflexible test. The question about the validity of the satisfaction of the authority will have to be considered on the facts of each case."

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"As abstract proposition of law, there may not be any doubt that section 3 (1) (a) does not preclude the authority from passing an order of detention against a person whilst he is in detention or in jail; but the relevant facts in connection with the making of the order may differ and that may make a difference in the application of the principle that a detention order can be passed against a person in jail. Take for instance, a case where a person has been sentenced to rigorous imprisonment for ten years. It cannot be seriously suggested that soon after the sentence of imprisonment is pronounced on the person, the detaining authority can make an order directing the detention of the said person after he is released from jail at the end of the period of the sentence imposed on him. In dealing with this question, again the considerations of proximity of time will not be irrelevant. On the other hand, if a person who is undergoing imprisonment for a very short period, say for a month or two or so, and it is known that he would soon be released from jail, it may be possible for the authority to consider the antecedent history of the said person and decide whether the detention of the said person would be necessary after he is released from jail, and if the authority is bona fide satisfied that such detention is necessary, he can make a valid order of detention a few days before the person is likely to be released. The antecedent history and the past conduct on which the order of detention would be based would, in such a case, be proximate in point of time and would have a rational connection with the conclusion drawn by the authority that the detention of the person after his release is necessary."

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It is obvious that before an authority can legitimately come to the conclusion that the detention of the person is necessary to prevent him from acting in a prejudicial manner, the authority has to be satisfied that if the person is not detained, he would act in a prejudicial manner and that inevitably postulates freedom of action to the said person at the relevant time. If a person is already in jail custody, how can it rationally

be postulated that if he is not detained, he would act in a prejudicial manner? At the point of time when an order of detention is going to be served on a person, it must be patent that the said person would act prejudicially if he is not detained and that is a consideration which would be absent when the authority is dealing with a person already in detention. The satisfaction that it is necessary to detain a person for the purpose of preventing him from acting in a prejudicial manner is thus the basis of the order under section 3 (1) (a), and this basis is clearly absent in the case of the petitioner."

11. The learned counsel for the petitioner also relied on *Makhan Singh v. State of Punjab*, AIR 1964 SC 1120, where the same principle was reiterated by their Lordships of the Supreme Court. Again in *Godavari Shamrao v. State of Maharashtra*, AIR 1964 SC 1128, a similar question arose for consideration. In this case the appellant was detained under Preventive Detention Act and the order of the detaining authority, which had been reported to the Government for approval, was to remain in force for 12 days under section 3 (3) of the Preventive Detention Act unless, in the meantime, it had been approved, by the State Government. The State Government, however, decided to revoke the order under the Preventive Detention Act and pass an order itself under the Defence of India Rules. Their Lordships of the Supreme Court distinguished the two earlier decisions on the ground that in those cases the service of the order of detention was held to be bad because the detenus there were in jail in one of the two circumstances, namely,—

(a) as an under trial prisoner and the period of his confinement was indeterminate; and

(b) as a convicted person and his sentence had still to run for some length of time.

11-A. Their Lordships of the Supreme Court, therefore, held those cases to be inapplicable and observed—

"The State Government, however, decided to revoke the order of November 7, 1962 and instead decided to pass an order under the Rules on the same day, namely November 10, 1962. In these circumstances it would be in our opinion an empty formality to allow the appellants to go out of jail on the revocation of the order of November 7 and to serve them with the order dated November 10, 1962 as soon as they were out of jail. Where the detention is not of two kinds considered in the cases of *Rameshwar Shaw*, Petn. No. 145 of 1963, D/- 11-9-1963; AIR 1964 SC 334 and *Makhan Singh*, Cr. Appeal No. 80 of 1963, D/ 11-10-1963;

AIR 1964 SC 1120 and is either under the Preventive Detention Act or under the Rules, and its duration is dependent upon the will of the State Government, we cannot see any reason for holding that if the State Government decides to revoke an earlier order of detention it cannot pass a fresh order of detention the same day and serve it on the detenu in jail, for the two orders are really of the same nature and are directed towards the same purpose. Further the order of the Commissioner dated November 7, 1962 was subject to the approval of the State Government without which it could only be in force for 12 days. In these circumstances the order passed by the State Government on November 10 under the Rules when it had decided to revoke the order of November 7, 1962, would in our opinion be perfectly valid so far as the time of the making of order was concerned and its service in jail on the persons who were detained not as under-trials or as convicted persons but as detenues, could not be assailed on the ground on which the order of detention was assailed in the cases of Rameshwar Shaw, Petn. No. 145 of 1963, D/- 11-9-1963; AIR 1964 SC 334 and Makhan Singh Cr. Appeal No. 80 of 1963, D/- 11-10-1963; AIR 1964 SC 1120. The principle of those two cases cannot in our opinion be applied to a case where a fresh order of detention is passed after the cancellation or revocation of an earlier order of detention."

12. These decisions lead me to the conclusion that in the circumstances of the case there was nothing wrong or illegal in the making of the detention order. The petitioner could secure his release on bail and was in fact ordered to be released on bail. He could also be acquitted of the charge at any time. In any of these eventualities it may have been difficult for the detaining authority to collect all the materials, apply its mind, make necessary enquiries necessary "to regulate his continued presence in India". The petitioner is not an Indian national, he is alleged to be an important executive of a gold smuggling syndicate in Lahore and these and other circumstances could, I am satisfied, lead a reasonable man to the conclusion that an order for detention should be made with a view to regulating his continued presence in India.

13. As to the proximity of time with the alleged activities, the learned counsel for the petitioner contended that the allegations against him as disclosed in the grounds related to the years 1963-64 and were too remote in point of time to lead the detaining authority to the conclusion that it was necessary to detain him. That argument has no merit. As

their Lordships of the Supreme Court said in Rameshwar Shaw's case, the validity of the satisfaction of the detaining authority has to be considered on the facts and circumstances of each case. The allegation against the petitioner is that he is still an important executive of a gold smuggling syndicate of Lahore. His confinement in jail from 18th October 1964, will, therefore, not make much difference as his existing membership of the syndicate etc. would be a factor proximate in point of time to justify the making of an order of detention. Moreover, the nature of the activities alleged are of the type that if they were carried on in 1963-1964 they could not be termed as so remote as to be destructive of the validity of the order. This then takes me to the question whether the order of detention could be served on the petitioner. This matter has two aspects—

(1) As I have said earlier the petitioner has failed to produce any material before us showing that the bail order is not in force. If that order is in force then all that the petitioner has to do is to furnish sureties and secure his release. It cannot then be said that the petitioner is confined to jail for an indeterminate period.

(2) Their Lordships of the Supreme Court were in the decisions, mentioned earlier dealing with section 3 (1) (a) where one of the pre-requisites for making an order of detention is the necessity to prevent the detenu from acting in any manner prejudicial to defence of India, security of States and the maintenance of supplies and services etc. It is in the light of this requirement that their Lordships came to the conclusion that it could not be necessary to prevent a person from indulging in any prejudicial activities if he was confined to jail for an indeterminate period. That principle may not apply with that strictness to section 3 (1) (b). Detention under section 3 (1) (b) is made with a view to regulating the detenu's continued presence in India or with a view to making arrangements for his expulsion from India. The possibility of a foreigner being acquitted or released on bail on any date when taken to Court for being produced before a Magistrate cannot be ignored. It may also be necessary in certain cases to pass an order of detention so that the detenu is not taken out of jail for any purpose. It may be said that if a person is confined in jail for an indeterminate period there can equally be no occasion for regulating his continued presence in India as there could be no occasion for preventing him from acting in any prejudicial manner particularly where detention is, as in this

case, on the ground that if the detenu is at large he will be a danger to the economy of India, yet the fact remains that in case of foreigners the aforementioned factors may not be irrelevant. For the purposes of this case, however, it is not necessary to pronounce on the second aspect and I rest my decision only on the first point.

14. Coming now to the argument that sections 3 (1) (a) and 3 (1) (b) should be read together, the learned counsel for the petitioner said that the whole of S. 3 deals with preventive detention and is, therefore, a law made under Entry 9 of List I and Entry, 3 of List III of the Seventh Schedule to the Constitution. These entries authorise the legislature to make law for preventive detention for reasons connected with defence, foreign affairs or the security of India; persons subject to such detention (Entry 9) and preventive detentions for reasons connected with the security of a State, the maintenance of public order or the maintenance of supplies and services essential to the community; persons subjected to such detention (Entry 3 of List III). The law made under Entries 9 and 3 must, therefore, be a law connected with the matters set out in these two entries. Those matters have all been incorporated in Section 3 (1) (a) inasmuch as under that clause a person can be detained only with a view to preventing him from acting in any manner prejudicial to the defence of India, the security of the State and various other matters set out in clause (a). There is no such express limitation in section 3 (1) (b) and if two sub-sections are read separately, section 3 (1) (b) will authorise detention "with a view to regulating his continued presence in India or with a view to making arrangements for his expulsion from India" and that detention may be for reasons unconnected with the various matters set out in the aforementioned Entries 9 and 3, such as defence, foreign affairs or security of India.

According to the learned counsel for the petitioner section 3 must, therefore, be so read as to authorise detention only for reasons mentioned in the said two Entries 9 and 3, and that object can be achieved only by reading sections 3(1) (a) and 3(1) (b) together. The learned counsel for the petitioner further suggested that in case section 3 (1) (b) is read as an independent provision authorising detention even for reasons unconnected with defence, foreign affairs or security of India, the section will fall outside Entries 9 and 3 and, therefore, outside the legislative competence of the Parliament. The learned counsel for the petitioner, therefore, wanted us to read

section 3 (1) (b) in such a way as to confer authority to detain a person with a view to regulating his continued presence in India for the purpose of preventing him from acting in any manner prejudicial to the various matters set out in clauses (i) to (iii) in section 3 (1) (a). When asked whether he would go to the extent of suggesting that preventive detention under section 3 (1) (b) "with a view to making arrangements for his expulsion from India" must also be subject to the said limitations and for the purposes set out in clause (a) the learned counsel for the petitioner frankly conceded that that part of section 3 (1) (b) could not be read with section 3 (1) (a). The reason given by the learned counsel was that under latter part of section 3 (1) (b) a person could be detained "for making arrangements for his expulsion from India; and such detention could not in the very nature of things be for preventing him from acting in any prejudicial manner as envisaged by clause (a) section 3 (1).

When driven to that position the learned counsel for the petitioner suggested that the power to detain a person with a view to regulating his presence in India must in any case be held limited by the various purposes in section 3 (1) (a). It is difficult to conceive that the legislature intended that a part of section 3 (1) (b) and section 3 (1) (a) should be read together while a part of section 3 (1) (b) be read independently. That apart, the construction suggested on behalf of the petitioner suffers from lack of inherent reasonableness.

The object of the two sub-sections is separate and distinct, and section 3 (1) (b) authorises detention for "regulating the continued presence of a foreigner in India" or with a view to making arrangements for his expulsion from India. Such detention need not necessarily be with a view to preventing him from carrying on any prejudicial activities, set out in section 3 (1) (a). Whether or not such a power of detention would violate Article 14 is a different question, but, at present I am concerned only with the construction of section 3 (1) (b). In my opinion section 3 (1) (a) and section 3(1) (b), must be read independently and section 3 (1) (b) held to authorise the detention of a foreigner "with a view to regulating his continued presence in India" unfettered by the limitations set out in section 3 (1) (a). Section 3 (1) (a) applies both to Indian nationals as well as foreigners and if the arguments of the learned counsel for the petitioner were right then it would have been unnecessary to enact a special provision in section 3 (1) (b) authorising detention for regulating the presence of a foreigner

In India, If detention under both S. 3(1) (a) and section 3 (1) (b) was authorised only for preventing a person from engaging in prejudicial activities expressed in section 3 (1) (a) then the object of the legislature could have been achieved by section 3 (1) (a) alone.

15. Having considered the above aspects, I now proceed to deal with another objection by the learned counsel for the petitioner. He contended that the grounds of detention were extremely vague and the petitioner had been denied his constitutional right of making a representation to the Advisory Board. The learned counsel for the petitioner mainly relied on *Rameshwar Lal v. State of Bihar*, Criminal Appeal No. 183 of 1967, D/- 1-12-1967: (AIR 1968 SC 1303). In that case the petitioner had been detained under section 3 (1) (a) (iii) of the Preventive Detention Act. The Second and third grounds of detention in that case were—

"(2) His trucks always take to wicked routes to Saithia (West Bengal) and he himself pilots them.

(3) A businessman of Barahiya disclosed that he (*Rameshwar Lal Patwari*) visited Barahiya on several occasions and purchased gram, gramdal under various names and smuggled them to West Bengal."

15A. Their Lordships held grounds Nos. 2 and 3 to be vague. It is not disputed by the learned counsel for the respondents that if any of the grounds are vague then subject to the respondents' claim of privilege under Article 22(6) of the Constitution and section 7(2) of the Act, the order of detention would be bad. Article 22 (5) requires two things.

- (1) furnishing of the grounds; and
- (2) affording the detenu earliest opportunity of making representation.

15B. It is now settled by the various decisions of the Supreme Court including *Rameshwar Lal's case*, AIR 1968 SC 1303 that if some of the grounds served on the detenu are vague and do not convey proper particulars to enable the detenu to make a representation, the detention would be illegal being violative of the constitutional right of making an effective representation. The learned counsel for the petitioner did not in view of the decision of their Lordships of the Supreme Court in *State of Bombay v. Atma Ram*, AIR 1951 SC 157, ask us to ignore the additional particulars supplied to the detenu. In *Atma Ram's case*, AIR 1951 SC 157 Kania, C. J. delivering the majority judgment observed: "The argument that supplementary grounds cannot be given after the grounds are first given to the detenu, similarly requires a closer examination. The adject-

tive 'supplementary' is capable of covering cases of adding new grounds to the original grounds, as also giving particulars of the facts which are already mentioned, or of giving facts in addition to the facts mentioned in the ground to lead to the conclusion of fact contained in the ground originally furnished. It is clear that if by 'supplementary grounds' is meant additional grounds, i.e., conclusions of fact required to bring about the satisfaction of the Government, the furnishing of any such additional grounds at a later stage will amount to an infringement of the first mentioned right in Article 22 (5) as the grounds for the order of detention must be before the Government before it is satisfied about the necessity for making the order and all such grounds have to be furnished as soon as may be. The other aspects, viz., the second communication (described as supplemental grounds) being only particulars of the facts mentioned or indicated in the ground firstly supplied, or being additional incidents which taken along with the facts mentioned or indicated in the ground already conveyed lead to the same conclusion of the fact, (which is the ground furnished in the first instance) stand on a different footing. These are not new grounds within the meaning of the first part of Article 22 (5). Thus, while the first mentioned type of 'additional' grounds cannot be given after the grounds are furnished in the first instance, the other types even if furnished after the grounds are furnished as soon as may be, but provided they are furnished so as not to come in conflict with giving the earliest opportunity to the detained person to make a representation, will not be considered an infringement of either of the rights mentioned in Article 22 (5) of the Constitution."

16. I, therefore, proceed to consider the argument about the vagueness of the grounds in the light of the grounds as they originally existed and the further particulars supplied.

17. A person detained without trial has very meagre safeguards and those safeguards have to be applied by Courts with scrupulous care and circumspection. Violation thereof and particularly of the constitutional right to make a representation must render the detention illegal. The cardinal precept upon which the constitutional safeguards ultimately rest is that the Government should be one of laws and not of men. The Courts have to be watchful against stealthy encroachments on constitutional rights and administer the laws on the hypothesis that rights of persons flow not from the mercy of men but from the mandate of laws though made by men. Grounds 3 and 4 even with the additional particu-

lars appear to me extremely vague. I have already, set out the said two grounds as they would read after incorporating the additional facts.

In ground No. 3, it is said that the detenu had been coming to India at regular intervals without valid passport documents. Except that in the additional facts supplied it is stated that he started coming to India "from the end of 1963 onwards", nothing is stated as to on what dates or when precisely he came to India without valid passport documents. If any dates were set out he may have been able to satisfy the Advisory Board that on those dates he was present in some other country or at some other place. After all, it is to be presumed that the detaining authority took note of those visits to India and then came to the conclusion that it was necessary to detain the petitioner. By the supplementary affidavit, the detaining authority has claimed a privilege under Article 22 (6) and it has been stated that it is against public interest to disclose further facts. I will deal with the claim of privilege separately but it does appear that the detaining authority were possessed of certain further facts which have been withheld.

Again, it has not been stated in what foreign currencies were the proceeds transferred. Similarly, ground No. 4 does not give any particulars on the basis of which the detenu could make an effective representation. That appears to be the reason why in his representation the detenu had merely to say that ground No. 4 is absolutely wrong and denied. That hardly meets the requirements of Article 22 (5). The detenu was not in a position, having regard to the facts, to make an effective representation. The said two grounds being vague the detenu would be entitled to succeed subject to the State's claim for privilege under Article 22 (6).

18. The position with respect to the privilege is that in the original counter-affidavit the State did not claim it. It merely denied the allegation of the petitioner that the grounds were vague and indefinite. In the further affidavit filed by Shri Vinod Kumar, Under Secretary, the State for the first time claimed privilege in the following words:

"That detaining authority has, with reference to the petitioner's representation, given to the petitioner further clarifications of the grounds of detention already furnished to him. A copy of the memorandum containing the said clarifications is attached as Annexure 'M'. The grounds of detention are not vague but are comprehensive and intelligible. The detaining authority is satisfied that it is against public interest to disclose any

facts and particulars other than those which have been already furnished to the petitioner, as laid down in S. 7 (2), Preventive Detention Act."

When I read words "particulars other than those which have been already furnished to the petitioner", I understand them to mean that what is against public interest to disclose are facts beyond the facts or particulars supplied initially and the further particulars supplied to the detenu and contained in Annexure 'M'. There is no statement in the further affidavit that the appropriate authority took any decision at the time of making the detention order or supplying the grounds to the detenu that disclosure of further particulars was against public interest. The paragraph of the further counter-affidavit suggests to me that the decision in this behalf was taken after supply of further particulars as contained in Annexure 'M' and that conclusion flows logically from the statement that "the detaining authority is satisfied that it is against public interest to disclose any facts and particulars other than those which have been already furnished to the petitioner."

The learned counsel for the petitioner contended that the claim of privilege at that stage was violative of Article 22 (6) of the Constitution. Having said that, I am now in a position to decide as to what are the requirements of Article 22 (5), as I have said earlier, are two —

(i) the authority making the detention order shall, as soon as may be, communicate to such person the grounds on which the order has been made; and (ii) shall afford him the earliest opportunity of making a representation against the order. Implicit in the requirement to afford the earliest opportunity of making a representation is the requirement to supply particulars and facts on which the detention order has been based. If in a case proper particulars are not furnished, the detaining authority may supply him further particulars and the requirements of Article 22 (5) would be met if the further particulars are supplied within such time as not to take away the earliest opportunity of making a representation. It follows logically that supply of further facts is also the requirement of Art. 22(5). Under Cl. (6) of Article 22 the detaining authority has been given a privilege to withhold facts the disclosure of which would, in the opinion of such authority, be against public interest.

The contention of the learned counsel for the petitioner was that the decision as to privilege must be taken at the time the grounds are furnished and the further affidavit on behalf of the State showed that that decision was taken

when supplementary particulars were given to the petitioner and not at the time of furnishing the grounds. He relied in support of his argument on *Lawrence Joachim Joseph D'Souza v. State of Bombay*, 1956 SCR 382 : (AIR 1956 SC 531). In that case an argument was raised in the High Court that the claim of non-disclosure made in the affidavit of the Under Secretary indicated a decision for non-disclosure by the Under Secretary himself and that too at the time of filing the affidavit and consequently the claim of privilege was invalid. The High Court did not accept that contention as it felt satisfied that what was stated in the affidavit related to the decision of the detaining authority itself. The learned Judges of the High Court observed—

"There is nothing in the affidavit of Mr. Bambawala to suggest that it is now that the detaining authority is claiming privilege or applying its mind to the question of privilege.....The meaning is clear that at no time it was in public interest to disclose the details referred to in the particular paragraph of the affidavit and there is nothing to suggest that this question was not considered by the detaining authority at the time when the grounds were furnished."

While dealing with this finding of the High Court their Lordships of the Supreme Court said—

"No argument has been addressed to us how this conclusion is incorrect." The question before the Bombay High Court was different. Moreover, before their Lordships of the Supreme Court no argument was addressed to challenge the above-quoted conclusion of the High Court.

19. As I have said earlier, one of the obligations cast under clause (5) of Article 22 on the detaining authority is to afford the detenu the earliest opportunity of making a representation. It is under this head of the diverse mandates of clause (5) that the particulars have to be supplied as in the absence thereof the detenu cannot make an effective representation. Supply of further particulars would also, therefore, be a requirement of clause (5) of Article 22 and consequently by reason of the overriding nature of Article 22 (6) the right to claim privilege will extend as much at the time of supplying further particulars as at the time of the initial stage. If in a case where proper particulars are not supplied, the detaining authority can, subject to the requirement of "the earliest opportunity of making a representation", supply further particulars without violating clause (5) of Article 22 then I see no reason why the detaining authority cannot at the time of supplying further particulars say that having regard to the

public interest "I can go thus far and no further". That would be so because by virtue of clause (6) of Article 22 nothing in clause (5) shall require the authority making any such order as is referred to in that clause to disclose facts which such authority considers to be against the public interest to disclose". In short the right of non-disclosure will override the mandates of Article 22 (5) as to supply of the particulars in the grounds of detention and at a subsequent stage.

20. The question then arises as to the point of time at which the detaining authority must apply its mind about the privilege. If the authority is not giving proper particulars in the grounds supplied to the detenu it must make up its mind at that time and record an order in that behalf. In case that is not done then the authority may soon thereafter decide on its own to supply further facts and may do so within proper time in which case no question of privilege will arise or the detenu may ask for further facts. In both the cases the authority when supplying further facts may say "it is not in the public interest to supply facts beyond the further facts supplied" and the decision taken will still be within the protection of Article 22 (6). That will be so because supply of further facts will be curing the original defect of the grounds being vague and such supply of further facts can still be confined within the limits prescribed by Article 22 (6).

In such an event the claim for privilege will be about facts beyond the further facts disclosed to the detenu. What will happen if the original grounds are vague, no decision to claim privilege is taken and recorded, no further facts are supplied and say three weeks later the authority records an order that facts were omitted in grounds on account of public interest. Then the claim of privilege may be bad on the ground that the authority did not direct its mind to the question of privilege when incorporating facts in the grounds and withheld such facts without proper application of mind with the result that earliest opportunity of making representation was denied without the detaining authority directing its attention for three weeks as to whether any facts were to be withheld and if so which.

On the other hand, if the authority applies its mind to all the facts, comes to the conclusion that an order of detention should be passed, passes the order but communicates vague grounds, the authority can on the next day apply its mind to the facts and take a decision that no further facts should be supplied as the

same would not be in public interest or decide to supply some further facts. There may be nothing wrong in that. The heart of the problem always is: has an earliest opportunity of making representation been given to the detenu after proper application of mind?

20A. In this case the claim of privilege is contained not only in the further affidavit but also in the communication conveying further particulars. I may point out that there is no requirement that the decision regarding privilege must be communicated to the detenu. As to the merits of the claim the Court has no power to review the same as Court of appeal and substitute its views for those of the authority. There is nothing to show that the claim was for ulterior reasons. My conclusion, therefore, is that the claim of privilege is valid. I may, however, point out that withholding the facts on the grounds of public interest is a serious invasion on an individual's liberty and must never be made in the absence of absolutely compelling reasons. The Courts must also scrutinise the claim of privilege with utmost vigilance so that no member of the body politic is deprived of the right of representation without proper justification.

21. As to the question raised in the contention of the learned counsel for the petitioner that a person detained for specific offence cannot be subjected validly to preventive detention, there is no force. As discussed earlier, a person may have been ordered to be released on bail or may be serving a short term sentence and in such circumstances it is not possible to hold that a person can never be preventively detained, the question of mala fides apart. No ground has been shown by the learned counsel for the petitioner to be irrelevant or non-existent and, therefore, his argument in this behalf cannot be accepted. Similarly, I am not satisfied, in view of the materials before us, that the detaining authority acted mechanically on the advice of the Customs Authorities for the purpose of extracting a confession to be used against other co-accused. I see no reason to disbelieve the affidavits filed on behalf of the State that the detaining authority was satisfied about justification of the detention order.

22. The contention of the learned counsel for the petitioner that the petitioner's detention has no rational or direct connection with the purpose set out in Section 3 of the Preventive Detention Act is founded on his proposition discussed earlier that section 3 (1) (a) and 3(1) (b) must be read together. I have already said that these two clauses of sub-section (1) of section 3 are to be read independently and are directed to the

achievement of different ends though to be achieved by preventive detention. The purpose of the petitioner's detention is for regulating the petitioner's continued presence in India. If clauses (a) and (b) of sub-section (1) of section 3 have to be read independently then the limitations expressed in clause (a) cannot be imported in clause (b) and in that situation the argument of the learned counsel for the petitioner loses validity. As to the competence of the Parliament, to enact the said Act under Entries 9 and 3 of Lists I and III of the Seventh Schedule to the Constitution respectively, I am of the opinion that the law is within the competence of the Parliament. A law for preventive detention for the purpose of regulating the detenu's continued presence in India can be justified under the aforementioned entries as it would be a law connected, in any case, with "foreign affairs" under entry 9. A law for preventive detention connected with foreign affairs would be as much under the protection of clause (3) of Article 22 as such law dealing with matters covered under clause (a) of sub-section (1) of S. 3 of the said Act.

23. That takes me to the last contention of the learned counsel for the petitioner based on Article 14 of the Constitution. The argument was that section 3 (1) (b) of the said Act gives unlimited powers to the Executive to pick and choose any foreigner for being subjected to preventive detention. This clause applies to all foreigners and, in my opinion, there are sufficient guiding principles governing the exercise of power by the Executive. Such a detention is authorised only with a view to regulating the continued presence in India of a foreigner within the meaning of the Foreigners Act, 1946 or with a view to making arrangement for the expulsion of such foreigner from India. The detaining authority has to apply his mind to the facts and is required, as soon as may be but not later than five days from the date of detention, to communicate to him the grounds on which an order has been made. Provision is also made for the earliest opportunity of making a representation against the order to the appropriate Government. In the face of these safeguards, I am unable to accept the argument that clause (b) of sub-section (1) of section 3 of the Act is hit by Article 14.

24. In the result, this petition fails and is dismissed.

25. **HARDAYAL HARDY, J:** I agree.

26. **T. V. R. TATACHARI, J.:** I agree.
GGM/D.V.C. Petition dismissed.

AIR 1969 DELHI 58 (V 56 C 11)

I. D. DUA, C. J. & HARDAYAL
HARDY, J.

Delhi Administration, through Secretary, Transport, Delhi, Petitioner v. State of Haryana through Secy. to Govt. Transport Dept. Chandigarh and others, Respondents.

Supreme Court Appeal No. 11 of 1968, D/- 2-5-1968, for leave to appeal to Supreme Court against judgment and order of High Court, Delhi, in Civil Writ No. 1376 of 1967, D/- 20-10-1967.

Constitution of India, Art. 133 (1) (c) — Certificate of fitness — Question of sufficient public or private importance — One vehicle operating on two permits for two routes — Routes passing through two different States — Issue of through tickets to passengers travelling in the vehicle — Question whether issue of through tickets can be prohibited under Motor Vehicles Act (1939) — Construction of S. 48 (3) (xiv) of Motor Vehicles Act (1939) involved — Question is of sufficient private or public importance to justify certificate of fitness for appeal under Art. 133 (1) (c).

(Para 6)

D. D. Chawla, for Petitioner; M. C. Chagla with S. S. Chadha, for Respondents.

ORDER. This is an application by the Delhi Administration purporting to be under Article 133 (1) (b) and (c) of the Constitution, but praying in the end that the case being of public importance, be certified to be a fit one for appeal to the Supreme Court under Article 133 (1) (c). The judgment sought to be appealed from was delivered by a bench of this Court on 20-10-1967 allowing C. W. 1376 of 1967 presented by the State of Haryana and quashing the order of the Inter-State transport Commission and of the Inter-State Transport Appellate Tribunal.

2. The short question raised in these proceedings, broadly speaking, relates to the construction of section 48 (3) (xiv) of the Motor Vehicles Act and it arises in this way. Public service buses running from the Union Territory of Delhi to the Union territory of Chandigarh have to pass through Karnal (in Haryana). Through tickets are issued to the passengers travelling by such vehicles from Delhi right up to Chandigarh. The Inter-State Transport Commission gave its advice on 27-8-1966 under section 63-A (2) (b) of the Motor Vehicles Act in the following terms:

"It would not be in order if one vehicle operating on two permits for two routes were to book direct passengers

travelling on both the routes on direct tickets for places on both the routes. Operations which would contravene this advice should be stopped and the services be so regulated to ensure that the provisions of the Motor Vehicles Act are not violated."

3. The Division Bench has in the order sought to be appealed from, held that issuing of through tickets cannot be prohibited under the Motor Vehicles Act.

4. The Administration of Delhi has submitted through Shri D. D. Chawla that the impugned order materially affects their financial interest and since similar disputes are likely to arise between other States as well it is eminently a fit case for appeal to the Supreme Court.

5. Shri M. C. Chagla, the learned counsel for the respondent has, in opposing this petition, submitted that it had been conceded by the Delhi Administration before the Bench that there could be two permits in respect of the same bus, one from Delhi to Karnal and the other from Karnal to Chandigarh and it is only a rational consequence flowing from this concession to hold that through tickets are permissible to be issued to the passengers travelling by the said bus. Two independent routes can, according to the counsel, be thus linked up for the purpose of issuing through tickets to the passengers.

6. We do not think it is for us to determine whether the impugned Bench decision of this Court is correct. This would have to be determined by the Supreme Court on appeal. We are at this stage only concerned with the problem whether the question raised is of sufficient public or private importance so as to justify a certificate of fitness for appeal to the Supreme Court. Keeping in view the conflicting and divergent approaches of the neighbouring States and the Union territory, we consider that the question raised is of sufficient public importance requiring the Supreme Court to settle the legal principle applicable to the construction of the relevant provisions of the Motor Vehicles Act. We accordingly direct that the necessary certificate be issued. There will be no order as to costs of these proceedings.

BNP/D.V.C.

Application allowed.

AIR 1969 DELHI 59 (V 56 C 12)

H. R. KHANNA AND H. HARDY, JJ.

Hindustan Steel (Pvt.) Ltd., Defendant
Appellant v. Smt. Usha Rani Gupta,
Plaintiff, Respondent.

First Appeal No. 53-D of 1958, D/- 14-4-1967, from decree of Sub. J., 1st Class, Delhi, D/- 25-2-1958.

T. P. Act (1882), S. 116 — Holding over by tenant — Effect of — Tenant not liable to pay double the rent — Liability of tenant is that of a trespasser — Tenant required to pay mesne profits — Damages to landlord limited to mesne profits — AIR 1924 Lah 643 and 1904 Pun Re 5 and 1898 Pun Re 33 and AIR 1919 Lah 72 and AIR 1924 Lah 643 and Civil Revn. No. 248 of 1948 D/- 3-9-1948 (Lah) and F.A. No. 190 of 1944 D/- 8-9-1948 (Lah), Dissented from.

Where the tenant fails to deliver up possession of the premises to the landlord on the expiry of his lease, he is not liable to pay damages at the rate of double the rent if the landlord leads no evidence to prove the actual damages suffered by him for the period during which the tenant holds over.

The rule of double the rent was based on English statutes. There is no warrant for extending it to India where in the absence of a Statute the liability of a person wilfully holding over cannot be made to exceed that of a trespasser.

In the absence of a statutory provision to the contrary, the only liability of a trespasser or a person in wrongful possession of the property is for payment of mesne profits to the lawful owner or the person lawfully entitled to possession.

The problem has, therefore, to be approached from the tenant's end. What has to be seen is what profit he, who is in wrongful possession, has actually received or might with ordinary diligence have received therefrom, AIR 1930 PC 82, Rel. on.

In case the property is one, rent of which is controlled by Rent Control Act the landlord can get only the rent fixed, with such increase, as is permissible under the Act.

In case the property is one, which is not controlled by the Rent Control Act, he is entitled to mesne profits. The only bearing which the evidence as to what the landlord in such a case might or would have made, on the question of mesne profits is that it is relevant for the purpose of showing what the tenant might, with reasonable diligence, have received, AIR 1966 SC 735, Dist.; AIR 1949 Nag 282 and AIR 1932 Lah 275 and AIR 1933 Lah 61, Rel. on; 1904 Pun

Re 5 and 1898 Pun Re 33 and AIR 1919 Lah 72 and AIR 1924 Lah 643 and AIR 1928 Lah 554 and Civil Revn. No. 248 of 1948 D/- 3-9-1948 (Lah) & F. A. No. 190 of 1944 D/- 8-9-1948 (Lah), Dissented from. (Para 20)

Cases Referred: Chronological Paras
(1966) AIR 1966 SC 735 (V 53) =

(1966) 2 SCR 286, Bhagwati Prasad v. Chandramaul 24

(1949) AIR 1949 Nag 282 (V 36) =
ILR (1948) Nag 922, Hasanali v. Dara Shah 23

(1948) First Appeal No. 190 of 1944, D/- 8-9-1948 (Lah), Nabi Baksh Mahommed Hussain v. Ram Kanwar Das 8, 17

(1948) Civil Revn. No. 248 of 1948, D/- 3-9-1948 (Lah) 8, 17

(1933) AIR 1933 Lah 61 (V 20) =
ILR 14 Lah 137, Sunder Singh v. Ram Saran Das 8, 15

(1933) AIR 1933 Lah 509 (V 20) =
34 Pun LR 262, Ubedul Rahman v. Darbari Lal 8, 16, 22

(1932) AIR 1932 Lah 275 (V 19) =
ILR 13 Lah 216, Narain Das v. Dharam Das 14, 15, 22

(1930) AIR 1930 PC 82 (V 17) =
57 Ind App 105, Harry Kempson Gray v. Bhagu Mian 19

(1929) AIR 1929 Lah 547 (V 16) =
30 Pun LR 228, Kirpa Ram Brij Lal v. Municipal Committee, Amritsar 8

(1928) AIR 1928 Lah 554 (V 15) =
ILR 9 Lah 576, Mul Raj v. Indar Singh 6, 13, 15

(1927) AIR 1927 Lah 1 (V 14) =
ILR 7 Lah 423, Obedur Rahman v. Darbari Lal 16

(1924) AIR 1924 Lah 643 (V 11) =
75 Ind Cas 1034, Rure Khan v. Ghulam Muhammad 6, 13, 15

(1921) 37 TLR 364, Northcott v. Roche 21

(1919) AIR 1919 Lah 72 (V 6) =
1918 Pun Re 70, Madan Mohan Lal v. B. Barooah and Co. 6, 12, 15, 17,

(1904) 1904 Pun Re 5 = 42 Pun LR 1904, Pirbhu Dial v. Ram Chand 6, 11, 12, 13

(1898) 1898 Pun Re 33, Ganga Singh v. Mst. Shib Devi 11, 12, 13

K. K. Raizada for Petitioner; Avadh Bihari, for Respondent.

JUDGMENT: This is defendant's appeal from the judgment and decree of the Court of a Subordinate Judge whereby the plaintiff's suit for recovery of Rs. 3000/- viz. Rs. 700/- on account of arrears of rent for the period 1-3-1957 to 19-3-1957 and Rs. 2300/- on account of damages for the period 20-3-1957 to 19-4-1957 was decreed with costs.

2. The plaintiff is the owner of a building in Sunder Nagar, New Delhi, the construction of which was completed

in or about March 1954. The defendant, Hindustan Steel (Private Limited), took up the said building on 20-3-1954 on a monthly rent of Rs. 1150/- exclusive of water and electric charges, on a fixed term lease for 3 years expiring on 19-3-1957. It appears that the lease was in the name of the defendant but the actual occupation of the first floor was from 10th September 1955 with the Ministry of Iron and Steel, Government of India, New Delhi, while the ground floor was occupied by Messrs. Krupp Demag Indienstgemeinshaft. On 19th March 1957, the defendant with a view to absolve itself of its responsibility for payment of rent, and also because of the lease having come to an end by efflux of time, gave a notice to the plaintiff signifying its intention to quit the property.

The actual possession of the property was, however, not surrendered to the plaintiff till 21st August 1957. Meanwhile, on 24th April 1957, the plaintiff filed a suit against the defendant for recovery of arrears of rent at the rate of Rs. 1150/- per mensem for the period 1st March 1951 to 19th March 1957 and for damages at the rate of Rs. 2300/- per mensem from 20th March 1957 to 19th April 1957. The claim for damage was made on the allegation that the defendant was wilfully and contumaciously holding over for the aforesaid period although the lease had come to an end by efflux of time and the defendant itself had served a notice on the plaintiff signifying its intention to quit on 19th March 1957.

3. The defendant resisted the plaintiff's claim and pleaded inter alia that the actual occupation of the first floor of the premises was to the knowledge of the plaintiff, with the Union of India through the Ministry of Iron and Steel while the ground floor was in the occupation of Messrs Krupp Demag Indienstgemeinshaft since 10th September, 1955; the defendant was therefore not liable for payment of any rent or damages. The plaintiff's right to claim damages at the rate of Rs. 2300/- per mensem was also denied.

4. On the pleadings of the parties, the trial Court framed the following issues:

1. Is the defendant liable for the suit costs?

2. Is the defendant liable to pay rent at double the rate for the period from 20-3-57 to 19-4-57.

3. Relief.

5. The trial Court held that the defendant had contumaciously held over the property in suit despite the fact that it had been notified by the plaintiff that in case of its failure to deliver possession on the determination of the lease the plaintiff would claim damages at double the agreed rate of rent.

6. In support of its decision the trial Court relied upon two decisions of the Punjab Chief Court in *Pirbhu Dial v. Ram Chand*, 5 Pun Re 1904 and *Madan Mohan Lal v. B. Barooah and Co.* 70 Pun Re 1918: AIR 1919 Lah 72 and two judgments of the Lahore High Court in *Rure Khan v. Ghulam Muhammad*, AIR 1924 Lah 643 and *Mul Raj v. Indar Singh*, AIR 1928 Lah 554 and held that the penalty of double rent could be taken as a fit standard for awarding reasonable damages in case of holding over by a lessee. As regards costs, the trial Court found that although the defendant had delivered possession of the property to the plaintiff during the pendency of the suit, the plaintiff had not only succeeded in her suit with regard to her claim for recovery of rent and damages but had by implication also succeeded in regard to the relief of possession. She was, therefore, awarded full costs of the suit.

7. In appeal, the learned counsel for the appellant has assailed the correctness of the trial Court's decision on both the issues and has urged that its finding about the appellant having wilfully and contumaciously held over is not supported by satisfactory evidence. His main attack, however, is against the award of damages at double the rate of rent. He contends that the rule of damages at double the rate of rent was a part of the statutory law of England which could not be adopted as a guide by courts in this country. In any case, this principle of English law could not be applied after the coming into force of the Constitution of India and the existence of rent control legislation in Delhi. The correctness of the Punjab Judgments relied upon by the trial Court has also been challenged by the learned counsel.

8. Learned counsel for the respondent has on the other hand urged that apart from the judgments relied upon by the trial Court there are several other decisions of Lahore High Court where the rule of double rent has been followed. Our attention has been particularly drawn to three Bench decisions of the Lahore High Court in *Kirpa Ram Brij Lal v. Municipal Committee, Amritsar*, AIR 1929 Lah 547, *Sunder Singh v. Ram Saran Das*, AIR 1933 Lah 61 and *Ubedul Rahman v. Darbari Lal*, AIR 1933 Lah 509. He has also cited a single Bench judgment of A. N. Bhandari J. (as he then was) of the Punjab High Court at Simla in *Civil Revn. No. 248 of 1948, D/- 3-9-1948* and a Division Bench decision of the same High Court (*Mehar Chand Mahajan and Teja Singh JJ.*) in *FA No. 190 of 1944, Nabi Baksh Mahammed Hussain v. Ram Kanwar Das*, decided on 8-9-1948.

9. There is no doubt that the defendant's lease being for a fixed term and the property being exempt from the operation of the Delhi Rent Control Act, 1952 the defendant had no right to remain in possession of the demised premises after 19-3-1957, more so when the plaintiff had served it with a notice dated 15-2-57 (copy Exhibit P-9) calling upon it to vacate the premises and on its failure to quit to pay double the amount of monthly rent payable under the lease. The trial Court was therefore right in holding that the defendant was holding over. But having regard to the fact that since September 1955 the actual occupation of the property was to the knowledge of the plaintiff not with the defendant and the defendant itself was anxious to surrender possession and did in fact make every effort and eventually succeeded in persuading the actual occupants to deliver possession on 21-8-1957, the finding of the trial Court about the holding over from 20-3-1957 to 21-4-1957 being wilful and contumacious may not appear to be quite correct. But since no serious attempt was made by the learned counsel for the appellant to attack the finding we do not feel inclined to differ from the conclusion reached by the trial Court in this behalf.

10. As regards the quantum of damages, it is conceded by the learned counsel for the respondent that she had not led any evidence to prove actual damages for the period during which the defendant held over the demised property. His contention however, is that it is not necessary to prove actual damages for the period during which the defendant held over the demised property. His contention is that it is not necessary to prove actual damages because the penalty of double rent has all along been regarded as a fit standard for awarding reasonable damages in case of holding over by a lessee. The question for decision in this appeal therefore is whether in a case where the tenant fails to deliver up possession of the premises to the landlord on the expiry of his lease he is liable to pay damages at the rate of double the rent although the plaintiff-landlord may have led no evidence to prove the actual damages suffered by him for the period during which the tenant held over the demised property.

11. The earliest case to which our attention has been invited by the learned counsel for the respondent is *Ganga Singh v. Mst. Shib Devi*, 33 Pun Re 1898 which was followed in 5 Pun Re 1904. The latter is a Bench decision of the Punjab Chief Court (Sir William Clark, Chief Judge and Robertson J.). Robertson J. who spoke for the court observed:

"If, however, it be found that a tenant has held over wilfully and contumaciously, the Courts in this country would properly award reasonable damages, and the penalty laid down in England by Statute 4, George II Chapter 28, section 1, of double the rent, may sometimes be taken as a fitting standard."

It is apparent from the above cited passage that the rule regarding penalty of double rent is based on the statutory provision contained in section 1, Chapter 28, of Statute 4, George II in England.

12. The next case, 70 Pun Re 1918: AIR 1919 Lah 72 is also a judgment of the Division Bench of the same Court (Scott-Smith and Shadi Lal JJ.) and merely followed the earlier decisions of the Court in 33 Pun Re 1898 and 5 Pun Re 1904.

13. *Pirbhu Dial's* case, 1904 Pun Re 5 was followed by a single Judge of the Lahore High Court (Campbell J.) in AIR 1924 Lah 643. Dealing with the question of damages on the basis of double the amount of rent, the learned Judge observed:

"It was ruled, however, in *Pirbhu Dial v. Ram Chand* that, when a tenant has held over wilfully and contumaciously the Courts in India would properly award reasonable damages and the penalty laid down in England by Statute, of double the rent, may sometimes be taken as a fitting standard."

The question again came up before the Lahore High Court in AIR 1928 Lah 554. Referring to the cases reported at 33 Pun Re 1898 and 5 Pun Re 1904, the Bench consisting of Tek Chand and Bhide JJ. observed:

"But these authorities do not lay down any such hard and fast rule. It was remarked in the latter ruling that double the rent may sometimes be taken as a fitting standard rent, but that, in considering what sum should be allowed for use and occupation, or for damages for contumacious holding over, the whole circumstances of the tenancy and the sufficiency in point of time of the notice may properly be taken into consideration."

14. The question again came up before the same court in *Narain Das v. Dharam Das*, AIR 1932 Lah 275 when the argument based on the rule of double rent was pressed in second Appeal before a Bench consisting of Broadway and Johnstone JJ. The learned Judges observed:

"It is a matter of discretion resting with the Court to decide whether a tenant contumaciously holding over should be penalised to the extent of making him pay double the rent or some lesser amount. In the present case the learn-

ed Additional District Judge has come to the conclusion that the circumstances are such that the situation would be met by an enhancement of Rs. 20/- p.m. I am not prepared to say that this view is wrong and I cannot regard it as against law."

It may be mentioned here that damages awarded in this case were at the rate of Rs. 150/- per mensem against the agreed rent of Rs. 130/- per mensem.

15. AIR 1933 Lah 61 is yet another case from the same Court where a Bench consisting of Broadway and Bhide JJ. after referring to the cases of 1918 Pun Re 70=(AIR 1919 Lah 72); AIR 1924 Lah 643 and AIR 1928 Lah 554, observed as under:

"The rule according to which double the normal rent is taken as a suitable measure of damages in such cases is taken from English Law. The matter is, no doubt, regulated by Statute in England (see 4 Geo II Ch. 28) but the rule has been held to be taken to be ordinarily a suitable guide in such cases in this Province. The rule is, of course, not inflexible and less or more may be awarded by way of damages according to circumstances: of AIR 1928 Lah 554 also AIR 1932 Lah 275 if there is evidence to justify such a course."

16. The next case is AIR 1933 Lah 509 where Bhide J. sitting with Addison J. after referring to the earlier decisions of the Court in AIR 1933 Lah 61 and Obedur Rahman v. Darbari Lal, AIR 1927 Lah 1 observed:

"It is unnecessary to discuss for the purpose of this appeal cases in which double the normal rent has been allowed when the tenant was found to have held over wilfully and contumaciously. For, in the present instance the plaintiffs have been given decrees only for the amounts actually realised by them from the sub-tenants. They have thus not been really penalised in any way. In the circumstances I see no ground to interfere."

17. In Civil Revn. No. 248 of 1948 (Lah) decided by A. N. Bhandari J. the learned Judge merely relied upon the case of AIR 1919 Lah 72. The case of First Appeal No. 190 of 1944 D/- 8-9-1948 (Lah) decided by Mehar Chand Mahajan and Teja Singh JJ. is a case in which the argument based on the provisions of the Rent Control Order 1944 was advanced by the learned counsel for the appellant in support of his contention that the trial Judge had wrongly relied upon the Punjab cases in holding that for wrongful and contumacious holding over the usual measure of damages was double the amount of rent. It was urged that the rule could not be appli-

ed to that case because if the premises were vacated by the defendant and the plaintiffs had to lease them to another tenant they could not have realised more rent than what was provided by the Control Order in force in Delhi. In such circumstances it was argued that it could not be said that the plaintiffs had suffered a loss for larger amount than the increased rent they could possibly get under the Control Order. The argument was repelled by Mahajan J. (as he then was) who upheld the rule of double rent applied by the trial Judge.

18. Close examination of the above authorities shows that there are two distinct lines of reasoning which have weighed with the learned Judges in awarding enhanced rate of rent to a landlord against a tenant contumaciously holding over after notice of ejectment. The one line of reasoning is that the rule of awarding double rent is not inflexible and the Court in awarding the rent at enhanced rate has to take into consideration the circumstances of the case and the damage suffered by the landlord on account of refusal of the tenant to vacate the premises despite notice. An illustration of that is the case where the tenant was realising rent at an enhanced rate from his sub-tenant and the Court took it that the landlord was deprived of the benefit of the rent at that rate because of the contumacious refusal of the tenant to vacate the premises. The Court, accordingly, awarded damages at the enhanced rate at which the tenant was realising the rent from his sub-tenant. No exception can be taken, in our opinion, to this line of reasoning and approach. The other line of reasoning in a few of the cases is that a penalty has to be imposed upon the tenant for his contumacy in continuing in possession of the premises despite notice of ejectment and the measure of this penalty has to be double the rate of rent irrespective of any damage suffered by the landlord. We find ourselves wholly unable to subscribe to this line of reasoning.

19. It is well settled that in the absence of a statutory provision to the contrary, the only liability of a trespasser or a person in wrongful possession of the property is for payment of mesne profits to the lawful owner or the person lawfully entitled to possession. Mesne profits" are defined in section 2(12), Civil Procedure Code 1908 as "... those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom, together with interest on such profits, but shall not include profits due to improvements made by the person in wrongful possession." As held by the Privy Council in *Harry*

Kempson Gray v. Bhagu Mian, AIR 1930 PC 82,

"The test set by the statutory definition of mesne profits is clearly not what the plaintiff has lost by his exclusion, but what the defendant has or might reasonably have made by his wrongful possession. What the plaintiff in such a case might or would have made can only be relevant as evidence of what the defendant might with reasonable diligence have received."

20. The problem has therefore to be approached from the defendant's end. What has to be seen is what profits, if any, the defendant who is in wrongful possession of the property has actually received or might with ordinary diligence have received therefrom. There can be no doubt that in the case of property of which rent is controlled by Rent Control Act the plaintiff cannot complain of having suffered any loss by his exclusion, beyond the rent for which the property is let out by him to the tenant holding over, except to the extent of any permissible increase of rent under the Rent Control Act itself, but the only bearing which the evidence as to what the plaintiff in such a case might or would have made, on the question of mesne profits, is that it is relevant for the purpose of showing what the defendant might with reasonable diligence have received. How and in what way can any element of penalty on account of the conduct of the defendant who is found to have been contumaciously holding over enter into calculation of mesne profits, we are wholly unable to see.

21. As already stated, in England the principle of double rent is based on a statute. There the matter is governed by two statutes viz. the Landlord and Tenant Act, 1730, Section 1, and Distress for Rent Act, 1737, section 18. The latter Act only applies where the tenant has given a notice binding upon him to quit at the expiration of the term specified in the notice and upon which the landlord might at that time act and bring ejectment. In such a case the relationship of landlord and tenant still continues and the action is not in the nature of an action for penalty see *Northcott v. Roche*, (1921) 37 TLR 364. On the other hand, under section 1 of the Landlord and Tenant Act, 1730, if a tenant for any term for a life or years, or any person who gets possession of the premises under or by collusion with such tenant wilfully holds over the premises after the determination of the term, and after demand made and notice in writing given for delivery of possession by the reversioner or his lawfully authorised agent, the person so holding over is liable to pay to the reversioner at the rate of double the

yearly value of the premises and against this penalty there is no relief in equity (see *Hill and Redman's Law of Landlord and Tenant* fourteenth Ed. P. 616 and cases cited in foot note under para 486)

Whether the payment is treated as rent or as penalty in either case the liability is founded on statute in England. Even if it is held that on account of its antiquity the statutory rule has become a part of the common law of England, there is no warrant for extending it to this country where in the absence of a statute the liability of a person wilfully holding over cannot reasonably be made to exceed that of a trespasser. Having regard to the definition of "mesne profits" in section 2 (12) Civil Procedure Code, we also find no escape from the conclusion that there is no other way in which "mesne profits" can be determined by the Court than by evidence being led before it about what the defendant has or might reasonably have made by his wrongful possession.

22. That learned Judges in some of the Punjab cases were not altogether oblivious of this, is apparent from the judgment in AIR 1933 Lah 509 where *Addison and Bhide JJ.* upheld the decision of the trial Court in awarding a decree for a larger amount than what would have been permissible under the rule of double rent, for the reason that the tenants had actually realised that amount from their sub-tenants while the bench consisting of *Broadway and Johnstone JJ.* was quite satisfied with the trial Court's decision in AIR 1932 Lah 275 in decreeing damages at the rate of Rs. 150/- p.m. only against the agreed rent of Rs. 130/- p.m.

23. In *Hasanali v. Dara Shah*, AIR 1949 Nag 282 a Division Bench of Nagpur High Court consisting of *Vivian Bose and Mudholkar JJ.* held that where a tenant continues in possession after the determination of the tenancy, without the consent of the landlord, he is a tenant at sufferance and not one at will and that he is no better than a trespasser. In such a case, all that the landlord can get is compensation for use and occupation and that the rent is a fair measure of compensation. It is pertinent to remark that the learned Judges also observed in that case that no question of notice could arise in such a case. The question whether the service of notice calling upon the defendant to pay double the rent, would make any difference to the situation, was neither raised nor dealt with by their Lordships.

24. Mr. K. K. Raizada, learned counsel for the appellants, has also brought to our notice a decision of the Supreme Court in *Bhagwati Prasad v. Chandra-*

maul, AIR 1966 SC 735. The precise point which arises in the case before us, was of course neither debated nor decided in that case although the actual decision may be of some help in deciding the case in hand. The particular passage in their Lordships' judgment on which Mr. Rajzada relies is:

"In regard to the plaintiff's claim for past rent we see no reason to interfere with the decree passed by the High Court. But we do not see how the High Court's decree in relation to future mesne profits can be sustained. Once it is held that the plaintiff is entitled to eject the defendant, it follows that from the date of the decree granting the relief of ejectment to the plaintiff, the defendant who remains in possession of the property despite the decree, must pay mesne profits or damages for use and occupation of the said property until it is delivered to the plaintiff. A decree for ejectment in such a case must be accompanied by a direction for payment of the future mesne profits or damages. Then as to the rate at which future mesne profits can be awarded to the plaintiff, we see no reason to differ from the view taken by the trial Court that the reasonable amount in the present case would be Rs. 300/- per month."

25. It may be mentioned that Rupees 300/- p.m. represented agreed rent of the premises and no evidence had been led by the plaintiff about the damages actually suffered by him in that case.

26. We have already pointed out that the plaintiff in the instant case took her stand on the rule that she was entitled to claim damages at the rate of double the amount of agreed rent and that it was not necessary for her to lead any evidence about the damages actually suffered by her. It is also true that the construction of the premises having been completed in March 1934 the premises, under section 39 of the Delhi and Ajmer Rent Control Act, 1952, were exempt from the operation of all the provisions of the said Act for a period of seven years from the date of such completion and thus there was no restriction on her right to charge any rent during the relevant period. This in our view, rendered it all the more necessary that there should have been some evidence which the Court could accept in regard to what the defendant had actually received from the under-lessees viz. the Ministry of Iron and Steel and the Krupp or might with reasonable diligence have received from them. In the absence of such evidence, it is impossible to hold that the rent at which the premises had been let by the plaintiff-respondent to the appellant did not represent fair compensation for use and occupation of the same

for the period during which they were held over by the appellant.

27. For the foregoing reasons, the appeal is accepted and the decree of the Court below is modified to the extent of the amount allowed by it at a rate more than the agreed rate of rent i.e. by Rs. 1150/- p.m. with proportionate costs throughout.

BDE/D.V.C.

Appeal allowed.

AIR 1969 DELHI 64 (V 56 C 13)
S. K. KAPUR AND S. N. ANDLEY, JJ.
Shiv Kumar Sharma, Petitioner v.
Union of India and others, Respondents.
Civil Writ Petns. Nos. 294, 330 and 343
of 1968, D/- 14-5-1968.

(A) Constitution of India, Art. 226 — Writ jurisdiction — Scope of — Investigation of question of fact — Kutch award given by Tribunal appointed by India and Pakistan to decide boundaries — Court cannot consider whether territory awarded to Pakistan was part of Indian territory, by considering mass of evidence before tribunal.

Writ jurisdiction cannot be invoked to decide whether certain territories handed over to Pakistan by India were part of Indian territory, when such transfer is made in pursuance of the award given by the Tribunal appointed by both the countries to decide a bona fide dispute as to where in fact the boundary between India and Pakistan lies. It is an impossible task to be undertaken by the High Court in the exercise of writ jurisdiction to go into the mass of evidence placed by both the countries before the Tribunal, as to what areas belonged to India or Pakistan because the dispute is with a foreign country which cannot be before the High Court. Once it is held that there was a bona fide dispute between the two Governments as to where in fact the boundary lay writ jurisdiction cannot be invoked for a decision on conflictory evidence that, as a matter of fact certain territories awarded to Pakistan were part of Indian territory, this is more so, when the High Court is satisfied on perusal of the award of the tribunal that there was evidence in support of the claims of both the Governments, which evidence was considered by the Tribunal. (Para 14)

(B) Constitution of India, Arts. 368 and 1 — Dispute regarding boundaries between India and Pakistan — Reference to Tribunal by both countries — Transfer of certain territory to Pakistan in pursuance of award — It is not cession of Indian territory — No alteration in Art. 1 involved — Constitutional amendment under Art. 368 not necessary.

GL/IL/D201/68

(D) Constitution of India, Article 226 — Questions meant to be decided by Tribunal — High Court would not, in petition under Art. 226 use its jurisdiction — Questions of fact and mixed questions of law and fact, will not be entertained in writ proceeding — Industrial Disputes Act (1947), S. 10.

The tribunals must be allowed to decide question which the Legislature intends that they should decide. There should be no usurpation of their jurisdiction. The Courts would interfere when the tribunals do not act within the ambit of the powers conferred upon them by the statutes to which they owe their existence or when they transgress the limits placed on those powers by the Legislature or when they do not act in conformity with the fundamental principles of judicial procedure. AIR 1947 PC 200 and AIR 1940 PC 105 and AIR 1964 SC 436, Ref. (Para 14)

Where the question involved before tribunal relates to the nature of the work carried on by the workers and there is dispute between the parties on the question and the decision of the question involves questions of facts and mixed questions of law and fact, the question will not be decided in writ proceeding. AIR 1968 SC 784, Rel. on. (Para 14)

(E) Industrial Disputes Act (1947), Ss. 10, 2 (a) (i) — Industrial dispute regarding major port Mormugao — Reference by appropriate Government — Reference by Administrator (Lt. Governor) is legal even if dispute does not relate to major port — In relation to State or Central Government appropriate Government is Administrator — Constitution of India, Arts. 364 (2) (a), 366 (10), 246 (4), 239 (1), 240 (1) (d) — Indian Ports Act (1908), S. 3 (8) — Goa, Daman and Diu (Laws) Regulation (1962), Cls. 3 (i), 5 (1), 6 (1) (b) — Industrial Disputes (Central) Rules (1957), R. 2 (f) — Government of Union Territories Act (1963) S. 46 (2) (3) — General Clauses Act (1897), Ss. 3 (8) (b), 3 (60) (c).

Under Section 2 (a) (i) of the Act "Major port" means a port defined in Clause (8) of Section 3 of the Indian Ports Act, 1908 which is an existing law within the meaning of Article 366 (10) of the Constitution, and which was extended to the territory of Goa, Daman and Diu, on 24th January 1963 and was brought into force on 26th January 1963 by virtue of Clause 3 (i) of the Goa, Daman and Diu (Laws) Regulations 1962. The General Clauses Act 1897 was similarly extended on 30th January 1963 and brought into force the same day. The port of Mormugao was declared by the Central Government as a "major port" in exercise of the powers conferred by Clause (8) of Sec. 3 of the Indian Ports Act on 2nd December 1963. Though the Union Territories are Centrally administered they do not lose their individual constitutional entity. They are not merged with the Central Government. (Para 10)

The Industrial Disputes Act was extended and brought into force in this territory without any modification. The Industrial Disputes (Central) Rules, 1957 extending to Union Territories in relation to all industrial disputes came into force in this territory on the same day the Act was brought into force, that is, 19th December, 1962. This was in terms of Clause (5) (1) of the 1962 Regulation. Under Rule 2 (f), unless there is anything repugnant in the subject or context, in relation to an industrial dispute in a Union Territory, for which the appropriate Government is the Central Government, reference to the Central Government of the Government of India shall be construed as a reference to the Administrator of the territory. (Para 11)

Where the industrial dispute relates to the port of Mormugao, a major port, assuming that the appropriate Government to make a reference is the Central Government, then by virtue of the said rule, the order of reference made by the Administrator appointed by the President, is legal. (Para 11)

Central Government, as defined in Section 3 (8) (b) (iii) General Clauses Act, shall include, in relation to the administration of a Union Territory, the administrator thereof acting within the scope of the authority given to him under Article 239 of the Constitution. Under Section 3 (60) (c) of that Act, State Government as respects anything done or to be done after the commencement of the Constitution (Seventh Amendment) Act, 1956, shall mean in a Union Territory, the Central Government. The Constitution (Seventh Amendment) Act 1956 came into force on 1st of November 1956. Clause 6 (1) (b) of the 1962 Regulation provides that in any Act or in any of the rules, notifications, orders, regulations and bye-laws made or issued thereunder and extended to this territory by the said Regulation, any reference to the State Government shall be construed as a reference to the Central Government and also as including a reference to the Central Government and also as including a reference to the Lt. Governor. This provision closely follows the language of Sec. 3 (60) (c) of the General Clauses Act. Thus, the reference is valid even on the assumption that the appropriate Government is the Central Government. It is also valid if the appropriate Government is the State Government, assuming the industrial dispute referred does not concern the port of Mormugao. In other words, on account of the operation of the Rule 2 (f) of the Industrial Disputes (Central Rules) (1957), read with Sec. 3 (8) (b) (iii) and S. 3 (60) (c) of the General Clauses Act, the Administrator is the appropriate Government in relation to industrial disputes concerning the port of Mormugao. The Administrator also is the appropriate Government in relation to industrial disputes which do not concern a major port, but concerns a minor port as commonly understood. This result follows

from the operation of Clause 6 (1) (b) of the 1962 Regulation. (Paras 12, 13)

The Administrator is the appropriate Government for the purposes of reference of industrial disputes in this territory, whether they fall within the Central or State sphere. The President acts through the Administrator in the administration of this territory and the State Government, in its turn, acts through the Administration. AIR 1967 Goa 169, Rel. on. Case law Ref. (Para 13)

Cases Referred: Chronological Paras

(1968) AIR 1968 SC 784 (V 55) = Civil Appeal No. 2176 of 1966, D/-28-11-67, Sri Tirumala Venkateswara Timber and Bamboo Firm v. Commercial Tax Officer, Rajahmundry

(1967) AIR 1967 SC 1 (V 54) = (1966) 3 SCR 744, Naresh v. State of Maharashtra

(1967) AIR 1967 SC 469 (V 54) = (1967) 1 SCR 882, Delhi Cloth and General Mills v. Its Workmen

(1967) AIR 1967 Goa 169 (V 54) = J. J. S. Rodrigues v. Union of India

(1966) AIR 1966 SC 921 (V 53) = 1962 Supp (3) SCR 934, Serajuddin & Co. v. Workmen

(1966) AIR 1966 SC 1089 (V 53) = (1966) 2 SCR 229, K. S. Venkataraman v. State of Madras

(1966) 60 ITR 260 = (1966) 17 STC 508 (SC), Beharilal Shyam Sundar v. Sales Tax Officer

(1964) AIR 1964 SC 436 (V 51) = 1964-1 SCR 200, Laxman v. State of Bombay

(1964) AIR 1964 Mad 192 (V 51) = ILR (1964) 2 Mad 919, Nagarathnam v. State of Madras

(1963) AIR 1963 SC 569 (V 50) = (1963) 3 SCR 548, Express Newspapers (P.) Ltd. v. The Workmen

(1962) AIR 1962 SC 1621 (V 49) = (1963) 1 SCR 778, Smt. Ujjam Bai v. State of Uttar Pradesh

(1962) AIR 1962 SC 1893 (V 49) = (1963) 1 SCA 622, East India Commercial Co. Ltd., Calcutta v. Collector of Customs, Calcutta

(1961) AIR 1961 Bom 277 (V 48) = ILR (1960) Bom 1034, Firm Tulshidas Khimji v. F. Jeejeebhoy

(1960) AIR 1960 Ker 190 (V 47) = ILR (1960) Ker 222, Burmah Shell Workers Union v. State of Kerala

(1960) AIR 1960 Punj 76 (V 47) = (1959-60) 16 FJR 152, Birla Cotton Spinning and Weaving Mills Ltd. v. Additional Industrial Tribunal

(1959) AIR 1959 Punj 75 (V 40) = ILR (1958) Punj 2061, Karnal Kaithal Co-operative Transport Society v. State of Punjab

(1958) AIR 1958 SC 1018 (V 45) = 1959 SCR 1191, State of Bihar v. D. N. Ganguly

(1958) AIR 1958 Ker 217 (V 45) = 1958 Ker LJ 438, Travancore Sugars and Chemicals Ltd. v. State of Kerala

(1957) AIR 1957 Mad 615 (V 44) = 1957-2 Mad LJ 357, In re Paramount Films of India

(1957) AIR 1957 Mad 700 (V 44) = 70 Mad LW 258, Management of Kadachira Motor Service Ltd. v. State of Madras

(1956) AIR 1956 Kutch 9 (V 43), 1956 SCR 256, Raman & Raman Ltd. v. State of Madras

(1956) AIR 1956 Kutch 9 (V 43) = P. K. Pillai v. Burma Shell Oil Storage & Distributing Co.

(1954) AIR 1954 SC 340 (V 41) = 1955 SCR 117, Kiran Singh v. Chaman Paswan

(1954) AIR 1954 Bhopal 17 (V 41), H. M. Manufacturing Co. v. State of Bhopal

(1953) AIR 1953 Mad 98 (V 40) = 1952-1 Mad LJ 481, Indian Metal and Metallurgical Corporation v. Industrial Tribunal, Madras

(1951) AIR 1951 SC 230 (V 38) = 1951 SCR 380, United Commercial Bank Ltd. v. Their Workmen

(1951) 1951-2 KB 1 = (1951) 1 All ER 482, R. v. Fulham, Hammersmith and Kensington Rent Tribunal

(1947) AIR 1947 PC 200 (V 34) = 74 Ind App 103, Govt. of the Provinces of Bombay v. Hormusji Manekji

(1940) AIR 1940 PC 105 (V 27) = 67 Ind App 222, Secy. of State v. Mask & Co.

(1888) 21 QBD 313 = 36 WR 776, R. v. Income Tax Special Purposes Comms.

(1887) ILR 9 All 191 = 13 Ind App 134 (PC), Ledgard v. Bull

(1874) 5 PC 417 = 30 LT 237, Colonial Bank of Australia v. Willan

U. B. Surlikar (for No. 1) and H. K. Sowani (for No. 2), for Petitioners; S. Tamba, Govt. Pleader (for Nos. 1 and 2), F. S. Nariman assisted by D. B. Engineer and Ataide Lobo (for Nos. 3 to 22), for Respondents.

JUDGMENT:— This is a petition duly amended under Article 226 of the Constitution. The petitioners are (1) The Goa Dock Labour Union, a trade union registered under the Indian Trade Unions Act, 1928, represented by its General Secretary Mohan Nair; and (2) Harichandra Pundalik Parab. The respondents are (1) Government of the Union Territory of Goa, Daman and Diu; (2) Shri K. R. Pawar, Industrial Tribunal, appointed by the respondent No. 1 under

the Industrial Disputes Act, 1947 (hereinafter referred to as "the Act"), and a number of other employers employing barge crew. The relief claimed by the petitioners is that the order of reference dated 3rd November, 1967, under Section 10 (1) of the Industrial Disputes Act by the State Government (respondent No. 1), whereby the Industrial Dispute between the barge crew and the respondent-employers was referred to the respondent No. 2 for adjudication be quashed by an appropriate writ etc., as the Central Government and not the State Government is the appropriate Government under the Act in relation to the said dispute which concerns a major port.

2. The case of the petitioners is that the respondent-employers ply their barges in connection with the movement, loading and unloading of iron ore for the purpose of export from the port of Mormugao. The number of the barge crew employed by them is approximately 2,500. This port has been declared as a major port by the Central Government by a notification dated 2nd December, 1963. By a resolution dated 13-11-64 the Central Government set up a Wage Board for the port and dock workers at major ports. According to the terms of the said resolution, the Wage Board was required to determine the categories of employees (manual, clerical, supervisory, etc.) who should be brought within the scope of the proposed wage fixation, and the term 'employees' was to cover (1) persons employed by the major port authorities; (2) dock workers as defined under the Dock Workers (Regulation of Employment) Act, 1948; (3) the employees engaged by the Dock Labour Boards and their administrative bodies; and (4) employees engaged by the listed employers. The Wage Board was also called upon to work out a wage structure based on the principles of fair wages set forth in the Report of the Committee on Fair Wages. The Wage Board was further directed by the Central Government, within three months from the date it starts its work to submit its recommendations regarding the demands of labour in respect of interim relief, pending submission of the final report. The said recommendations were submitted on 9th April 1965. They relate to interim relief and additional dearness allowance for the categories of employees mentioned who were connected with the port and dock work at major ports. The Central Government then requested the concerned employers to implement the said recommendations. The petitioners contended that the barge crew employed by the respondents-employers were also governed by the said recommendations and therefore they should have the interim relief and additional dearness allowance. The respondents-

employers joined issue and their stand was that the said recommendations are not applicable to the barge crew employed by them. It was later agreed to seek necessary clarification from the Wage Board. The Wage Board gave no clarification. The dispute remained unresolved for some time for various reasons. The barge crew represented by the petitioner union and also the barge crew not so represented then went on strike with effect from 1st November, 1967, in order to enforce their collective demands. On 3rd November, 1967, the State Government referred the pending Industrial Dispute to the Industrial Tribunal (respondent No. 2) for adjudication under Section 10 (1) in the following terms:— (i) whether the barge crew employed by the barge owners mentioned in Schedule II Annexed hereunder are entitled to the benefits of Interim Relief and D. A. recommended by the Central Wage Board for Port and Dock Workers as accepted by the Government of India in their Notifications Nos. WB-21(13)/65 dated 27th April, 1965 and WB-21(14)/65 dated 19th October, 1966; (ii) if not, to what relief the barge crew are entitled having due regard to the terms of the settlement entered into by the barge owners with their workers during the years from 1963 to 1966 regarding Wages, Allowances and other service conditions; (iii) to what other relief, if any, the barge crew are entitled. The petitioners felt that the said order of reference by the State Government was illegal, as it was not the appropriate Government under the Act, and, therefore, it was not competent to refer the said dispute for adjudication. According to the petitioners the work done by the barge crew forms part of the activities of the port of Mormugao, a major port. It is directly connected with or has a direct relation with the activities of the said port. They are engaged in the movement of cargo, namely the iron-ore through the navigable parts of rivers and canals (which also comprise the said port), to the ships and vessels into which the said cargo is loaded for the purposes of export. The barge crew are dock workers as defined in Section 2 (b) of the Dock Workers (Regulation of Employment) Act, 1948 and, in that capacity, are governed by the Dock Workers (Safety, Health and Welfare) Scheme, 1961 framed under this Act. In view of the nature of the work performed by the barge crew the industrial dispute referred concerns the said port and, consequently, the Central Government alone was competent to refer it for adjudication. In the premises, the order of reference by the State Government is illegal and hence it should be quashed by an appropriate writ etc.

3. The case, on behalf of the respondents Nos. (1) and (2), as explained in the affidavit of C. N. Bopaiah, Labour Commissioner, is that the order of reference is valid. The industrial dispute referred does not concern the said port. The Central Government is not the appropriate Government for the purposes of reference under the Act. The State Government is the appropriate Government. The barge crew are not wholly engaged within the limits of the said port. Any dispute between them and their employers does not concern the said port. The barge crew do not load, nor unload, the iron-ore from the barges nor do they move the cargo. They are not dock workers as defined in Section 2 (h) of the Dock Workers, (Regulation of Employment) Act, 1948. On 2nd August, 1965, the Central Government clarified that the State Government and not the Central Government was the appropriate Government. The respondent No. 2 is competent to adjudicate the industrial dispute referred. The petitioners may raise the question of jurisdiction before him. The petition is misconceived. The petitioners have not made out any case for quashing the order of reference. (It may be said that it was really not necessary nor appropriate, to have sworn an affidavit on behalf of the respondent No. 2 who is a disinterested party. This seems to be a bona fide mistake).

4. The case of the respondent-employers is generally the same. It is set out at length in the affidavit of Volcunta Srinivassa Sinai Dempo, a Director of Messrs. V. S. Dempo and Company Private Limited. This company is respondent No. 4. It is therefore not necessary to refer to similar averments with minor variations in the counter-affidavits of other respondent-employers. The case of all the respondent-employers is that the petition involves disputed questions of fact which cannot appropriately be decided in any proceeding under Article 226. The petitioner union participated in a conciliation proceeding by the Conciliation Officer appointed by the State Government by Notification dated 16th August, 1966. This conciliation resulted in a settlement. There was also another settlement between the petitioners and respondent No. 4 and other employers, on 15th November, 1967. This was after the order of reference dated 3rd of November, 1967. The petitioners conveniently omitted to refer to this settlement in their petition. One of the terms of this settlement was that the employers and the petitioner union would forward a copy of the settlement to the State Government (respondent No. 1) and respondent No. 2 for their necessary action. In that settlement the amounts paid

thereunder and also under the conciliation settlements arrived at in 1966 and thereafter were to be adjusted on the basis of the award of the respondent No. 2. The petitioners appeared before the respondent No. 2 and asked for time to file a statement of their claim. This conduct of the petitioners, according to the employers, shows that they acquiesced in the jurisdiction of the respondent No. 2 and, therefore, the principle of estoppel would apply to them. The petitioners can raise the question of the validity of the reference before the respondent No. 2.

The averment that the barge owners employ the barge crew in connection with the movement, loading and unloading of iron-ore for the purposes of export to ships and vessels from the said port, is denied. The barge crew have nothing to do with the movement, loading or unloading of iron-ore. Their function is restricted merely to operation and plying of the barges in question. The order of reference dated 3rd November, 1967, is legal because the industrial dispute referred does not concern the said port. The barge crew are not dock workers for the purposes of the Dock Workers (Regulation of Employment) Act, 1948. The iron-ore extracted from the mines is loaded into trucks which carry it to the plots near the jetties alongside the rivers. It is thereafter stacked on such plots and the loading of ore into the barges is carried out by labour attached to the plots. In the case of some respondent-employers, this loading is done mechanically. The ore, after it is loaded, is transported by the barges to the vessels and ships. Unloading of the ore from the barges into the vessels is done by the labour engaged by the Dock Labour Board. The total navigable length of the Mandovi river is about 41 miles, and the total navigable length of the Zuari river is about 42 miles. The barges ply on these rivers and tributaries thereof. The farthest loading point on these rivers from the said port would be about 42 miles and the nearest loading point from which the ore is loaded into the barges is about 7 miles from the main port. On a comparison of the total length of these rivers, the loading points and the limits of the said port set out in the notification dated 16th November, 1963, it would be clear that the barges ply from points far removed from the limits of the said port and that the major part of these rivers on which the barges are plied, is outside the limits of the said port. The barge crew are not engaged either in the said port or in the vicinity thereof. The various beneficial schemes applicable to dock and port workers under the above 1948 Act, the Indian Dock Labourers Act, 1934 and the Indian

Dock Labourers Regulation, 1948, are not applicable to the barge crew. The plying of barges is an independent activity outside the jurisdiction of the said port and therefore it is not connected or concerned with it. In a hypothetical case if the ore in question were transported by lorries or trucks from the mines to the said port, it could be contended (if the petitioners were right) that this activity also concerns a major port. As admitted by the petitioners, the barge crew decided to "refuse to enter the port limits from the 1st of November, 1967", and when they struck work they transported the ore from the plots upto a point outside the limits of the said port, anchored the barges and refused to transport the ore further. The barge crew themselves realized that there was a distinction between the area of their operation and the limits of the said port. The barges are registered under the provisions of the Indian Steam Vessels Act, 1947. The entire activity of plying the barges is in respect of inland waters.

The whole idea of presenting the petition is to procrastinate adjudication by the respondent No. 2 so that it may be difficult for the employers to recover the amounts already paid and thereafter payable. The petitioners have made out no case for grant of a writ of certiorari etc. The respondent No. 2 is vested with the jurisdiction to decide the question of the validity of the reference. In these circumstances it is stated that the petition should be dismissed with costs.

In the rejoinder reply affidavit it is affirmed by Mohan Nair on behalf of the petitioner union that the petition does not involve disputed questions of fact. The clarificatory opinion of the Central Government that the State Government is the appropriate Government is not binding. The respondent No. 2, being a tribunal of limited jurisdiction, cannot go beyond the order of reference and as such cannot decide whether the Central Government or the State Government is the appropriate Government. It is not correct that the petitioners deliberately omitted from the petition reference to the settlement reached on 15th November, 1967. This settlement is not a valid document, apart from the fact that it is not material for the purposes of deciding the question as to which is the appropriate Government. The petitioners did not acquiesce in the jurisdiction of the respondent No. 2. The extension of time was applied for with the object of challenging the validity of the reference. The barges belonging to the respondent-employers operate in the said port, including also in approaches or canals in which the Indian Ports Act, 1908, is in force. The functions of the barge crew are intimately connected with the load-

ing, unloading and the transportation or the movement of the ore which is exported. The plying of barges is not the only function. The function of plying the barges is necessarily the function of transporting the ore. The operation of the barges cannot be imagined in the absence of the working of the said port. The barges ply in the rivers connected with the said port for the purpose of transporting ore but the operations are not complete, unless the ore is transported in the harbour. The barge crew have to remain alert on the barges for the purpose of facilitating the gangmen and the winchmen to carry out the work of loading the ore into vessels or ships. The barge crew spend most of their time in the harbour for the purpose of loading the ore. The respondent No. 2 is not vested with the jurisdiction to decide the question of the validity of the order of reference. The respondent No. 2 cannot go beyond the terms of reference. He cannot decide whether the Central Government or the State Government is the appropriate Government. This, in short, is the substance of the pleadings of the parties.

5. I shall presently address myself to the main question, namely, whether the Central Government or the State Government is the appropriate Government but before I do so it may be convenient to deal with the plea of estoppel by acquiescence and also the plea that the respondent No. 2 has jurisdiction to answer the main question and hence this Court should dismiss the petition. Acquiescence operates by way of estoppel. The explanation of the petitioners that they did not consider it necessary to refer to the settlement dated 15th November, 1967, in their petition is not convincing. This settlement was reached after the order of reference dated 3rd November, 1967. The petitioners seeking extraordinary relief are expected to disclose material facts. They may be against them, but that is no reason to keep them back from the Court. However, I would not like to dismiss the petition on this ground. As will appear from terms 5 and 7, the settlement has a bearing on the industrial dispute referred to the respondent No. 2.

Mr. Nariman, learned Counsel for the respondent-employers, at first argued that assent may reasonably be inferred from the conduct of the petitioners when they submitted to the jurisdiction of the respondent No. 2 and therefore it is not now open to them to impugn the validity of the reference but later fairly conceded that if the respondent No. 2 initially lacks jurisdiction because the reference is not by the appropriate Government then the plea of estoppel by

acquiescence is no hurdle in the way of the petitioners. It may be stated that the law is that where by reason of any limitation imposed by statute a Court, (or tribunal) lacks jurisdiction to entertain any particular matter, neither acquiescence nor consent of the parties can confer jurisdiction upon it. No appearance, answer or request for extension of time, as in the instant case, can give jurisdiction which is conferred by statute. If the State Government is not competent to refer the industrial dispute because it is not an appropriate Government then no award can be made by the respondent No. 2. Such an award *ex facie* would be without jurisdiction and therefore illegal and inoperative. It is immaterial, in that case, that objection was not taken by the petitioner before the Tribunal challenging its jurisdiction. Any exercise of unauthorized jurisdiction by the Tribunal would amount to usurpation of the sovereign power of the State. A party cannot confer jurisdiction on a tribunal, nor take away its jurisdiction by way of an objection. Where jurisdiction does not exist, no amount of consent, acquiescence or waiver can create it or confer it. *Kiran Singh v. Chaman Paswan*, AIR 1954 SC 340. *United Commercial Bank Ltd. v. Their Workmen*, AIR 1951 SC 230 at p. 237 and *Ledger v. Bull*, (1887) 11 LR 9 All 191 at p. 203 (PC). This is particularly so in respect of inferior Courts as distinguished from the superior Courts. The law is also well settled that *prima facie*, no matter is deemed to be beyond the jurisdiction of a superior Court unless it is expressly shown to be so, while nothing is within the jurisdiction of an inferior Court unless it is expressly shown on the face of the proceedings that the particular matter is within the cognizance of the particular Court: (*Halsbury's Laws of England*), Volume 9, page 349 cited with approval in *Nareish v. State of Maharashtra*, AIR 1967 SC 1 at p. 18. What is true of inferior Courts is equally true of tribunals of limited authority, as in the instant case. The plea of estoppel by acquiescence is no bar if the respondent No. 2 lacks jurisdiction. That takes me to the next plea whether he has the jurisdiction to decide the main question whether the Central Government or the State Government is the appropriate Government for the purposes of reference.

6. The order of reference in this case is under Section 10 (1) of the Act. Section 10 (4) provides that where the appropriate Government has specified the points of dispute for adjudication, the tribunal shall confine its adjudication to those points and matters incidental thereto. In *Delhi Cloth & General Mills v. Its Workmen*, AIR 1967 SC 469, Mit-

ter, J., speaking for the Supreme Court, observed that the industrial dispute is a fundamental thing whilst something incidental thereto is an adjunct to it. Respondent No. 2 therefore has to confine himself to the industrial dispute referred and the matters incidental thereto. In *Smt. Ujjam Bai v. State of Uttar Pradesh*, AIR 1962 SC 1621, the doctrine of jurisdictional fact in connection with the jurisdiction of the administrative tribunals generally was explained by S. K. Das, J., in the following words:—

"The question whether a tribunal has jurisdiction depends not on the truth or falsehood of the facts into which it has to enquire, or upon the correctness of its finding on those facts, but upon their nature and is determinable 'at the commencement not at the conclusion of the inquiry' A tribunal may lack jurisdiction if it is improperly constituted, or if it fails to observe certain essential preliminaries to the inquiry. But it does not exceed its jurisdiction by basing its decision upon an incorrect determination of any question that it is empowered or required (i.e., has jurisdiction) to determine. The strength of this theory of jurisdiction lies in its logical consistency. But there are other cases where Parliament when it empowers an inferior tribunal to enquire into certain facts intends to demarcate two areas of enquiry, the tribunal's findings within one area being conclusive and within the other area impeachable."

In *Halsbury's Laws of England*, Third Edition, Volume 11 page 59, the law on the jurisdiction of an inferior Tribunal is explained thus:—

"The jurisdiction of an inferior tribunal may depend upon the fulfilment of some condition precedent (such as notice) or upon the existence of some particular fact. Such a fact is collateral to the actual matter which the inferior tribunal has to try, and the determination whether it exists or not is logically and temporally prior to the determination of the actual question which the inferior tribunal has to try. The inferior tribunal must itself decide as to the collateral fact: when, at the inception of an inquiry by a tribunal of limited jurisdiction, a challenge is made to its jurisdiction, the tribunal has to make up its mind whether it will act or not, and for that purpose to arrive at some decision on whether it has jurisdiction or not. There may be tribunals which, by virtue of legislation constituting them, have the power to determine finally the preliminary facts on which the further exercise of their jurisdiction depends, but, subject to that, an inferior tribunal cannot, by a wrong decision with regard to a collateral fact, give itself a jurisdiction

which it would not otherwise possess or deprive itself of a jurisdiction which it otherwise would possess. If it purports to do so, it may be restrained or compelled (as the case may be) by an order of prohibition or mandamus, or its decision brought up by an order of certiorari and quashed."

The judgment of Lord Esher, M. R. in *R. v. Income Tax Special Purposes Comrs.* (1888) 21 QBD 313 at p. 339, and also the judgments of some other learned Judges in England are cited in support of the above statement of law.

7. Mr. Surlikar, learned Counsel for the petitioner union, invited my attention to *H. M. Manufacturing Co. v. State of Bhopal*, AIR 1954 Bhopal 17 in support of his contention that the respondent No. 2 has no jurisdiction to determine the validity of the reference on the ground that the State Government is not the appropriate Government. Mr. Sowani, learned Counsel for the petitioner No. 2, contended that the respondent No. 2 derives authority to decide the industrial dispute referred from the order of reference and therefore he cannot question the authority of the State Government. In the Bhopal case the learned Judicial Commissioner observed that the tribunal to whom an industrial dispute is referred for adjudication cannot enter into the question if the reference is valid or otherwise, but is bound to deal with it as it stands. He went on to add that at any rate the language of Section 15 (1) of the Industrial Disputes Act does not seem to permit the tribunal to go behind the validity of the reference and examine it for that consideration. In making these observations, the learned Judicial Commissioner was influenced by certain observations of the Madras High Court in *Indian Metal and Metallurgical Corporation v. Industrial Tribunal, Madras*, AIR 1953 Mad 98.

The learned Judges of the Madras High Court expressed their doubt

"if the appellate tribunal has the power to declare the reference by the Government to be invalid or to hold that the Industrial Disputes Act itself is invalid or otherwise."

Mr. Nariman, learned Counsel for the respondents, drew my attention to *K. K. Co-operative Transport Society v. State of Punjab*, AIR 1959 Punj 75 at p. 77 where the view expressed by the learned Judicial Commissioner was regarded as "wholly misconceived". The decision in the Punjab case is by a Division Bench as in the Madras case.

The learned Judges of the Punjab High Court stated that the jurisdiction of every judicial or quasi-judicial tribunal is derived from and limited by the statute or other instrument by which it has

been created, and every judicial or quasi-judicial tribunal has power to determine the boundaries of its own jurisdiction. They also stated that every such tribunal should, of its own motion, consider the question of its jurisdiction over any matter brought before it even though it is not raised by the parties. They went on to add that there was no substance in the contention that the language of Section 15 (1) of the Industrial Disputes Act does not permit the tribunal to question the validity of a reference made to it by the State Government. The conclusion was that the question of jurisdiction should be raised before the tribunal itself and decided by it in accordance with law. Section 15 (1) as originally enacted provided that where an industrial dispute has been referred to a Tribunal for adjudication, it shall hold its proceedings expeditiously and shall, as soon as practicable on the conclusion thereof, submit its award to the appropriate Government. With respect, I agree with the view expressed by the learned Judges of the Punjab High Court. It is true that the tribunal of limited authority, as in the present case, cannot consider the question whether the Act or any provision thereof is invalid but as will be pointed out hereafter the law is well settled that the question of validity of the reference can be decided by it where exercise of jurisdiction depends upon the existence of a preliminary or collateral fact which goes to the jurisdiction. In *K. S. Venkataraman v. State of Madras*, AIR 1966 SC 1089 Subba Rao, J., (as he then was), whilst expressing majority view on behalf of the Supreme Court, observed that an authority created by a statute cannot question vires of that statute or any of the provisions thereof whereunder it functions. It must act under the Act and not outside. This view was reiterated in *Beharilal Shyam Sundar v. Sales Tax Officer*, (1966) 60 ITR 260 (SC).

Mr. Sowani's argument that because the tribunal derives authority from the reference and therefore it cannot decide its validity is far from convincing. Mr. Nariman also drew my attention to the following authorities in support of his contention that the tribunal has the jurisdiction to decide validity of the reference. In *re Paramount Films of India Ltd.*, AIR 1957 Mad 615; *Management of Kadachira Motor Service Ltd. v. State of Madras*, AIR 1957 Mad 700; *Travancore Sugars & Chemicals Ltd. v. State of Kerala*, AIR 1958 Ker 217; *Burmah Shell Workers Union v. State of Kerala*, AIR 1960 Ker 190; and *Nagarathnam v. State of Madras*, AIR 1964 Mad 192. I shall briefly review these decisions.

In AIR 1957 Mad 615, Rajagopalan, J., said that the person seeking to avoid the reference on the ground that there is no dispute at all for adjudication has to take it up even as a preliminary issue for decision by the tribunal itself. If the tribunal arrives at a wrong decision, the aggrieved person will be entitled to challenge the validity of such a decision by an application for the issue of a writ of certiorari.

In AIR 1957 Mad 700 the same learned Judge observed that the question whether a given dispute is an industrial dispute is primarily for the tribunal to decide. If there is no industrial dispute at all as defined by the Act the tribunal would obviously have no further jurisdiction to adjudicate any dispute. At that stage neither a writ of prohibition nor a writ of mandamus can issue.

In AIR 1958 Ker 217, Vaidialingam, J., after reviewing the case-law at some length opined that it is within the jurisdiction of the tribunal to decide the question about the existence or otherwise of the employer and employee relationship. There is nothing in the Act which denies jurisdiction to the tribunal to decide these questions.

AIR 1960 Ker 190 is an authority in support of the proposition that if the order of reference is *ex facie* without jurisdiction and such absence of jurisdiction can be seen without considering disputed questions of fact, it would be proper for the Court to interfere even before the tribunal decides the question. The question whether the Court should interfere or not would depend upon the facts of each case and the test appears to be whether the question can be decided without investigation of disputed facts. If it involves such investigation the Court should not interfere. This decision by the Division Bench cites the decision of Their Lordships of the Supreme Court in *State of Bihar v. D. N. Ganguly*, AIR 1958 SC 1018 in support of the above statement of law.

In AIR 1964 Mad 192 Srinivasan, J., sitting singly, observed that after the reference under Section 10 (1) (e) has been made by the Government, the Labour Court has jurisdiction to determine whether on the facts placed before it an industrial dispute within the meaning of the Act has really arisen. If that undoubted jurisdiction exists in the Labour Court, it follows that the grounds such as that there was no relationship of master and servant between the employer and the employee and therefore the employee was not a workman, and that there was no existence of any industrial dispute, are grounds which can be validly examined and adjudicated upon by the Labour Court itself as the determination of a collateral issue which

confers jurisdiction upon it to deal with the main reference entrusted to it.

The recent decision of the Supreme Court in *Delhi Cloth & General Mills case*, AIR 1967 SC 469 (supra), clarifies the legal position. In that case the Supreme Court observed that the cases discussed go to show that it is open to the parties to show that the dispute referred was not an industrial dispute at all and it is certainly open to them to bring out before the Tribunal the ramifications of the dispute. The Supreme Court referred to its earlier decision in *Express Newspapers (P.) Ltd. v. The Workers*, AIR 1963 SC 569, and the following passage therefrom was cited:—

"There is no doubt that in law, the appellant is entitled to move the High Court even at the initial stage and seek to satisfy it that the dispute is not an industrial dispute and so, the Industrial Tribunal has no jurisdiction to embark upon the proposed enquiry. If the industrial tribunal proceeds to assume jurisdiction over a non-industrial dispute, that can be successfully challenged before the High Court by a petition for an appropriate writ, and the power of the High Court to issue an appropriate writ in that behalf cannot be questioned. It is also true that even if the dispute is tried by the industrial tribunal, at the very commencement, the industrial tribunal will have to examine as a preliminary issue the question as to whether the dispute referred to it is an industrial dispute or not, and the decision of this question would inevitably depend upon the view which the industrial tribunal may take as to whether the action taken by the appellant is a closure or a lock-out. The finding which the industrial tribunal may record on this preliminary issue will decide whether it has jurisdiction to deal with the merits of the dispute or not."

8. The aforesaid decisions show that the Industrial Tribunal can decide collateral issues which confer jurisdiction upon it. It can decide whether an industrial dispute exists or not. This is because on its determination would depend the power and authority to decide the main question. If there was no employer-employee relationship then it follows, as a consequence, that there is no industrial dispute. 'Industrial dispute' under Section 2 (k) of the Industrial Disputes Act, to the extent it is relevant for the present purpose, means "any dispute or difference between employers and workmen which is connected with the employment or non-employment or the terms of employment or with the conditions of labour, of any person".

9. The fact that the dispute referred in the present case is an industrial dis-

pute as defined does not seem to be in dispute. This is a relieving feature. The difference is that it does not concern a major port. If it does not, then the respondent No. 2 would (not?) be without jurisdiction. The position would be different if it does. This, in my opinion, is a collateral fact to the actual matter referred to the respondent No. 2 for adjudication. This is collateral to the "very essence of the enquiry": *R. v. Fulham, Hammersmith and Kensington Rent Tribunal*, (1951) 2 KB 1 at p. 6. It is "extrinsic to the adjudication": *Colonial Bank of Australasia v. Willan*, (1874) 5 PC 417. In other words, it is not direct and intrinsic. In *Raman & Raman Ltd. v. State of Madras*, AIR 1956 SC 463 it was stated by Their Lordships that there may be cases where the jurisdiction of an inferior tribunal may depend upon the fulfilment of some condition precedent or upon the existence of some fact. Such a fact is collateral to the actual matter which the inferior tribunal has to try and the determination of whether it exists or not is logically and in sequence prior to the determination of the actual question which the inferior tribunal has to try. The respondent No. 2 could have decided objectively at the inception of the enquiry in the event of a challenge to its jurisdiction whether the dispute referred concerns the Port of Mormugao, a major port. The Act does not say that the opinion of the appropriate Government on this question is final and the Tribunal cannot enquire into it. It was open to the petitioners to have raised the question of jurisdiction as a preliminary issue for the decision of the respondent No. 2. This decision could have been challenged by them in a proceeding under Articles 226 and 227, in case it was erroneous, for no Tribunal can confer jurisdiction upon itself by misconstruing a section. I agree with Mr. Nariman, learned Counsel for the respondent-employers, that the respondent No. 2 has jurisdiction to decide whether the Central or the State Government is the appropriate Government.

What then are the alternatives? According to Mr. Nariman the petition should be dismissed and the respondent No. 2 left free to decide this issue. This is one alternative. According to the learned Counsel for the petitioners, this Court should decide it, as the point involved is important and has been argued at length. I am for the second alternative. The decision by this Court would enable the respondent No. 2 to confine his attention to the industrial dispute referred and the matters incidental thereto. It would also save labour and time of the respondent No. 2 as the decision given by this Court on the validity of the reference would be binding on

him. In this connection reference may be made to the decision of the Supreme Court in *East India Commercial Co. Ltd., Calcutta v. Collector of Customs, Calcutta*, AIR 1962 SC 1893 at p. 1905 where it was explained that the law declared by the highest Court in the State is binding on authorities or tribunals under its superintendence.

10. The main question now remains to be considered. Which is the appropriate Government for the purposes of the present reference? In order to answer this question we have to turn to the scheme of the Act. The Act was extended to this territory on 18th February, 1962 and brought into force on 19th December 1962 in accordance with Clause 3 (1) of the Goa, Daman and Diu (Laws) Regulation, 1962. The subject-matter of the Act is relatable to concurrent list entry 'industrial and labour disputes'. The Act was enacted to make provision for the investigation and settlement of industrial disputes, and for certain other purposes. Section 2 (a) defines "appropriate Government". Under that definition, unless there is anything repugnant in the subject or context, "appropriate Government", in so far as it is material for the present purpose, means — (i) in relation to any industrial dispute ... concerning a major port, the Central Government, and (ii) in relation to any other industrial dispute, the State Government. This expression occurs in many provisions of the Act. The field of industrial and labour disputes for the purposes of reference and other matters dealt with in the Act is demarcated between the Centre and the States. This is because both Parliament and the State Legislatures are competent to legislate. The Act is a Pre-Constitution law. Sub-clause (i) enables the Central Government to act as an appropriate Government in relation to major ports and other industries falling within the Union List. What is a "major port" is defined in Article 364 (2) (a) of the Constitution. Under that definition, "major port" means a port declared to be a major port by or under any law made by Parliament or any existing law and includes all areas for the time being included within the limits of such port. Entry 27 of the Union List refers to major ports. Under Section 2 (1) (a) of the Act "major port" means a port defined in Clause 8 of Section 3 of the Indian Ports Act, 1908. The Indian Ports Act, 1908 is an existing law within the meaning of Article 366 (10) of the Constitution. Under that Article "existing law" means any law passed or made before the commencement of the Constitution by any Legislature. The Indian Ports Act, 1908 was extended to this territory on 24th January, 1963, and was brought into force on 26th January.

1963, by virtue of Clause 3 (i) of the said 1962 Regulation. The General Clauses Act, 1897 was similarly extended on 30th January, 1963 and brought into force the same day. The port of Mormugao was declared by the Central Government as a "major port" in exercise of the powers conferred by Clause 8 of Section 3 of the Indian Ports Act on 2nd December, 1963, vide notification SR 1907 bearing the same date. The areas comprised therein and also its limitations were declared earlier by notification No. GSR 1838 dated 16th November, 1963. It is because of the said declaration that the industrial disputes relating to the said port have been made the responsibility of the Central Government. Article 246 (4) of the Constitution empowers Parliament to make laws with respect to any matter in the Union territories, notwithstanding that such matter is a matter enumerated in the State List. The Union territories included in Part II of the first Schedule appended to the Constitution are distinct constitutional entities from the States included in Part I of the said Schedule. It is true that the Union territories are centrally administered but they do not lose their individual constitutional entity. They are not merged with the Central Government. This distinction between the States and the Union territories included in the First Schedule has to be borne in mind before considering the arguments advanced at the Bar.

11. Mr. Nariman, learned Counsel for the respondent-employers, argued that the Act was extended and brought into force in this territory without any modification. The Industrial Disputes (Central) Rules, 1957 extending to Union territories in relation to all industrial disputes came into force in this territory on the same day the Act was brought into force, that is, 19th December, 1962. This was in terms of Clause 5 (i) of the said 1962 Regulation. He particularly drew my attention to Rule 2 (f) of the said rules and stressed its importance, for the present purpose. Under that rule, unless there is anything repugnant in the subject or context, in relation to an industrial dispute in a Union Territory, for which the appropriate Government is the Central Government, reference to the Central Government or the Government of India shall be construed as a reference to the Administrator of the territory. ... He went on to argue that assuming the industrial dispute referred to the respondent No. 2 concerns the port of Mormugao, a major port, and that the appropriate Government is the Central Government, even then by virtue of the said rule, the order of reference dated 3rd November, 1967, made by the Administrator appointed by the President, is

legal. It may be said that this order conforms to the provisions of Section 46 (2) and (3) of the Government of Union Territories Act, 1963. This fact is not disputed by learned Counsel for the petitioners. Section 46 (2) of this Act says, that all executive action of the Administrator, whether taken on the advice of his minister or otherwise, shall be expressed to be taken in the name of the Administrator. Section 46 (3) requires orders made and executed in the name of the Administrator to be authenticated in the manner prescribed. The effect of the said rule is that the reference to the Central Government is to be fictionally construed as a reference to the Administrator. Article 239 (1) of the Constitution provides that save as otherwise provided by Parliament by law, every Union territory shall be administered by the President acting, to such extent as he thinks fit, through an Administrator to be appointed by him with such designation as he may specify. The Administrator of this territory has the designation of Lt. Governor. The said 1962 Regulation, continued Mr. Nariman, is the law in terms of Article 240 (1) (d) of the Constitution. Under that provision, the President is empowered to make regulations for the peace, progress and good government of this territory. The argument developed by him was that if the intention were that the Central Government alone should have been the appropriate Government and not the Administrator in relation to industrial disputes concerning the major ports situated in Union Territories, the said rules would have been differently worded by the Central Government, or the Act would have been extended to this territory subject to modifications indicating a different intention in accordance with Clause 3 (i) of the said 1962 Regulation. This sub-clause provides for extension of Acts subject to the modifications, if any specified in the Schedule. As stated already, the Act was extended to this territory without any modification. There is nothing repugnant in the subject or context in the said rule or rules supporting the view that in relation to an industrial dispute concerning major ports in Union Territories the Administrator cannot refer it to adjudication. The order of reference by him is competent in view of the said rule. Mr. Nariman also drew my attention to Section 3 (8) (b) of the General Clauses Act. It provides that in all Central Acts and Regulations made after the commencement of that Act, unless there is anything repugnant in the subject or context, "Central Government" in relation to anything done or to be done after the commencement of the Constitution, means the President. The said rule, continued Mr. Nariman, has

the sanction of Article 239 (1) of the Constitution. The President (Central Government) may act through an Administrator by means of law as in the case of the said rule or by means of an executive action. In this view of the matter, contended Mr. Nariman, the said rule operates effectively and fully and, therefore, the order of reference dated 3rd November, 1967, is valid. This is not all.

12. Mr. Nariman next invited my attention to Section 3 (8) (b) (iii) and Section 3 (60) (c) of the General Clauses Act and Section 6 (1) (b) of the said 1962 Regulation and the decision of this Court in *J. J. S. Rodrigues v. Union of India*, AIR 1967 Goa 169 at p. 175 in support of the validity of the order of reference. These provisions may be read. "Central Government", as defined in Section 3 (8) (b) (iii) shall include, in relation to the administration of a Union territory, the administrator thereof acting within the scope of the authority given to him under Article 239 of the Constitution. Under Section 3 (60) (c) "State Government", as respects anything done or to be done after the commencement of the Constitution (Seventh Amendment) Act, 1956, shall mean in a Union Territory, the Central Government. The Constitution (Seventh Amendment) Act 1956 came into force on 1st of November 1956. Section 6 (1) (b) of the said 1962 Regulation provides that in any Act or in any of the rules, notifications, orders, regulations and by-laws made or issued thereunder and extended to this territory by the said Regulation, any reference to the State Government shall be construed as a reference to the Central Government and also as including a reference to the Lt. Governor. This provision closely follows the language of Section 3 (60) (c) of the General Clauses Act. The decision in AIR 1967 Goa 169 at p. 175 discusses the question of "appropriate Government" in the context of the definition in Section 2 (ee) of the Land Acquisition Act, 1894. This decision is relevant and apart from the provisions of law cited by Mr. Nariman, it helps his contention that the reference is valid even on the assumption that the appropriate Government is the Central Government. It is also valid if the appropriate Government is the State Government, assuming the industrial dispute referred does not concern the port of Mormugao. In other words, on account of the operation of the said Rule 2 (f) read with Section 3 (8) (b) (iii) and Section 3 (60) (c) of the General Clauses Act, the Administrator is the appropriate Government in relation to industrial disputes concerning the port of Mormugao. The Administrator also is the appropriate Government in relation to industrial disputes which do not concern a

major port, but concerns a minor port as commonly understood. This result follows from the operation of Section 6 (1) (b) of the said 1962 Regulation. Section 3 (4) of the Indian Ports Act, 1908 defines "port" as including any part of a river, or channel in which this Act is for the time being in force. The arguments of Mr. Nariman in support of the validity of the order of reference are not without substance. They have the authority of the law. Mr. Tamba, learned Government Pleader, contented himself with supporting these arguments. He also relied on *J. J. S. Rodrigues's case*, AIR 1967 Goa 169 (supra), where a similar question was considered, but in a different context. He drew my attention to *Birla Cotton Spinning and Weaving Mills v. Additional Industrial Tribunal*, AIR 1960 Punj 76 and *P. K. Pillai v. Burmah Shell Oil Storage & Distributing Co.*, AIR 1956 Kutch 9, in support of the validity of the order of reference.

In the Punjab case the decision was that in view of the provisions of Section 3 (8) and Section 3 (60) of the General Clauses Act, the then Chief Commissioner of Delhi was the Central Government and when he issued the order of reference under the Act whereby he referred certain industrial disputes for adjudication he issued it in that capacity, so that it cannot be said that he is not the authority in whose name such an order should be issued or that he is not the authority which is the State Government within the scope of the definition Section 2 (a) (ii) of the Act. This decision also lends support to the arguments advanced by Mr. Nariman.

In the Kutch case, it was held by the learned Judicial Commissioner that the business of the Burmah Shell Company having an office in Kandla Port cannot be said to be business concerning a major port and the dispute between the company and its discharged employee cannot be said to be a dispute relating to a major port. It cannot therefore be said that the Central Government would be the appropriate Government in relation to the dispute between them. This decision considered the question of "appropriate Government" on merits in the light of the business activities of the Burma Shell Company. It does not discuss the definition of "appropriate Government" in the light of the provisions cited by Mr. Nariman earlier.

13. Mr. Surlikar, learned Counsel for the petitioner union, cited *Serajuddin & Co. v. Workmen*, AIR 1966 SC 921 and *Firm Tulsidas Khimji v. F. Jeejeebhoy*, AIR 1961 Bom 277 in support of his contention that the expression "concerned" in the definition of "appropriate Government" would also take in work perform-

ed by the bargecrew which is incidental to, or connected with the functioning of the major port of Mormugao. The facts of this case are distinguishable. Gajendragadkar, J., (as he then was), speaking for the Supreme Court, after referring to the definition of "appropriate Government" in the Act, in relation to a mine and also the definition of a person said to be "employed" in a mine under Section 2 (h) of the Mines Act, 1952, observed that a person is said to be employed in a mine who works in any mining operation, or in cleaning or oiling any part of any machinery used in or about the mine, or in any other kind of work whatsoever incidental to, or connected with, mining operation. In this view of the matter Their Lordships of the Supreme Court came to the conclusion that the persons employed in the Head Office of the Company wherever it may be situated, cannot be said to do the mining operations. They cannot be said to be ordinarily engaged in any other kind of work which is incidental to or connected with mining operations either. The work which is incidental to or connected with mining operations must have some connection with or relation to the mining operations themselves. This decision, with respect, is not helpful for the present purpose except for the observation therein that all industrial disputes which are outside the definition in Section 2 (a) (i) of the Act are the concern of the State Government under Section 2 (a) (ii). In other words, the general rule is that an industrial dispute arising between an employer and his employees would be referred for adjudication by the State Government, except in cases falling under Section 2 (a) (i). This decision does not relate to Union Territory which is centrally administered. In this case it was held, in view of the facts established, that the tribunal to whom the industrial dispute was referred, was right in coming to the conclusion that the reference by the State Government of West Bengal was valid. The appeal by special leave of the company was accordingly dismissed by the Supreme Court.

In *Tulsidas's case*, AIR 1961 Bom 277 it was held by the Bombay High Court that the activities carried on in clearing, shipping and godown department of the firm, could be said to be concerning a major port and therefore the appropriate Government was the Central Government, for the purposes of reference. In regard to retrenchment of the concerned workmen. This decision also is not helpful on a pure question of law whether the order of reference dated 3rd November, 1967, by the Administrator is valid or not. As in the case of *Serajuddin*, it relates to the State Government and not

to a Union Territory. Mr. Nariman rightly contended that these decisions have no bearing on the arguments urged by him which are based on the provisions of law applicable to this territory.

Mr. Sowani, learned Counsel for the petitioner No. 2, argued that there was a strike in connection with the industrial dispute and this strike considerably affected the functioning of the port of Mormugao. It concerned this port and, therefore, the State Government is the appropriate Government. This argument overlooks the precise scope and ambit of the definition of "appropriate Government", in relation to any industrial dispute concerning a major port. The dispute referred is not whether the strike was legal or illegal or whether it was justified or not. The dispute referred to the respondent No. 2 is of a different kind, and the strike factor is really not relevant in construing this definition.

Mr. Sowani next argued that the Central Government and the Administrator are different functionaries, and, therefore, the order of reference dated 3rd November, 1967 is not valid. It is obvious that they are two different authorities, but it is not clear how this argument is really material for the present purpose. It is not the contention of Mr. Sowani or Mr. Surlikar that rule 2 (f) and other provisions of the General Clauses Act and the 1962 Regulation cited by Mr. Nariman are either ultra vires, or are not applicable to the facts of the present case. The further argument that in making the order of reference the Administrator was not acting within the scope of the authority given to him under Article 239 of the Constitution as envisaged by Section 3 (8) (b) (iii) of the General Clauses Act is also not convincing. Rule 2 (f), contended Mr. Nariman, can be regarded as an authority for this purpose. The President (Central Government) can act through the Administrator by law or by an executive action. In any case learned Counsel for the petitioners have not been able to convince this Court that the order of reference dated 3rd November, 1967, by the Administrator is invalid. The burden of proving its invalidity rests on the petitioners, and not on the State Government, and other respondents. The clarification by the Central Government in its letter dated 2nd June, 1966, perhaps could have been more precise but, be that as it may, for legal purposes, we are to be guided by the provisions of law and not by the clarifications given by the executive. I am satisfied in this case that the order of reference dated 3rd November, 1967, is valid and the contentions that it is not so are devoid of substance. The Administrator is the appropriate Government for the purposes of refer-

ence of industrial disputes in this territory, whether they fall within the Central or State sphere. The President acts through the Administrator in the administration of this territory and the State Government, in its turn, acts through the Administrator. The main question therefore is answered against the petitioners.

14. The task of the respondent No. 2 has been made easier by upholding the validity of the order of reference. As pointed out earlier, the respondent No. 2 is required to confine the scope of the enquiry to the industrial dispute referred to him and the matters incidental thereto. The Schedule appended to the order of reference dated 3rd November, 1967, contains the terms for adjudication. Learned Counsel for the parties addressed me at some length on the nature of the work performed by the bargecrew. This work is set out in the pleadings of the parties. These arguments were with reference to the question whether this work concerns the port of Mormugao, or the minor port outside its limits. According to the petitioners the bargecrew satisfy the definition of "dock workers" in Section 2 (b) of the Dock Workers (Regulation of Employment) Act, 1948 and therefore they are entitled to the Interim relief granted by the Wage Board. The respondent-employers feel differently. According to them the bargecrew do not satisfy this definition. This is a mixed question of law and facts. It is the case of the respondents-employers that the barges ply from points far removed from the limits of the port of Mormugao and that the major part of the rivers Mandovi and Zuari on which the barges ply, is outside the limits of the said port. This is a question of fact. It is also their case that the plying of barges is an independent activity, in respect of inland waters which is outside the limits of the said port and, therefore, it is not connected or concerned with it. This also is a mixed question of law and facts. The work of the bargecrew, according to the petitioners, is intimately connected with loading, unloading and the transportation or the movement of cargo inside the port of Mormugao. According to the State Government (respondent No. 1) the primary activity of the bargecrew does not concern the said port. They are not wholly engaged within the limits of the said port. This involves investigation of facts. These matters may be having some bearing on the industrial dispute referred and the matters incidental thereto and they fall within the jurisdiction of the respondent No. 2, and in view of the finding of this Court that the order of reference dated 3rd November 1967, is valid, I would not like to express any opinion thereon. This is what the law would expect of the Courts. The Tribu-

nals must be allowed to decide questions which the Legislature intends that they should decide. There should be no usurpation of their jurisdiction. The Courts would interfere when the tribunals do not act within the ambit of the powers conferred upon them by the statutes to which they owe their existence or when they transgress the limits placed on those powers by the legislature or when they do not act in conformity with the fundamental principles of judicial procedure, Govt. of the Province of Bombay v. Hormusji Manekji, AIR 1947 PC 200 and Secy. of State v. Mask & Co., AIR 1940 PC 105, cited with approval in Laxman v. State of Bombay, AIR 1964 SC 436 at p. 443. It is for the respondent No. 2 to give his decision on the industrial dispute referred and the matters incidental thereto. As pointed out earlier in regard to the nature of the work performed by the bargecrew the parties are at variance. The petition therefore involves disputed questions of fact and law. They cannot appropriately be determined in an application for writ under Article 226 of the Constitution. In this connection Mr. Nariman cited the recent decision of their Lordships of the Supreme Court, in Sri Tirumala Venkateswara Timber & Bamboo Firm, Gokawaram v. Commercial Tax Officer, Rajahmundry, Civil Appeal No. 2176 of 1966, D/- 28-11-1967= (reported in AIR 1968 SC 784). In that decision it was stated that:—

"... the question as to whether the transactions in the present case are sales or contracts of agency is a mixed question of fact and law and must be investigated with reference to the material which the appellant might be able to place before the appropriate authority. The question is not one which can properly be determined in an application for a writ under Art. 226 of the Constitution."

This is an additional reason for not entertaining the petition filed by the petitioners. The respondent No. 2 is now free to adjudicate the industrial dispute referred to him and the incidental matters thereto. The stay order granted by this Court restraining the respondent No. 2 from proceeding with the adjudication of the dispute is hereby vacated.

15. In the view taken of this matter the petition filed by the petitioners is rejected with costs. As many as 22 employers are impleaded as respondents to the petition, in addition to respondents (1) and (2). In absence of rules the costs assessed nominally are Rs. 200/- (Rs. two hundred only). Order accordingly.

RGD

Petition dismissed.

AIR 1969 GOA, DAMAN & DIU 30

(V 56 C 4)

V. S. JETLEY, J. C.

Xembu Govinda Sinai Cuvelcar and others, Petitioners v. Union of India, through the Administrator of Goa, Daman and Diu and others, Respondents.

Writ Petns Nos. 14, 24 and 25 of 1967, D/- 26-8-1968.

(A) Constitution of India, Art. 265 — Unconstitutional tax and tax imposed without authority of law — Distinction — Substitution of coinage does not amount to enhancement of tax.

An unconstitutional tax has to be distinguished from the tax imposed without authority of law. There is no enhancement of the tax where substitution of one coinage is made by another coinage of equivalent value. No tax or duty can be levied by an executive order nor can a tax be imposed by inference or by analogy. There is no equity about a tax. In the matter of taxation, the assessee has no choice if the tax imposed has authority of law. AIR 1963 SC 589 and 1946 AC 119 and AIR 1967 SC 1401 and AIR 1967 SC 1801 and AIR 1940 Mad 366 and AIR 1961 Cal 649 and AIR 1957 SC 733, Rel. on. (Para 8)

(B) Civil P. C. (1908), Preamble — Interpretation of Statutes — Inconsistent statutes — Implied repeal.

Doctrine of implied repeal is governed by well-established rules of construction. A case of an implied repeal may arise where the later of the two general enactments is worded in negative terms. It may also arise where the later general enactment is in affirmative terms but, in fact, it involves that negative which renders the earlier general enactment inconsistent. Each case of an implied repeal is to be considered on its own facts, the decisions in other cases being illustrative and not determinative. The Courts lean against implying a repeal. This is because the legislature is presumed not to intend that the two inconsistent enactments should co-exist. Further if the two statutes are repugnant to each other then the general rule *leges posteriores priores contrarias abrogant* (the later statute will abrogate the earlier) will apply. AIR 1963 SC 1561, Rel. on. (Para 7)

Held that the Decree Law D/- 5-12-1910 approving Regulamento das Minas and Decree Law No. 41680 D/- 16-6-1958 Promulgating Reforma monetaria do Estado da India were to be construed according to Indian system of law and that they were not irreconcilable and the latter did not repeal the former by necessary implication. AIR 1967 Goa 102, Rel. on. (Para 7)

(C) Civil P. C. (1908), Preamble — Precedent — Case is authority for what it decides. (Para 7)

(D) Constitution of India, Art. 226 — Jurisdiction under — Nature of — Jurisdiction is extraordinary and has to be sparingly used. (Para 9)

Cases Referred: Chronological Paras

(1968) AIR 1968 Goa 3 (V 55), Joao da Costa v. Union Territory of Goa 8

(1967) AIR 1967 SC 1401 (V 54)= ILR 46 Pat 848, Tata Engineering and Locomotive Ltd. v. Asstt. Commissioner of Taxes 7

(1967) AIR 1967 SC 1801 (V 54)= (1967) 2 SCR 679, New Manek Chowk Spg. and Wvg. Mills Co. Ltd. v. Municipal Corporation of the City of Ahmedabad 7

(1967) AIR 1967 Goa 102 (V 54), Xec Ayub v. Goa Government 7

(1964) AIR 1964 SC 1006 (V 51)= (1964) 6 SCR 261, State of Madhya Pradesh v. Babulal Bhalvalal 8

(1963) AIR 1963 SC 589 (V 50)= (1963) Supp 1 SCR 275, Mangalore Ganesh Beedi Works v. State of Mysore 7

(1963) AIR 1963 SC 864 (V 50)= (1964) 2 SCR 87, Municipal Council, Palai v. T. J. Joseph 7

(1961) AIR 1961 SC 864 (V 48)= 1962-1 SCR 1, Amalgamated Coalfields Ltd. v. Janpada Sabha, Chhindwara 8

(1961) AIR 1961 Cal 649 (V 48)= 65 Cal WN 706, Kastur Chand v. Gift Tax Officer 7

(1957) AIR 1957 SC 733 (V 44)= 1957 SCJ 709, Gulabdas & Co. v. Asstt. Collector of Customs 7

(1946) 1946 AC 119=1945-2 All ER 499, Canadian Eagle Oil Co. v. R. 7

(1940) AIR 1940 Mad 366 (V 27)= ILR 1940 Mad 178 (SB), Commissioner of Income Tax Madras v. Bosetto Brothers Ltd., Madras 7

S. K. Kakodkar with B. S. Ramanim and S. K. Sonak, for Petitioners; S. Tamba, Govt. Pleader, for Respondents.

ORDER:— The petitioners in petitions Nos. 14, 24 and 25 of 1967 under Articles 226 and 227 of the Constitution have questioned the right of the respondents to levy and collect the mining taxes for the years 1962 to 1966 as indicated in the final mining tax lists, on the ground that such taxes are without the authority of law. The prayer is that assessments made in these lists should be quashed by a writ of certiorari or any other appropriate writ, direction or order. In petitions Nos. 24 and 25 the petitioners have been called upon to pay the taxes in accordance with these lists, while in petition No. 14, such a demand is imminent. Learned Counsel for the parties are 22-

reed that the decision in writ petition No. 14 will also govern petitions Nos. 24 and 25. The arguments are advanced in petition No. 14 only. This is because the questions involved are identical except for some minor variations, which are not material.

2. The respondents in this case are — (1) The Union of India through the Administrator of Goa, Daman and Diu, Panaji; (2) The Government of Goa, Daman and Diu; (3) The Director of Industries and Mines, Government of Goa, Daman and Diu; and (4) the Commissioner for Revenue and Taxes, Government of Goa, Daman and Diu.

3. The case of the petitioner Xembu Govinda Sinai Cuvelcar and two others in Petition No. 14 is that they are the owners of some mining concessions. During the Portuguese regime these concessions were regulated by 'Regulamento das Minas' as approved by Decree-Law dated 20-9-1906, (hereinafter referred to as the 1906 decree'). The fixed tax known as 'Imposto fixo' under the 1906 Decree was 500 reis per hectare for mines containing non-precious stones or metals. By Decree Law dated 5th December, 1910, (hereinafter referred to as 'the 1910 Decree'), the Government of Portugal fixed the official rate of the Portuguese rupee as equivalent to 350 reis (hereinafter referred to as 'the Goan rupee'). In 'Estado de India', that is, Goa, Daman and Diu, (hereinafter referred to as 'the territory'), the Goan rupee was a legal tender in the territory. By Decree-Law of 1911 (hereinafter referred to as 'the 1911 Decree'), in metropolitan Portugal after 1911, the escudo was a legal tender with its sub-division into 100 centavos.

Before 1911 in metropolitan Portugal the escudo was a legal tender with its sub-division into 1000 reis. Reis ceased to be a legal tender in metropolitan Portugal after 1911. The tax liability levied was increased ten times by Decree Law No. 32251 dated 9th September, 1942, (hereinafter referred to as 'the 1942 Decree'). As the Goan rupee was a legal tender in the territory the tax in reis under the 1906 Decree was payable in the Goan rupees at the official rate of one Goan rupee as equivalent to 350 reis, in terms of the 1910 Decree. This was the position upon 1958 when the Government of Portugal promulgated 'Reforma monetaria do Estado da India' (Currency Reform Law) known as Decree-Law No. 41680 dated 16th June 1958, (hereinafter referred to as 'the 1958 Decree'). The Goan rupee ceased to be a legal tender with effect from 1st January, 1959, when the 1958 Decree was brought into force in the territory. Under the 1958 Decree, the escudo (hereinafter referred to as

'the Goan escudo'), became the monetary unit exchangeable at par with the escudo of metropolitan Portugal. The escudo then became a legal tender. 1 Goan rupee was exchangeable at the rate of 6 Goan escudos.

The territory was liberated with effect from 20th December 1961, but, before that date, for the years 1959 to 1961, the Portuguese Government published the final mining tax lists, as in the past. The tax liability in these lists was expressed in the Goan escudos. These lists, according to the petitioners, were prepared by merely multiplying the tax figures in the Goan rupees in the 1958 final mining tax list by six Goan escudos. The territory became part of India with effect from the 20th day of December, 1961, as a result of the Constitution (Twelfth Amendment) Act, 1962, enacted on 27th March, 1962. The Government of India withdrew the Goan escudo from circulation and, in its place, substituted the Indian rupee as a legal tender at the exchangeable rate of 6 Goan escudos for one Indian rupee. Under S. 5(1) of the Goa, Daman and Diu (Administration) Act, 1962, enacted by Parliament on 27th March, 1962, and brought into force with back effect from 5th March, 1962, the laws in force immediately before the 20th December, 1961, were continued in force in the territory until amended or repealed by a competent legislature or other competent authority. The Mines and Minerals (Regulation and Development) Act, 1957 and the Mines Act, 1952 and the rules made thereunder were made applicable to the territory with effect from 1st October, 1963, but the tax continues to be levied on the basis of the 1906, 1910, 1942 and 1958 Decrees, which were continued in force under the said Section 5 (1).

The final mining tax lists for the years 1962 to 1966 were prepared by the respondents in terms of these Decrees except in place of the Goan escudo, the Indian rupee was substituted. The petitioners discovered in March 1967, for the first time, that the final mining tax lists for the years following 1959 were vitiated by a fundamental error. The 1958 Decree established a complete parity of exchange between the currency of metropolitan Portugal and the currency of the territory, and, in view of the application of the 1911 Decree and also in view of the repeal of the 1910 Decree by the 1958 Decree, the liability of the petitioners to pay the tax would be about seventeen times less than the liability assessed under the final mining tax lists for the years 1962 to 1966. The increase in taxation by about seventeen times after liberation is in contravention of Article 265 of the Constitution and, consequently, the assessment made thereon

may be quashed. This, in substance, is the case of the petitioners.

4. The case of the respondents, broadly stated, is that the petitioners are guilty of laches. They did not challenge the final mining tax lists for the years 1962 to 1966 for several years until shortly before they filed the present petition. These lists are prepared in accordance with the 1906 Decree and other Decrees. This is an executive act and hence not justiciable. There is no error apparent on the face of the record which should justify interference by a writ of certiorari. The petitioners have no legal right to the performance of any legal duty and, therefore, there is no case for a writ of mandamus either. The coinage reis was not considered as a sub-division of metropolitan escudo, in the territory. From 1910 till 1965 the tax was computed on the basis of 350 reis equivalent to 1 Goan or 1 Indian rupee, as the case may be, in terms of the 1910 Decree.

The 1911 Decree had no application to the territory and, therefore, no reliance can be placed thereon. The 1958 Decree did not repeal the 1910 Decree, which fixed the official rate of the Goan rupee at 350 reis. The monetary unit for the purposes of the tax continued to be reis before liberation, and not a single complaint was made by the mine owners nor any appeal filed under Article 136 of the 1906 Decree. The petitioners paid the tax as assessed in the final mining tax lists for the years before 1962 on the basis of 1 Goan rupee equivalent to 350 reis, and not 1 metropolitan or 1 Goan escudo equivalent to 1000 reis. The 1958 Decree did not enable the petitioners to discharge their tax liability on basis of 1 Goan escudo equivalent to 1000 reis. There is no contravention of Article 265 of the Constitution. The final mining tax lists for the years 1962 and 1966 are not invalid. The assessment is according to the provisions of the laws continued after liberation. The petition is misconceived and accordingly it should be rejected.

5. The principal question for consideration is whether the tax levied for the years 1962 to 1966 is by authority of law in terms of Article 265 of the Constitution. That Article provides that no tax shall be levied or collected except by authority of law. In order to answer this question I may turn to the pleadings of the parties which are not very clear. It is, therefore, necessary to draw a thread of clarity through the web of coinage currency and tear the outward wrappings in order to see the substance. I shall first delimit the field where there is agreement between the parties and then go on to the controversial area of disagreement. As in life so in law, agreement has first preference. The parties are agreed that upto January 1959 when the

1958 Decree came into force in the territory, the tax liability was correctly computed in terms of the 1906, 1910 and 1942 Decrees. These are the laws still in force.

The method of computation followed by the Portuguese Government, before liberation, and thereafter by the respondents, may be briefly illustrated so that the area of disagreement may appear clear. I shall take a hypothetical case where, for example, a mining concessionaire owns 100 hectares of non-precious metals or stones. The tax payable by him would be 500 reis per hectare under Article 132 of the 1906 Decree. Liability is declared under this charging provision. The total tax would thus amount to 50,000 reis. Under Article 1 of the 1910 Decree, this liability is next to be ascertained at the rate of 1 Goan rupee as equivalent to 350 reis, that is, $50,000/350 = 142.86$ Goan rupees. This would be the second step. The third step would be to multiply 142.86 Goan rupees by 10 as the tax liability was increased by ten times, under Article 1 of the 1942 Decree. The total tax payable would thus amount to 1428.6 Goan rupees. This was the position until the 1958 Decree came into force. The tax liability of 1428.6 Goan rupees was multiplied by 6 Goan escudos, as a result of the 1958 Decree. The total tax payable would thus amount to 8571.6 Goan escudos at the official rate of one Goan rupee exchangeable for 6 Goan escudos. This would be the fourth step, and the tax became payable in the escudos and not in the Goan rupees.

This was the method of computation before liberation. It was adopted by the respondents after liberation except for the substitution of the Indian rupee in place of the Goan escudo, at the exchange rate of 6 Goan escudos for 1 Indian rupee. This was the fifth and the last step. This substitution was initially by an executive order by the Military Governor of Goa, dated 30th December, 1961, but later it assumed the authority of law under Section 9 (1) of the Goa, Daman and Diu (Administration) Act, 1962, enacted by Parliament on 27th March, 1962. The executive order stated that the reis of exchange is 6 escudos to the Indian rupee. Section 9 (1) validated this action by declaring that it "should be as valid and operative" as if it had been done or taken in accordance with law. The tax liability in the case contemplated would thus amount to $8571.56/6$ escudos = 1428.6 Indian rupees. This is the method of computation followed by the respondents.

6. The disagreement arises because of the operation of the 1958 Decree. The effect of this Decree is viewed differently

appears to be clear, viz. to punish a person guilty of violation of an injunction. It is true that the Court cannot fill in gaps left over by the Legislature and the intention of the Legislature has to be gathered from what has been enacted by it. It is also true that the cardinal rule of construction of the Acts of Legislature is that they should be construed according to how the Legislature itself has expressed and when the language and the structure of a provision is clear, it should be given effect to. But that does not mean that one should ignore the true perspective and the setting in which a provision has been placed. It is true that the language of an enactment reflects the legislative intent but all that can be said in the present case is that sub-rule (3) of Rule 2 has not been placed at its proper place. Nevertheless, the intent of the Legislature is clear and the words that have been used in sub-rule (3) are that "In case of disobedience, or of breach of any such terms" and these words which are followed by the penalty to be imposed show that the Legislature intended to punish breaches of injunctions falling under Rule 1 as well as under Rule 2. Order XXXIX, Rule 1 and Rule 2 have to be read with Section 94 of the Civil Procedure Code which is as under :—

"In order to prevent the ends of justice from being defeated the Court may, if it is so prescribed, —

(a) issue a warrant to arrest the defendant and bring him before the Court to show cause why he should not give security for his appearance, and if he fails to comply with any order for security commit him to the civil prison;

(b) direct the defendant to furnish security to produce any property belonging to him and to place the same at the disposal of the Court or order the attachment of any property;

(c) grant a temporary injunction and in case of disobedience commit the person guilty thereof to the civil prison and order that his property be attached and sold;

(d) appoint a receiver of any property and enforce the performance of his duties by attaching and selling his property;

(e) make such other interlocutory orders as may appear to the Court to be just and convenient."

Under sub-clause (c) of Section 94, the Court is empowered to grant a temporary injunction and in case of disobedience commit the person guilty thereof to the civil prison and order that his property be attached and sold. The grant of an injunction has been provided for under Order 39 and if we read both the section and the rules together, it would appear that the punishment prescribed under sub-rule (3) of Rule 2 would apply to an injunction issued under Order XXXIX

and Section 94. Order XXXIX has to be read in the light of Section 94 and on reading both the sections together, it appears that what was intended by the Legislature was that the punishment provided for in sub-rule (3) of Rule 2 was in respect of all injunctions issued under Order XXXIX and section 94 and we cannot persuade ourselves to accept the argument that the Legislature did not intend to punish a person who had flouted an order of injunction issued under Order XXXIX, Rule 1, although it intended to punish a person who had committed a breach of injunction issued under Rule 2 of Order XXXIX. We are, therefore, in agreement with the view expressed in AIR 1926 Mad 574 and AIR 1963 Andh Pra 136. The learned trial Judge had, therefore, the power to punish the appellant for breach of the injunction granted on 21st March 1960. In view of the above finding, it is unnecessary to take resort to the provisions of section 36 and Order 21, Rule 32 of the Civil Procedure Code. Section 36 provides that —

"The provisions of this Code relating to the execution of decrees shall, so far as they are applicable, be deemed to apply to the execution of orders."

Order 21, rule 32 lays down that where the party against whom a decree for an injunction has been passed, has had an opportunity of obeying the decree and has wilfully failed to obey it, the decree may be enforced in the case of a decree for an injunction by his detention in the Civil prison, or by the attachment of his property, or by both. It will be seen that the penalty is almost the same as one contained in Order XXXIX, rule 2(3) and the period of detention in civil prison would be regulated by the provisions of Section 58 of the Civil Procedure Code. It was on this reasoning that the power to impose penalty for a breach of an order of injunction issued under Order XXXIX, Rule 1 was sought to be justified by the Nagpur High Court in AIR 1945 Nag 134. This is indeed a possible view of the matter, but as already stated, the power to punish for breach of an order of injunction issued under Order XXXIX, Rule 1 can more appropriately be justified on the view that sub-rule (3) of Rule 2 of Order XXXIX also covers cases of breach of orders for injunction issued under Order XXXIX, Rule 1.

12. For the reasons aforesaid, we are unable to accept the argument of Mr. Shelat that the learned trial Judge had no power in law to punish the appellant for the breach of the order of injunction passed against him.

13. The appeal, therefore, fails and is dismissed with costs.

CWM/D.V.C.

Appeal dismissed.

AIR 1969 GUJARAT 34 (V 56 C 7)*

M. U. SHAH AND J. M. SHETH, JJ.

Dayaprakash Trikammbhai, Appellant v.
Special Land Acquisition Officer, Baroda,
Respondent.

First Appeal No. 373 of 1962, D/- 11-4-1967, against decision of Joint Civil J., Sr. Division at Baroda in C. S. No. 1 of 1960.

(A) Land Acquisition Act (1894), Ss. 9 (1), 15, 16, 18, 23(1) — Reference under S. 18 — Claimant in pursuance of notice issued under S. 9 filing claim statement on 20-8-1959 — Plantain plants planted on land under acquisition after 20-8-1959 — Award given on 10-11-1959 and possession taken on 5-12-1959 — Plantain plants standing on land at the time — Held under S. 23 Court was bound to take into consideration damages sustained by claimant by reason of taking standing crops on land under acquisition at time of Collector's taking possession — Claimant could agitate this question in court in reference under S. 18. (Paras 10, 12)

(B) Land Acquisition Act (1894), Ss. 15, 23, 24 — Scope — S. 23 deals with matters to be considered by Court in determining compensation — Court is obliged to take them into consideration — Collector has in view of S. 15 only to take guidance from Ss. 23 and 24 in determining compensation : (1955) 57 Bom LR 934 (1938), Dissent. from. (Para 12)

(C) Land Acquisition Act (1894), S. 16 — Scope.

S. 16 does not lay down any time limit within which the Collector is obliged to take possession after the declaration of the award. The Collector can take possession at his own sweet will. The claimant is not expected to keep his land uncultivated till the Collector decides to take possession of it. (Para 10)

(D) Land Acquisition Act (1894), S. 23 (1) — Criterion for compensation is the damage and not the market value — Actual loss to owner by depriving him of harvest, is the basis, and not price of unripe crops. (Para 14)

Cases Referred: Chronological Paras
(1955) 57 Bom LR 934, Special
Land Acquisition Officer, Bombay
City v. Kalyanji Dewji Dharis 2, 7
(1907) ILR 30 Mad 151=16 Mad
LJ 551, Sub-Collector of Godavari
v. Seragam Subbaroyadu 15
J. M. Patel, for M. M. Patel, for Appellant; H. M. Choksi, Govt. Pleader with B. R. Sompura, Asst. Govt. Pleader, for Respondent.

SHETH J. :—

A short, but an interesting question arises in this appeal.

*Only portions approved for reporting by High Court are reported here.

DL/HL/C104/68

2. The notification under Section 4(1) of the Land Acquisition Act, 1894 was published in the Government Gazette on 3rd September, 1958. In pursuance of a notice, issued under Section 9 of the Act, the appellant-claimant filed his claim statement on 20th August, 1959. At that time, on the land under acquisition he had not planted the plantain plants. The award was given by the Land Acquisition Officer on 10-11-1959. The possession of the Land was taken on 5-12-1959, i. e. after the award. The Land Acquisition Officer had made the Panchnama at the time of taking possession of the land. That Panchnama is Ex. 40 of 29-11-1959. It means that the Panchnama was also made after the award was declared. At that time, the Panchnama of the standing crops was made. The Panchnama reveals that there were 2,000 plants of plantains standing on the land under acquisition, and the possession of the land alongwith those plants was taken. The claimant-appellant, in the reference application that came to be made, had claimed compensation for the damages caused to him on account of taking possession of the land with the standing crops. He has stated therein that the income therefrom would have been to the extent of Rs. 9,000. No doubt, he laid that claim, stating it to be one of the grounds in support of his total claim of Rs. 12,000/- and odd. The learned trial Judge observed in para 10 of his judgment, in regard to this claim, as under:—

"The claimant has led evidence regarding the loss of the crop of plantains in the land. There were plantain plants nearly two months old when possession was taken on 5th December, 1959. Already the award had been passed on 10th November, 1959 and hence, naturally the claimant did not claim any amount before the Land Acquisition Officer on this ground under Section 9 of the Land Acquisition Act. There was no crop when the notification under Section 4 was published. Hence, the claimant is not entitled to any compensation for the crop as compensation for the land itself. He can claim compensation only under Section 23 "Secondly". But from the application for claim it is clear that he has not claimed anything for the crop of plantains. He has paid court-fee only for the additional compensation claimed for the land itself. He has been paid only the costs of cultivation while taking possession. No doubt, he would be entitled to claim the loss he suffered because he could not harvest the crop. He has examined an expert who has estimated that the yield from 3,000 plants would have been 1,42,500 pounds of plantains (Ex. 47) assuming that there were 3,000 plants on the land. The expert Chandulal Chhotalal (Ex. 45) did not actually see the crop but he only examined the soil and other factors. Moreover, his

estimate is about average cultivation. He admits that the cultivation of the field in question was below average. Hence the yield that the claimant would have got would have been definitely much less than what the expert states. It is in evidence that the rate of the unripe plantains was Rs. 2-4-0 to Rs. 3-0-0 per maund. According to the claimant, there were 3,000 plants. In the Panchnama made by the Government (Ex. 40), the number of plants is stated to be 2,000. There is no satisfactory evidence to prove that there were 3,000 plants. The claim of the claimant for the crop of plantains is Rs. 9,000. The amount he would have been entitled to, to my mind, would not have been more than Rs. 3,000. However, as already stated as he has not paid the Court-fee stamp for the claim and as he has not actually made any claim on the ground, he is not entitled to any compensation for the plantain plants that were standing on the land when possession was taken. It should be noticed that in the application for the claim, in paragraph 3, the fact about there being 3,000 plantain plants on the land is mentioned only as one of the grounds for claiming Rs. 12,650 for the land itself."

The question for consideration before us as contended by the learned Assistant Government Pleader, Shri Sompura, was that as no such claim was made by the claimant-appellant before the Land Acquisition Officer, and no specific contention has been raised in that regard before the Land Acquisition Officer, no objection on that basis could be raised in the Court in the reference that came to be made under Section 18 of the Land Acquisition Act. In short, his argument was that the reference being not an independent judicial proceeding, the question for consideration in that reference could be against the question agitated before the Land Acquisition officer and no fresh question could be agitated in the reference that be made under Section 18 of the Land Acquisition Act. In support of his argument, he invited our attention to a decision, reported in 57 Bom LR 934, in Special Land Acquisition Officer Bombay City and Bombay Suburban District v. Kalyanji Dewji Dharsi. The learned Advocate, Shri Patel, appearing on behalf of the claimant, contended that the claimant had put forward a total claim of Rs. 12,000 and odd. In support of his claim, one of the grounds mentioned was that at the time of taking possession, there were 3,000 plantain plants standing on the land under acquisition. If the possession had not been taken with those standing plants, he would have got an income of Rs. 9,000 therefrom. That was the ground, no doubt, taken up by him as shown in that reference application in support of

his claim made for Rs. 12,000 and odd. He contended that the possession having been taken after the award was declared and as these plants were not existing or standing at the date of notification under Section 4(1) of the Act, was published, no question arose for laying the claim before the Land Acquisition Officer. He, therefore, contended that the ratio of the decision cited by the learned Assistant Government Pleader cannot be pressed into service. Before we advert to the decision cited by the learned Assistant Government Pleader, we first propose to refer to several important sections for understanding the scheme of the Land Acquisition Act, 1894.

3. The material part of Section 9 of the Act runs as under:—

"9(1) The Collector shall then cause public notice to be given at convenient places on or near the land to be taken stating that the Government intends to take possession of the land, and that claims to compensation for all interests in such land may be made to him."

"(2) Such notice shall state the particulars of the land so needed, and shall require all persons interested in the land to appear personally or by agent before the Collector at a time and place therein mentioned (such time not being earlier than fifteen days after the date of publication of the notice), and to state the nature of their respective interests in the land and the amount and particulars of their claims to compensation for such interests and their objections (if any) to the measurements made under S. 8. The Collector may in any case require such statement to be made in writing and signed by the party or his agent."

A perusal of this Section indicates that on receipt of a notice under that Section, the person interested has to state the nature of his respective interests in the land and the amount and particulars of his claim to compensation for such interests and to file objections (if any), regarding the measurements. It will be significant to note that in the instant case, at the time the notification under Section 4(1) was issued, there were no such plants standing on the land under acquisition. It transpires from the evidence of the claimant's power of attorney holder, Ex. 32 that they were not even standing on the date, the claim was made by the claimant before the Land Acquisition Officer on receipt of notice, issued under Section 9 of the Act. If these crops or the plants were standing on the land under acquisition at the date of publication of Section 4(1) of the Act, the claim would have been covered in his claim made for the compensation for the land itself. As that was not the position, that claim could not have been covered in the claim made for the land itself. As these plants were

not standing on that date as well as on the date, the claimant laid the claim before the Land Acquisition Officer, in pursuance of the notice under Section 9 of the Act, he could not have given the particulars of the claim and could not have valued that interest of his. The obvious reason being that they were not existing on that date and eventually, no occasion could arise for evaluating that interest of his. It also transpires from the evidence that these plants were about 1½ months old at the time, the Panchnama, Ex. 40 came to be made, and it was made after the award was declared. The question for consideration is, therefore, as to whether in the absence of any claim made in that regard prior to the declaration of the award, this claim could be made in the reference application that came to be made under Section 18 of the Act.

4. Section 11 of the Act deals with a question regarding the inquiry and award to be made by the Collector.

(i) He has to determine the true area of the land;

(ii) the compensation which in his opinion should be allowed for the land; and

(iii) the apportionment of the said compensation among all the persons known or believed to be interested in the land, of whom, or of whose claims, he has information, whether or not they have respectively appeared before him.

5. Section 15, which in our opinion is material for our purposes, runs as under:—

"In determining the amount of compensation, the Collector shall be guided by the provisions contained in Ss. 23 and 24."

Thus it is evident that the Collector is also enjoined to take into consideration Sections 23 and 24 of the Act, no doubt, he has to take guidance only from those provisions.

6. Section 18 states that:

"(1) Any person interested who has not accepted the award may, by written application to the Collector, require that the matter be referred by the Collector for the determination of the Court, whether his objection be to the measurement of the land, the amount of the compensation, the persons to whom it is payable, or the apportionment of the compensation among the persons interested."

"(2) The application shall state the grounds on which objection to the award is taken. . . ."

This section indicates that the claimant who seeks reference to the Court, can take objection regarding the measurement of the land; (2) the amount of compensation; and (3) the persons to whom it is payable or the apportionment of the compensation amongst the persons interested.

7. Admittedly, the present appellant/claimant had taken objection regarding

the amount of compensation. He in all claimed compensation of Rs. 12,000 and odd. Amongst the grounds mentioned in support of the claim, he referred to the fact that there were 3,000 plants of plants standing on the land under acquisition at the time of taking over its possession and he suffered a loss of an income of Rs. 9,000 therefrom. That fact should be taken into account while awarding compensation to him. It will be significant to note that the learned Assistant Government Pleader also concedes that this is not a case where this claim made by the claimant is hit by the provisions of Section 25 of the Act. His contention is that as this claim was not made before the Land Acquisition Officer, the Court cannot go into this question. The Court had to confine itself to the questions considered by the Land Acquisition Officer only. The Court cannot go into any other question. If we read this Section 18 of the Act, on a plain reading of it also it does not appear that it lays down any such rule. No doubt, if no objection regarding the measurement is taken before the Land Acquisition Officer, objection regarding it cannot be taken before the Court in the reference that be made to the Court under Section 18 of the Act. If the amount of compensation is stated to be inadequate, in the Court, in the reference, he can lay a claim for the compensation for the land value etc. It was contended by the learned Assistant Government Pleader that even though possession was not taken prior to the date of declaration of the award, the claimant could have anticipated these damages and could have laid a claim in regard to it before the Land Acquisition Officer. He further contended that even though these plants were not existing on the date, the claimant filed his claim statement before the Land Acquisition Officer, he could have amended his claim before the Land Acquisition Officer and could have put forward his supplementary claim for these damages. As he has not done it, his claim in that regard cannot be entertained in the reference. No doubt, the observations made by Mr. Justice Tendolkar of the Bombay High Court, in 57 Bom LR 934, prima facie lend support to the argument, advanced by the learned Assistant Government Pleader, Shri Sompura. The relevant observations made therein can be referred to, with advantage at this stage. They are as under:—

"Where a claim for damages of the nature contemplated in the grounds 'secondly' to 'sixthly' in Section 23(1) of the Land Acquisition Act, 1894, is not put forward before the Collector under Section 9(2) of the Act, it cannot be allowed to be put forward for the first time upon a reference under Section 18 of the Act."

"The claimant must, in the first instance, if he wishes to claim damages under any of the heads "secondly" to "sixthly" enumerated in Section 23 of the Act, make such a claim when he puts forward a claim under Section 9(2). If he fails to do so, it is not open to the Collector to consider of his own motion whether the claimant has sustained damage under any of the sub-heads "secondly" to "sixthly" described under Section 23. Before the Collector's award is made, the Collector may allow the claimant to amend his claim by giving particulars as regards any alleged damage, and if he does so, the Collector may proceed to adjudicate upon it; but in the absence of an adjudication as regards damages sustained by the claimant, no question can arise of the claimant coming to Court on a reference and claiming that damage has been sustained by him."

"When Section 23 of the Land Acquisition Act, 1894, refers to damage sustained at the time of possession, it can only be such damage as can have been reasonably anticipated at or before the time of making the award."

8. The learned Assistant Government Pleader invited our attention to certain observations made by Mr. Justice Tendolkar in the body of the judgment at pages 937-938. They are as under:—

"When the Court rose for the day yesterday and after the judgment was part-delivered Mr. Mody for the claimants drew my attention to the fact that compensation which is "secondly" and "fourthly" described in Section 23 is for damage sustained at the time of the Collector's taking possession; and the point apparently made is that whereas the Collector does not ordinarily take possession, except when resort is had to his special powers under Section 17, until after the award is made these two grounds of damage in any event will arise at a date subsequent to the making of the award; and that being so the damages cannot possibly be claimed before the award is made or indeed before the Collector takes possession. The matter has not been argued at the bar but prima facie there appears to be more than one answer to this contention. In the first instance, Section 23 deals with matters which are to be taken into consideration by the person making the award, viz. the Collector in the first instance, and once the award has been made, there can be no question of the Collector considering anything at all. Therefore, when Section 23 refers to damage sustained at the time of taking possession, it can only be such damage as can have been reasonably anticipated at or before the time of making the award. Of course, in a case in which possession has been taken under the provisions of Section 17 the damage may be actual and

in other cases only prospective. But that does not prevent the claimant from claiming the damage which could have been reasonably foreseen before the date of the award. It is possible to conceive of cases, however, where the damage caused could not be so reasonably foreseen. What the remedy of the claimant would be in such a case, it is not necessary to determine in these proceedings because it is not alleged in this case that any damage resulted which could not have been reasonably foreseen at or before the date of making the award. Such damage can certainly not be claimed upon a reference for the simple and ample reason that you can on reference only raise objections to the award of the Collector under Section 18; and if the damage could not even have been reasonably foreseen at the date of the award, certainly no objection can be raised to the award itself on the ground that such damage was not allowed. It is said that there is no wrong without a remedy, and it is quite possible that the general law confers upon the claimants power to recover in proper proceedings any damage that he may sustain by reason of the acquisition which could not have been reasonably foreseen at or about the time of the making of the award by the Collector and which could not, therefore, have been claimed before the Collector."

I, therefore, uphold the objection and disallow any evidence to prove such damages."

It will be significant to note that in that case, the claimants at the time of hearing urged that as the land was acquired for a particular use, it would injuriously affect the value of the remaining land of the claimant and, they therefore, sought to prove that they had sustained damage by the reason of acquisition for such purposes.

9. It is, therefore, evident that in that case, the claimants could have very well anticipated the damages on account of the injurious affection of his remaining property by the acquisition of the land for the use as a cemetery. In the instant case, the possession of the land was not taken. The plants of plantain were planted after the appellant-claimant had already laid a claim before the Land Acquisition Officer in respect of his interests.

10. Section 16 of the Land Acquisition Act states that:

"When the Collector has made an award under Section 11, he may take possession of the land, which shall thereupon (vest absolutely in the (Government), free from all encumbrances." It does not lay down any time limit within which the Collector is obliged to take possession after the declaration of the award. The Collector can take possession

[at his own sweet will. It is not certain as to when he will take possession. The claimant is not expected to keep his land uncultivated till the Collector decides to take possession of it. If the possession had not been taken prior to the reaping of these crops, no question of claiming any compensation in regard to it would have arisen. It, therefore, cannot be said that the claimant could have anticipated these damages and could have claimed it. If the possession had not been taken prior to the reaping of these crops, the question of making any claim for these damages would not have arisen. In such an event, we are of the view that no such objections against this claim could be sustained on these grounds in a reference that could be made. The claimant in our opinion, is entitled to make such a claim.]

11. If we now examine the wordings of Section 23 of the Act, it indicates what are the matters to be considered by the Court in determining compensation. It does not deal with the matters to be considered by the Collector at the time of making an award. It is only in view of the provisions of Section 15 of the Act to which we have already made a reference earlier that the Collector is to be guided by the provisions contained in Sections 23 and 24 for determining the amount of compensation.

12. With the greatest respect to Mr. Justice Tendolkar, we are of the view that his remarks at page 938 are not wholly justified. Those remarks are as under:—

"In the first instance Section 23 deals with matters which are to be taken into consideration by the person making the award, viz. the Collector in the first instance, and once the award has been made, there can be no question of the Collector considering anything at all."

Section 23 deals with a question regarding the matters to be considered by the Court in determining the compensation. It means, the Court is obliged to take into consideration the matters referred to, in Section 23 of the Act, while the Collector, in view of the provisions of Section 15 of the Act, has to take guidance from Sections 23 and 24 while determining the compensation. Clause 2nd of section 23(1) of the Act with which we are concerned in the present appeal, runs as under:—

"23(1). In determining the amount of compensation to be awarded for land acquired under this Act, the Court shall take into consideration the damage sustained by the person interested, by reason of the taking of any standing crops or trees which may be on the land at the time of taking possession."

In our view, a plain reading of this clause indicates that the Court is obliged

to take into consideration the damage sustained by the person interested by reason of taking of any crops standing on the land at the time of Collector's taking possession thereof. It means that the Court has to take into consideration the damage sustained by the claimant on account of taking of any standing crops or trees which may be on the land at the time of the Collector's taking possession thereof. It means that it is only on an event happening i.e., an event of taking standing crops which may be on the land at the time of taking possession, this question will arise. This section leaves no discretion to the Court. The Court is bound to take into consideration the damage sustained by the claimant by reason of taking standing crops which may be on the land acquired at the time, the Collector takes possession. If there are no standing crops at the time of taking possession, that question does not arise. In our view, therefore, the Court is bound to consider this claim if the claimant has suffered any damages on account of standing crops which may be on the land under acquisition at the time of Collector's taking possession. Taking into consideration all these relevant sections and the fact that the possession was taken after the award, and these plants were planted after the claimant had made a claim before the Land Acquisition Officer, in pursuance of a notice issued to him under Section 9 of the Act, the claimant can agitate this question in the Court in the reference made under Section 18 of the Act. We, therefore, reject the argument advanced by the learned Assistant Government Pleader, Shri Sompura.

13. The next question for consideration is regarding the measure of these damages. The claimant had claimed Rs. 9,000 for these damages. The claimant's power of attorney holder has been examined at Ex. 32. He has not led any evidence regarding the costs of sapplings, costs of labourers, etc. He has not also produced any documentary evidence in support of his claim. He also admits that the plantain plants had never been grown prior to this occasion. He has no doubt, stated that the plants were watered 7 to 8 times by the water of the well nearby. It appears from the evidence of an Expert, Chandulal Chhotalal Shah, examined by him at Ex. 45, that the water of this well was quite suitable for watering these plants and the soil was also adaptable for planting the plantain plants. That witness was a Vice-President of Agricultural College, Anand from 1947 to 1955, and was holding M.Sc. Degree of Bombay and Ph.D. Degree of London University. He has also worked as a Joint Director of Agriculture in the State of Saurashtra, and also worked as a Deputy Director of

Agriculture in Gujarat. It is true that at the time he visited the site, there were no crops standing. From the experience he has given the average yield of the plants. He has stated that the yield per plant would be about 50 lbs. He has further stated that in Gujarat, the plants are rarely affected by any disease. At the same time, he has stated that generally, the lands are not very well managed as an expert would like it to be, and this field's management was below average. It is, therefore, evident that the yield cannot be estimated by him, taking into consideration the factor that the management was below average. The learned Advocate Shri Patel, appearing on behalf of the claimant, urged that at least compensation of Rs. 3,000 be awarded to him for the damages. As against this, the learned Assistant Government Pleader urged that the Panchnama, Ex. 40 reveals that the costs of sappling and labour charges would be about Rs. 216. The claimant would, therefore, be entitled to get only Rs. 216 for these damages. In our opinion, the argument advanced by the learned Assistant Government Pleader is not well founded.

14. The learned Author Sanjiva Row, in his book, *Law of Land Acquisition & Compensation*, 5th Edition, 1966, at pages 574 and 575, made the following comments under the heading — "Clause Secondly", para 13:—

"Compensation, when paid under the clause, is damage and not market value, and the measure of damage is the loss which the owner suffers by being deprived of the harvest and not the price (if any) of the unripe crop. In other words, the amount would be about the same as the value of the ripe crop when reaped in due course. In practice, however, it is usual to postpone, wherever possible, taking possession of lands with standing crops till they are harvested, so that the crops may be saved."

"It is pertinent to note that the criterion for compensation is the damage and not the market value. The actual loss to the owner, by depriving him of the harvest, is the basis, and not the price of unripe crops."

We have, in our opinion, to evaluate the compensation to be paid on this basis.

15. Certain observations made in *Sub-Collector of Godavari v. Seragam Subbaroyadu* in a decision, reported in (1907) ILR 30 Mad 151, can be referred to, with advantage, as they indicate the real purpose of clause 2 of Section 23(1) of the Act. They are as under:—

"The word 'land' as defined in Section 3(a) includes 'things attached to the earth,' and therefore, trees, and this definition has to be applied to section 23, unless there is something repugnant in the subject or context.

The Government Pleader contends that the second clause of sub-sec. (1) of Section 23, shows that in this section the trees standing upon land cannot be regarded as a part thereof, but we do not think that that is the effect of the clause. That clause refers to damage sustained by reason of the taking of standing crops or trees which may be on the land at the time of the Collector's taking possession thereof, and cannot, without a misuse of language, be applied to a case of purchase of land with trees upon it. In such a case if the price is fair no damage is sustained by either party.

We think the clause may be applied to the case provided for in section 17 when the Collector takes possession before award, and the owner of the land declines to accept the sum then offered as payment for the crops or trees taken, or possibly, as suggested for the respondent, to the case of crops or trees grown after the date of the declaration under Section 16, the date with reference to which the market value has to be estimated.

It may be, as the Government Pleader suggests, that the Collector is not, in making an offer under Section 17(3), bound to allow 15% over the value of the trees to be paid for, but the offer made under that section is one which the owner of the land can accept or reject, and he may prefer to take a sum down rather than to wait for the award.

Moreover, to read the first clause of section 23(1) as referring to the bare land without the trees, involves this difficulty: there is no provision in the Act for the separate assessment of compensation for buildings apart from the land on which they stand, and, inasmuch as it is impossible to hold that they are liable to be acquired without payment of compensation, it must be taken, that in Section 23, the word 'land' includes "buildings standing thereon." If so, that must be, because buildings are things attached to the earth, and it is anomalous to interpret the same word as including one class of things attached to the earth and excluding another.

We avoid this difficulty by including the trees as part of the land, and we can, at the same time, give due effect to the second clause of sub-section (1), by applying that clause to the special cases to which we have already referred."

16. It will be significant to note that the learned trial Judge has not recorded the finding in categorical terms that the claimant would be entitled to Rs. 3,000 by way of compensation for these damages. He has observed as under:—

"The amount he would have been entitled to, to my mind, would not have been more than Rs. 3,000/-."

It means that he only recorded the finding that at any rate, on this basis, the

claimant cannot be entitled to more than Rs. 3,000. The Panchnama reveals that there were 2,000 standing plants at the date this Panchnama was made. The claimant has not led any satisfactory evidence to prove that there were 3,000 plants standing at the date of taking-over possession. Furthermore, at the time of Panchnama, these plants were 1½ months old. Some plants might also wither away. There would be some further costs to be incurred prior to the reaping of the harvest. Taking into consideration all the relevant factors, we are of the view that the damages suffered by the appellant-claimant, could be reasonably and fairly said to be Rs. 2,000. The claimant-appellant would be entitled to get compensation of Rs. 2,000 in regard to that claim.

17. In view of our finding regarding the market rate of the land under acquisition, to be Rs. 3,200 per acre, the claimant is entitled to an additional amount of compensation of Rs. 582.30 nPs. including solatium at the rate of 15% for the land. He will be further entitled to an additional amount of Rs. 2,000 for the damages suffered by him on account of digging of plants of the plantains at the time of taking-over possession by the Collector. The total additional amount that becomes awardable comes to Rs. 2,582.30 nPs. The claimant-appellant will be entitled to this additional amount of compensation. The decree for that amount to be passed in his favour. He will be further entitled to get 4½% interest per annum on that additional amount awarded, from the date of taking over possession, i. e. 5-12-1959 till the date of payment. The claimant-appellant to get the proportionate costs from the respondent for the claim allowed and to pay the costs to the respondent for the claim disallowed in this appeal. Appeal is partly allowed.

18. The claimant was and is a minor and hence he is not competent to alienate. In view of the provisions of sections 31 and 32 of the Land Acquisition Act, 1894, (1 of 1894), the additional amount of compensation that will be awardable to the claimant-appellant will have to be invested during his minority in Government securities. The appellant's advocate expresses a desire and states that it will be in the interests of minor Dahyaprakash Trikambhai to invest the additional amount that is awarded by this Court in National Savings Certificates (First Issue). It is, therefore, ordered that the additional amount that is awarded by this Court in the appeal, and which will be payable to the appellant, is to be invested in National Savings Certificates (First Issue).

RSK/D.V.C.

Order accordingly.

AIR 1969 GUJARAT 40 (V 56 C 8)

A. D. DESAI, J.

Jhalawar Electric Power Supply Co. Ltd., Appellant v. Wadhwan City Municipality of Wadhwan City, Respondent.

Second Appeal No. 184 of 1962, D/- 21-3-1968, against decision of Extra Asstt. J., Surendranagar in C. A. No. 97 of 1959.

Electricity (Supply) Act (1948), S. 57 and Sch. VI, Cl. 1 — Electricity Act (1910), S. 3 — Agreement for supply of energy — No provision for revision of rates during period of contract — Agreement is in conflict with Sch. VI, Cl. 1 — Company can revise rates unilaterally. AIR 1955 Bom 182, held overruled in AIR 1964 SC 1598.

A company which was known as Wadhwan State Electric Power Distributing Company held a licence under the Electricity Act for supplying electric energy within the limits of Wadhwan City. The respondent municipality entered into agreements with the Company for the supply of electric energy to its water works, motors as well as street lights. The agreements were entered in 1943. On the integration of the former Wadhwan State and formation of United State of Saurashtra the appellant Company purchased the old Company in the year 1950. The appellant company continued to supply electric energy to consumers including the municipality. The appellant company published revised charges for supply of energy and increased the rates. The respondent municipality refused to pay higher rates and continued to pay at the rates fixed under the agreement.

Held, that the action of the appellant company could not be said to be illegal as it had power to revise the rates unilaterally. AIR 1955 Bom 182 held overruled in AIR 1964 SC 1598. (Para 8)

Provisions of Section 57 and first clause to Schedule 6 of the Electricity (Supply) Act, 1948, read together clearly indicate that the terms of the agreements have to give way to the power of revision of rates given under the first clause of Schedule 6. Sec. 57 of the Electricity (Supply) Act, 1948 clearly provides that if a term of an agreement was inconsistent with the provisions of Sch. 6, such a term is void and of no effect. (Para 8)

By the agreements the Electricity Company and the Municipality, fixed the rates to be charged for the supply of the electrical energy and it did not provide for its revision during the period of the contract. In short it prohibited unilateral variations in the rates during the continuance of the contract. This term of the contract was in direct conflict with the

first clause of the 6th Schedule which provides that the licensee shall so adjust its rates for sale of electricity by periodical revision that his clear profit in any year shall not as far as possible exceed the amount of reasonable return. This being the true position, the clauses in the agreements which fixed the rates for the consumption of the electricity are void and of no effect and the appellant company has the power to revise the rates in accordance with the 6th Schedule.

(Para 8)

Cases Referred: Chronological Paras

(1964) AIR 1964 SC 1598 (V 51)=

(1964) 7 SCR 503, Amalgamated Electricity Co. Ltd. v. N. S.

Bothena 4, 7, 8

(1955) AIR 1955 Bom 182 (V 42)=

ILR (1955) Bom 42=56 Bom LR 994, Babulal Chhaganlal v.

Chopda Electric Supply Co. Ltd. 4, 6, 7

C. T. Daru with S. A. Shah and P. M. Raval, for Appellant; K. S. Nanavati for I. M. Nanavati, for Respondent.

JUDGMENT:— The dispute in this appeal relates to the rate at which the electricity was to be supplied to the respondent in respect of the street lights and water works motors. The facts according to the plaintiffs are that formerly there was a company which was known as Wadhwan State Electric Power Distributing Company, and it held a licence under Indian Electricity Act for supplying electric energy within the limits of Wadhwan City. The respondent Municipality entered into agreements with the said Company for the supply of electric energy to its water works motors as well as street lights. The agreements with respect to supply of electric energy to water works and the street lights were entered on September 28, 1943. The said Company was a partnership firm of which the former Wadhwan State and one Natvarlal Dhanjibhai Mehta were partners. On the integration of the former Wadhwan State and the formation of United State of Saurashtra, the State of Saurashtra became a partner in the said Company. The Zalawad Electric Power Supply Company who is the appellant in this case purchased the said Wadhwan State Electric Power Distributing Company in the year 1950. According to the plaintiff, the appellant company had purchased all the rights and obligations of Wadhwan State Electric Power Distributing Company. After the date of the purchase, the Wadhwan State Electric Power Distributing Company ceased functioning and the appellant company continued to supply electric energy to consumers including the respondent municipality. Some time in the month of May 1952, the appellant company published revised charges for the supply of energy and thereby increasing the rate at which the energy was sup-

plied to the consumers. The respondent Municipality objected to the proposed revised charges. There was correspondence between the parties and the appellant company assured the respondent Municipality that the agreements under which the electricity was supplied to the respondent Municipality were not affected by fixation of revised charges and the energy would be supplied to the respondent Municipality according to the terms and conditions of the said agreements. It seems that there was some dispute between consumers and the appellant company with regard to the revised rates and the dispute was referred to arbitrators. The arbitrators did not agree and, therefore, the dispute was referred to the sarpanch or umpire for settlement. The umpire fixed the rates of the supply of the electric energy by his award dated September 3, 1952. Thereafter the appellant company issued a public notice informing the consumers, of the rates at which the electric energy was to be supplied by them to the consumers. The rates mentioned in the public notice were the rates fixed by the umpire in his award dated September 3, 1952. The appellant company forwarded a copy of the award to the Municipality by their letter dated October 8, 1952. From August 1952 the appellant company started tendering bills to the Municipality for the energy supplied for running the water work motors at the rate fixed by the arbitrator. The appellant company addressed a letter dated August 30, 1956, informing the respondent Municipality that from November 1, 1956 the rates of supply of the electricity for the street lights would be at the revised rates i. e. as. 5 per unit. The appellant company started tendering to the Municipality the bills at this revised rate from November 1, 1956. The respondent Municipality refused to pay the higher rates for the electrical energy and, therefore, the appellant company made frequently demands for the payment. The respondent Municipality rejected those demands and continued to pay at the rates fixed under the agreements. The appellant company, therefore, gave the notice to the Municipality dated April 9, 1957 under Section 24 of the Electricity Act, 1910 to cut off the supply of electricity from April 26th, 1957 as the Municipality had committed a default in payment of the bills preferred by the company for the consumption of the energy. The appellant company had preferred bills at the revised rates. The respondent Municipality therefore filed a Civil Suit No. 50 of 1957 in the Court of Civil Judge, Junior Division, Wadhwan City, alleging that appellant Company was bound to supply electric energy to the respondent Municipality at the rates fixed under the agreements and that the

demands made in respect of the consumption of the energy at the revised rates were illegal and contrary to the agreements. The respondent Municipality claimed the relief restraining the appellant company from discontinuing the supply of the electric energy to the Municipality, restraining the defendant company from interfering with the supply of electrical energy directly or indirectly and restraining the appellant company from making demands at the revised rates.

2. The appellant company filed its written statement and contended that they had not purchased the liabilities of Wadhwan State Electric Power Distributing Company. The contention was that they had purchased only the assets of the company and, therefore, the agreements between the Municipality and the Wadhwan State Electric Power Distributing Company were not binding to them. It also contended that the company was within its rights in preferring bills at the revised rates for the consumption of the energy by the Municipality. According to the defendant the umpire was appointed by the consumers including the Municipality, and the company and the award given by the umpire was binding on the Municipality. As the Municipality did not pay up the arrears, the company had the right to take action under Section 24 of the Indian Electricity Act and cut off the supply of the energy.

3. The learned trial Judge held that the appellant company had purchased rights and liabilities of Wadhwan State Electric Power Distributing Company and, therefore, agreements entered into by the said company were binding on the appellant company. It also held that the appellant company was not entitled to raise the rates of the water work motors and street lights by its unilateral act. The learned Judge also came to the conclusion that the appellant company had given an assurance to the Municipality that it would not charge the revised rates for the supply of energy to the Municipality and on the basis of the aforesaid findings the learned trial Judge decreed the suit of the plaintiff. Being aggrieved by the said decision, the appellant company filed a Regular Civil Appeal No. 97 of 1959 in the Court of the District Judge, Surendranagar. The said appeal was heard by the Extra Assistant Judge, Surendranagar who held that the appellant company had purchased the assets and liabilities of the Wadhwan State Electric Power Distributing Company. The learned Judge also held that agreements entered into between the said company and the Municipality were binding on the appellant company. The learned Judge held that the appellant company had no right to revise the rates unilaterally and to charge the enhanced rates from the Municipality.

The learned Judge also held that the Municipality was entitled to the relief of injunction based on the agreement in view of the provisions of Section 56(f) read with Section 21(1) of the Specific Relief Act. The Court also held that the action of the appellant company in revising the rates so as to enhance the electrical charges was contrary to the provisions of law, and therefore, illegal. The learned Judge, therefore, granted the injunction asked for by the Municipality and thus confirmed the decree passed by the trial Court. It is against this judgment and decree that this second appeal has been filed by the appellant company.

4. The Extra Assistant Judge, Surendranagar came to the conclusion that the appellant company was not entitled to revise the rates of electrical energy unilaterally and was bound by the contracts between the parties. For this proposition of law the learned Judge mainly relied on the decision in *Babulal Chhaganlal Gujerathi v. Chopra Electric Supply Co. Ltd.*, AIR 1955 Bom 182. Mr. Daru appearing for the appellant relied on the decision of the Supreme Court in *Amalgamated Electricity Co. Ltd. v. N. S. Bathena*, AIR 1964 SC 1598, and contended that the decision in *Babulal Chhaganlal*, AIR 1955 Bom 182 (Supra) has now been overruled by the Supreme Court and, therefore, the judgment and decree passed by the Extra Assistant Judge, Surendranagar were erroneous.

5. In order to appreciate the argument of Mr. Daru, it is necessary to refer to certain provisions of the Indian Electricity Act, 1910 and the Electricity (Supply) Act, 1948. By sub-section (1) of Section 3 of the Indian Electricity Act, 1910, it is provided that the State Government may grant to any person a licence to supply electrical energy in any specified area. In respect of every licence granted under sub-sec.(1) of Sec. 3, certain provisions made in sub-section (2) are necessary to be noticed. Two out of these provisions are that a license granted under sub-section (1) of Section 3 may prescribe such terms as to the limits within which and the conditions under which, the supply of energy is to be compulsory or permissive and as to the limits of price to be charged in respect of the supply of energy. The other relevant provision of the Act is that the provisions contained in the Schedule to the Act shall be deemed to be incorporated in, and to form part of, every license granted under part I save in so far as they are expressly added to, varied or excepted by the license. Under section 21 clause (2) a licensee may with the previous sanction of the State Government given after consulting the local authority, make conditions not inconsistent with the Act or with his license or with any rules made

under the Act, to regulate his relations with the persons who are or intend to become consumers, and may, with the like sanction given after the like consultation, add to or alter or amend any such conditions and any conditions made by a licensee without such sanction shall be null and void. The relevant part of section 57 of the Electricity (Supply) Act, 1948 as it stood before its amendment was as under:—

"Section 57: Licensees' charges to consumers: Sub-section (1): The provisions of the Sixth Schedule and the Table appended to the Seventh Schedule shall be deemed to be incorporated in the licence of every licensee, not being a local authority, from the date of the commencement of the licensee's next succeeding year of account, and from such date the licensee shall comply therewith accordingly and any provisions of such license or of the Indian Electricity Act, 1910 (IX of 1910), or any other law, agreement or instrument applicable to the licensee shall, in relation to the licensee, be void and of no effect in so far as they are inconsistent with the provisions of this section and the said Schedule and Table."

The first clause of the Sixth Schedule to the Electricity Supply Act, provided that "the licensee shall so adjust his rates for the sale of electricity by periodical revision that his clear profit in any year shall not as far as possible exceed the amount of reasonable return". There is a proviso to this clause with which we are not concerned.

6. We will now go to the facts of the case of Babulal Chhaganlal Gujarathi, AIR 1955 Bom 182 (Supra). In that case the clause 9(A) of the license issued under the Electricity Act provided as under:—

"The rates to be charged by the licensee for energy supplied by him shall not exceed the maxima set out below: (A) Where energy is supplied by meter — (1) for general supply purpose, namely (a) for lights and fans not provided for in item (b) below — a rate of Annas 6 per unit; . . . (c) for heating and refrigerating purposes — a rate of Annas 2 per unit."

The defendant company assuming that by the Electricity (Supply) Act, 1948, restrictions which were placed under the license and by the Electricity Act, 1910 upon the right of the licensee to levy rates and charges from consumers of electrical energy were abrogated, issued a notice to the consumers informing them of revised charges for the supply of electrical energy at increased rates. Babulal Gujarathi, who was one of the consumers, challenged this right of the electric company of revising the rates and ultimately filed a Civil Suit for a declaration that the revised rates fix-

ed by the Electric Supply Company were contrary to law and for injunction restraining the electric supplying Company from discontinuing the supply of electricity for non-payment of the charges. The plaintiff succeeded in his suit but lost in the appeal in the District Court. A second appeal was filed in the High Court and the High Court took the view that the Electricity Company had no power to revise the rates so as to exceed the maxima fixed by the Government while granting license under the Indian Electricity Act, 1910. The High Court held that provisions of sub-section (1) of the Section 57 impose an obligation upon the licensees and did not create any new rights in favour of the licensees. By the said provisions, a further obligation was imposed on the licensees to so adjust the rates by making periodical revisions so that their clear profits in any year shall not so far as possible exceed the amount of reasonable return.

7. Now we come to the facts of the case in AIR 1964 SC 1598 (Supra). In that case also the Government while issuing the license for the supply of electricity fixed the rates which the licensee could charge for supply of the electrical energy to the consumers. Due to the conditions brought about by the Second World War, certain orders were made by the Government permitting the licensees to add a surcharge not exceeding 33½ per cent to the existing charges. Ultimately an Act was passed by the Bombay Legislature called the Bombay Electricity (Surcharge) Act, 1946, which continued the surcharge specified therein for a period of three years. That Act expired on September 30, 1949. Even after the expiry of the said Act, the Electricity Company continued charging the consumers at the rates which included the surcharge, under the Surcharge Act. One of the consumers, therefore, filed a suit against the Electricity Company for the refund of the amount illegally collected from him in excess of the limits fixed by the Government. The Supreme Court while considering the question as to whether the Electricity Company had a right to revise the rates and charge the rates higher than fixed by the Government, had construed the provisions of the Indian Electricity Act and also the Indian Electricity (Supply) Act, 1948. The question which was raised before the Court in that case was with regard to effect of the Electricity (Supply) Act 1948 on the maxima of rates fixed by the Government under S. 3(2) of the Electricity Act, 1910, which could be charged by a licensee. While considering this question the Supreme Court observed thus:—

"So far as the 1st point is concerned viz., whether the maxima prescribed by Government under the Electricity Act,

1910 still continue to bind the licensee after the coming into force of the Supply Act, we feel no hesitation in agreeing with the submission of the Appellant which found favour with the High Court. Section 57 of the Supply Act, 1948 — both as originally enacted and as amended in 1956 expressly provided that the provisions of the Vith Schedule shall be deemed to be incorporated in the license of every licensee and 'that the provisions of the Indian Electricity Act 1910 and the license granted thereunder and any other law, agreement or instrument applicable to the licensee shall be void and of no effect in so far as they are inconsistent with the provisions of the section and the said Schedule'. Read in the light of S. 70 of the Supply Act it would follow that if any restriction incorporated in the license granted under the Electricity Act, 1910 is inconsistent with the rate which a licensee might charge under Para 1 of Sch. VI of the Supply Act, 1948, the former would, to that extent, be superseded and the latter would prevail.

Para 1 of Sch. VI both as it originally stood and as amended, as seen already empowered the licensee to adjust his rates so that his clear profit in any year shall not, as far as possible, exceed the amount of reasonable return. We shall reserve for later consideration the meaning of the expression 'so adjust his rates.' But one thing is clear and that is that the adjustment is unilateral and that the licensee has a statutory right to adjust his rates provided he conforms to the requirements of that paragraph viz., the rate charged does not yield a profit exceeding the amount of reasonable return. The conclusion is therefore irresistible that the maxima prescribed by the State Government which bound the licensee under the Electricity Act of 1910 no longer limited the amount which a licensee could charge after the Supply Act, 1948 came into force, since the 'clear profit' and 'reasonable return' which determined the rate to be charged was to be computed on the basis of very different criteria and factors than what obtained under the Electricity Act. In support of the submission that notwithstanding the Supply Act the maxima fixed by the State Government was still binding on the licensee and that any adjustment within 1st paragraph of Sch. VI made by the licensee within the limits of this maxima we were referred to a decision of the Bombay High Court reported as 56 Bom LR 994=ILR (1955) Bom 42=AIR 1955 Bom 182. It is sufficient to extract the head-note to understand the point of the decision:

"Sec. 57(1) of the Electricity (Supply) Act, 1948, or Cl. 1 of the Sixth Schedule to the Act, does not confer a right upon a licensee unilaterally to alter the terms and conditions on which supply may be

made by a licensee of electrical energy to consumers in the area of supply irrespective of the restrictions contained in the license and the Indian Electricity Act, 1910.

Not only does S. 57(1) of the Electricity (Supply) Act, 1948, impose an obligation upon the licensee to conform to the provisions of the Sixth Schedule and the table appended to the Seventh Schedule to the Act, but the first clause of the Sixth Schedule imposes a further obligation to make periodical revisions and to adjust the profits so that his profits in any year do not as far as possible exceed a reasonable return on his investment. There is nothing in S. 57 or in the first clause of the Sixth Schedule which either expressly or by implication amends the provisions of the Indian Electricity Act, 1910, contained in S. 3(2)(d) or in S. 21(2) of that Act or the rates and methods of charging the same as fixed by the licensee. The provision contained in S. 3(2)(d) of Indian Electricity Act, 1910, which requires the State Government to prescribe the terms and conditions under which the supply of energy is to be made is not affected by the Electricity (Supply) Act, 1948. The right to amend the license is conferred by the Indian Electricity Act, 1910, upon the State Government and that right is not affected by the Electricity (Supply) Act, 1948."

With great respect to the learned Judge we are unable to agree with this decision, for, in our opinion, the provisions of the Supply Act, 1948 to which we have adverted are too strong to permit the construction, that the maxima prescribed under the Electricity Act of 1910 serve as a fetter on the right of the licensee under paragraph 1 of the Vith Schedule. If there was any room for any argument of this kind on the terms of para 1 of Sch. VI as originally enacted, the matter is placed beyond possibility of dispute by the amendment effected by Act 101 of 1956 to the Vith Schedule where the opening paragraph commences with the words 'notwithstanding anything contained in the Indian Electricity Act and the provisions in the licence of a licensee'.

8. Mr. Nanavati faintly argued that the decision in Babulal Chhaganlal Gujarathi (Supra), was not overruled by the latter decision of the Supreme Court in AIR 1964 SC 1598 (Supra). The observations cited above from the judgment of the Supreme Court clearly show that the decision given in Babulal Gujarathi was not approved by their Lordships of the Supreme Court. The Supreme Court in that case considered Section 57 as it was originally enacted and held that the Electricity Company had the power to adjustment of rates under the provisions of first clause of Schedule 6 of the Electricity (Supply) Act, 1948. It is, therefore,

clear that when the appellant company revised the rates of supply of the electric energy it exercised the power conferred by first clause of Schedule 6 of the Electricity (Supply) Act, 1948. Mr. Nanavati contended that in the instant case the rates for the supply of the energy were fixed by agreements and not by statute as was the case in Babulal Gujarathi and Amalgamated Electricity Company Ltd., and therefore the company had no unilateral right of revision of rate. Mr. Nanavati is right in his contention that in this case there were agreements between the parties fixing the rates of supply of energy, but in my opinion this circumstance does not make any difference. Provisions of section 57 and first clause to Schedule 6 of the Electricity (Supply) Act, 1948, read together clearly indicate that the terms of the agreements have to give way to the power of revision of rates given under the first clause of Schedule 6. Section 57 of the Electricity (Supply) Act, 1948 clearly provides that if a term of an agreement was inconsistent with the provisions of Schedule 6, such a term is void and of no effect. In the case before us, by agreements, the Electricity Company and the Municipality, fixed the rates to be charged for the supply of the electrical energy and it did not provide for its revision during the period of the contract. In short it prohibited unilateral variations in the rates during the continuance of the contract. This term of the contract was in direct conflict with the first clause of the 6th Schedule which provides that the licensee shall so adjust its rates for sale of electricity by periodical revision that his clear profit in any year shall not as far as possible exceed the amount of reasonable return. This being the true position, the clauses in the agreements which fixed the rates for the consumption of the electricity are void and of no effect and the appellant company has the power to revise the rates in accordance with the 6th Schedule. The appellant company in this case exercised the said authority under the said Schedule and has fixed the rates to be charged from August 1, 1952 in respect of the water work motor and from August 30, 1958 in respect of the street lights. This action of the appellant company cannot be said to be illegal as the company had the power to charge the rates unilaterally.

9. Mr. Nanavati then contended that there is difference between the terms of the contract being inconsistent with the provisions of the Schedule and the agreement being inconsistent with the action taken by a party under the Schedule. It is difficult to appreciate this argument. What Section 57 of the Electricity (Supply) Act, 1948 provides is that if a term of a contract is inconsistent with the provi-

sions of the first clause of Sch. 6 then the provisions of Schedule 6 must prevail. In exercise of the powers conferred on the appellant company by the first clause of Schedule 6, the company charged the consumers the revised rates for the supply of energy. The terms of the contract fixing the rates at a particular amount were inconsistent with the provisions of revision of rates as provided in the first clause of Schedule 6 and that being so the company had the right to revise the rates.

10. Mr. Nanavati next argued that before the appellant company revised the rates of the energy it was bound to show that its return of profits as a result of the agreed rates was less than the reasonable return as contemplated by Schedule 6 and it was only then that the company could say that the agreement was not binding to the parties. It is difficult to accept this contention. First clause to Schedule 6 empowers the company to revise the rates and the Company in this case acted under the said provisions and revised the rates. It had not been challenged in this case that the revised rates fixed by the company were not in consonance with the provisions of 6th Schedule. The only question that was agitated in the suit and the lower appellate Court was whether the company had a power to revise the rates under the provisions of the first clause of Sch. 6 in spite of the agreement between the parties. I have already come to the conclusion that the company had such a power and that being so the company had the power to revise the rates.

11. It was next contended by Mr. Nanavati that in this case the electricity company had given an assurance that they would not charge the Municipality at the revised rates and for this purpose Mr. Nanavati relied on the correspondence which ensued between the appellant company and the Municipality. Mr. Nanavati first drew my attention to Ex. 92 dated May, 12, 1952 which was a public notice issued by the appellant company for revising the rates in respect of supply of the electric energy from 1st June 1952. In response to this notice the President of the respondent Municipality addressed a letter, Ex. 70, to the appellant company informing the company that there were specific agreements between the parties with regard to the charges for the supply of the electricity and, therefore, revised rates notified by the company were not applicable to the Municipality. By Ex. 71, the Municipality again put forward the said contention. Ex. 73 dated June 4, 1952, was the letter of the appellant company addressed to the respondent Municipality wherein they stated that a separate agreement for supply of

electricity was in respect of water works motors only and other motors installed by the Municipality temporarily or permanently were to be charged as per the rates in force from time to time. The appellant company also addressed another letter, Ex. 72, dated June 5, 1952 to the Secretary of the respondent Municipality in reply to the letters Ex. 70 and Ex. 71 and informed the Municipality that the Municipality was their consumer for connections such as Gangavav and Madhavav to which the revised rates were applicable as per notice already given. The respondent Municipality addressed a letter Ex. 74 dated June 26, 1952 to the appellant company inquiring from the Company as to whether the revised rates were applicable to the street lights and water work motors. The appellant company by their letter, Ex. 75 dated July 15, 1952 informed the Municipality that revised rates which were to come in force from August, 1, 1952 were not applicable to the energy supplied under the special agreements. It must be noted that aforesaid correspondence except Ex. 74 related only to the revisions of rates in respect of the supply of electric energy to the water work motors. On the basis of this correspondence the argument advanced by Mr. Nanavati was that the appellant company had specifically agreed that the revised rates were not applicable to the municipality with regard to the supply of electric energy for water work motors and street-lights and the action of the Company charging revised rates was contrary to the agreements and therefore illegal. Mr. Daru, appearing for the company argued that it was not the case of the Municipality in the plaint that the appellant company had agreed not to charge the enhanced rates after the copy of the revised rates was sent to the Municipality with Ex. 85 dated October 8, 1952 and Mr. Nanavati did not raise any dispute on this point. The argument of Mr. Daru was that no doubt an assurance was given by the company not to charge the revised rates as were set out in Ex. 69 but subsequently an award was given by the umpire and the appellant company decided to charge the revised rates in respect of the consumption of the electrical energy by the Municipality. For this purpose Mr. Daru relied on the fact that the umpire by his award fixed the revised rates which the company had to charge for the supply of the electrical energy to its consumers. The public notice, Ex. 83, in respect of these rates was given to all the consumers in this respect. The said public notice refers to the notice Ex. 69. The reference was to the operative part of the said notice Ex. 69 which informed the consumers that the company was revising the charges for the supply of the electrical energy under

the provisions of Section 57 of the Electricity (Supply) Act, 1948 read with first clause of the 6th Schedule thereof. The public notice Ex. 83 also gave the revised rates which were fixed by the umpire and which the company had decided to charge under the provisions of Section 57 of the Electricity (Supply) Act read with clause 1 of the Schedule 6 of the Electricity (Supply) Act. The revised rates were fixed also for the consumption of the electrical energy of water work motors. A copy of this was forwarded to the Municipality by letter, Ex. 85, dated October 8, 1952. Thereafter some correspondence ensued between the appellant company and the Municipality and by letter, Ex. 85, the appellate company informed the Municipality that an agreement pertaining to the ~~electric supply automatically terminated~~, and they had the right to make and issue the bills as per revised rates fixed by the umpire. The argument of Mr. Daru was that this correspondence clearly indicated that the company intended to charge revised rates from the Municipality in respect of the consumption for water work motors and street lights after the revised rates were fixed by the umpire. The assurance given by the company in Ex. 75, was only in respect of rates notified in Ex. 69 and in respect of revised rates mentioned in Ex. 83. Under the circumstances the company was justified in making a demand for the consumption of the electrical energy at the rates, fixed by the umpire and adopted by the company under the provisions of Section 57 read with clause 1 of the Schedule 6. The correspondence referred to above clearly indicates that the company at a latter stage i. e. after the rates were fixed by the umpire, had decided to charge the Municipality with the revised rates as fixed by the umpire. The assurance which was given by the appellant company not to charge revised rates was in respect of the rates fixed in Ex. 69. There is nothing on the record to show that the company continued the said assurance in respect of the rates fixed by the umpire on September 3, 1952. Ex. 72 clearly shows the intention of the appellant company because it was stated therein in categorically terms that the company had the right to make a demand as per rates mentioned in the notice Ex. 83. Thus the argument of Mr. Nanavati that the appellant company was not entitled to charge the revised rates from the Municipality of consumption for electrical energy for water works as well as for the street lights because of the assurance given by the company cannot be accepted. The result is that the lower Courts erred in decreeing the suit of the Municipality and granting injunctions against the appellant company.

12. For the reasons stated above the suit of the plaintiff is dismissed and the appeal is allowed with costs throughout.

MVJ/D.V.C.

Appeal allowed.

AIR 1969 GUJARAT 47 (V 56 C 9)

N. G. SHELAT, J.

Thakordas Sugnamal and others, Appellants v. State of Gujarat, Respondent.
Criminal Appeal No. 500 of 1965, D/- 28-1-1967.

Bombay Prevention of Gambling Act (4 of 1887), Ss. 6(1), 7 Proviso — On death of person issuing general order or authority under S. 6(1), general order or authority comes to end and search cannot be made thereunder — If search is made under such invalid authority or order there is no question of any defect being not a material one and proviso to S. 7 cannot be invoked for raising presumption under such unauthorised act: Criminal Appeals Nos. 139 and 143 of 1965, D/- 15-7-1966 (Guj), Foll. (Para 2)

Cases Referred: Chronological Paras
(1966) Cri Appeals Nos. 139 and
143 of 1965, D/- 15-7-1966 (Guj), 4

H. K. Thakore, for Appellants; J. U. Mehta, Asstt. Govt. Pleader, for Respondent.

JUDGMENT:— Armed with a general order in writing issued by late Mr. Niranjan Das, Police Commissioner, Ahmedabad, under section 6(1) of the Bombay Prevention of Gambling Act, (hereinafter to be referred as "the Act") Mr. Dharia, the P. S. I. Ahmedabad City, accompanied by the police officers and the panchas raided the house bearing No. 2375/B/3 Kalapur — I at about 8-30 p. m. on 28th December 1964 in pursuance of some information received by him that it was used as a gaming house and that the accused and other persons were gaming or present for the purpose of gaming. Finding them gaming with cards and money, he made a panchnama in respect of all that was found there. He also searched those persons who were found gaming in cards and money. The complaint was then lodged against accused No. 1 for offences under sections 4 and 5 of the Bombay Prevention of Gambling Act, and under section 5 of the said Act against the remaining accused Nos. 2 to 9. The accused pleaded not guilty to the charges levelled against them. After considering the effect of the evidence, the learned Magistrate found accused Nos. 2 to 9 guilty for an offence under Section 5 of the Act and each one of them was sentenced to undergo rigorous imprisonment for one month and to pay a

fine of Rs. 500, or, in default, to suffer further rigorous imprisonment for one month. Accused No. 1 was acquitted. Feeling dissatisfied with that order passed on 1-6-1965 by Mr. P. M. Mehta, City Magistrate, 2nd Court, Ahmedabad, the accused Nos. 2 to 9 have come in appeal before this Court.

2. Mr. Thakore, the learned advocate for the appellants, contends that the order of conviction of these appellants-accused is mainly based on the presumption raised under section 7 of the Act, inasmuch as the search was carried out under a general order issued in favour of Mr. Dharia by the Commissioner of Police, Ahmedabad, under Section 6(1) of the Act. That order was issued on 14th September 1964, and, according to him, at the date when this search was effected by Mr. Dharia, viz., on 28-12-64, Mr. Niranjan Das, the Commissioner of Police who had empowered him by a general order or authority under section 6(1) of the Act was dead and that therefore, that authority cannot be said to continue on that day. Since the search effected under Section 6 of the Act was invalid, no presumption can be allowed to be raised against the accused-appellants under section 7 of the Act. Now section 7 of the Act runs thus:—

"7. When any instrument of gaming has been seized in any house, room or place entered under Section 6 or about the person of any one found therein, and in the case of any other thing so seized if the court is satisfied that the Police Officer who entered such house, room or place had reasonable grounds for suspecting that the thing so seized was an instrument of gaming, the seizure of such instrument or thing shall be evidence, until the contrary is proved, that such house, room or place is used as a common gaming-house and the persons found therein were then present for the purpose of gaming, although no gaming was actually seen by the Magistrate or the Police Officer or by any person acting under the authority of either of them.

Provided that the aforesaid presumption shall be made, notwithstanding any defect in the warrant or order in pursuance of which the house, room or place was entered under Section 6, if the Court considers the defect not to be a material one."

As contemplated in the proviso thereto, if the defect is not material in respect of the warrant or order in pursuance of which house or room or place was entered under Section 6 of the Act, the Court can raise a presumption. In other words, if the authority under which Mr. Dharia acted in searching the premises in question, was invalid, the prosecution cannot avail of the presumption arising under Section 7 of the Act. Now it appears from the

evidence of the P. S. I. Mr. Dharia that Mr. Niranjan Das had died before this raid was effected on 28th December 1964 and after his death he did try to obtain a fresh general authority to carry out the raid at this particular place from where the accused were searched and arrested, but he could not get the same from Mr. Deboo, the Commissioner of Police, who succeeded late Mr. Niranjan Das. In fact he has also admitted "that he could not raid the premises with the old warrant."

The general order which was issued in his favour by late Mr. Niranjan Das, the Commissioner of Police, under Section 6(1) of the Act automatically came to an end on the day he expired. It cannot continue after his death for the simple reason that the person who gave him such an authority was no more the Commissioner of Police. It may well be that the succeeding officer may not choose to issue any such general authority in favour of Mr. Dharia and in fact it had so happened in this case. The person who issues such a general authority has the power to withdraw the same at any time during his life time and, therefore, such an authority would continue upto the time it was not withdrawn, and at any rate only upto his death. In no case that authority can continue to exist beyond his death for he ceased to be the issuing authority under the Act. That authority, therefore, could not be utilised by P. S. I. Mr. Dharia in carrying out the raid of the premises in question, and more so, when the succeeding officer Mr. Deboo declined to give him any such general authority under Section 6(1) of the Act. He also realised that he could not raid the premises under that authority, and yet surprisingly he did so under the authority which was invalid in law. It puts an end to his power to search the premises under section 6(1) and thus there is no question of the defect being not a material one. The proviso to Section 7 cannot be invoked for raising presumption under such an unauthorised act on the part of Mr. Dharia committed on 28-12-64 before which the issuing authority no longer was there, and someone else was the authority to issue it under Section 6(1) of the Act.

3. The search effected was thus unauthorised and invalid and consequently no effect can be given to the same as contemplated under section 7 of the Act viz. to presume that the thing so seized was an instrument of gaming and that such house or place was used as a common gaming house and the persons present were there for the purpose of gaming until the contrary is proved.

4. Now from the judgment it appears that the learned Magistrate has raised a presumption arising out of any such raid effected by Mr. Dharia in pursuance of a general authority issued under section 6

(1) of the Act and the appreciation of evidence in the case has been on that basis. No such presumption can at all arise as contemplated under Section 7 of the Act. It would therefore, be essential to appreciate the evidence on its own merits, and that can be best done by the trial Court. A similar view has been taken by Raju J. in an unreported decision of 15-7-1966 in Criminal Appeal Nos. 139 and 143 of 1965 (Guj). In the result, the decision based on such appreciation of evidence has to be set aside, and the case shall be sent back to the trial Court for disposal in accordance with law keeping in mind the observations made hereabove.

5. The order of conviction and sentence passed against the accused-appellant is set aside and the case is sent back for hearing and disposal in accordance with law keeping in mind the observations made hereabove.

JHS/D.V.C.

Order accordingly.

AIR 1969 GUJARAT 48 (V 56 C 10)

J. B. MEHTA, J.

Ajitrai Shivprasad Mehta, Appellant v. Bai Vasumati, Respondent.

A. F. O. D. Appeal No. 520 of 1962, D/-20-6-1967, against decision of Principal J., City Civil Court at Ahmedabad in Civil Suit No. 317 of 1961.

(A) Hindu Marriage Act (1955), Ss. 5 (i), 10(1)(e), 11, 12, 13(1)(iii) — Scope.

If the condition in section 5(ii) is not fulfilled the marriage is not a void marriage as provided in S. 11, but a voidable marriage, under S. 12, which can be annulled by a decree of nullity on the ground that the other party was an idiot or lunatic at the time of the marriage. This type of mental defect which could be called "idiotcy or lunacy", if it existed at the time of the marriage, would enable the party to avoid the marriage because under S. 5(ii) this is one of the necessary conditions, the non-fulfilment of which makes the Hindu marriage voidable. On the other hand Ss. 10 and 13 which deal with the judicial separation and divorce provide for the ground of unsoundness of mind either for two years or three years, but the real difference in the two classes is that for a judicial separation mere unsoundness of mind for the relevant period is a ground, while for divorce such unsoundness of mind for the relevant period is to be further proved to be incurable. The mental infirmity which the legislature has considered as adequate to be made a ground for avoiding the marriage and getting a decree of nullity is one which amounts to "idiotcy or lunacy" and it must exist at the time

DL/IL/C65/68

of marriage while as a ground of divorce it must be proved that the concerned spouse was for the relevant period specified in S. 13(j)(iii) of "incurably unsound mind." (Para 5)

(B) Hindu Marriage Act (1955), S. 13 — 'Incurably unsound mind' — What is.

The expression "incurably unsound mind" cannot be so widely interpreted as to cover feeble-minded persons or persons of dull intellect who understand the nature and consequences of their acts and are able, therefore, to control themselves and their affairs and their reactions in the normal way: AIR 1934 All 273, Ref.

(Para 7)

When this ground of unsoundness of mind is relied upon as a ground for dissolution of marriage or for avoiding the marriage, the said ground must be proved by cogent and clear evidence beyond reasonable doubt so as to satisfy the Court.

(Para 10)

Held consideration of entire evidence made it very clear that the respondent was able to manage herself and all her affairs in her own simple way and she would be able to cope with the obligations of a marital life. Even if on some occasions she needed better instructions or advice, she was able to look after herself and her affairs all alone and was not even seriously sub-normal as it was sought to be suggested.

(Para 10)

(C) Evidence Act (1872), S. 45 — Opinion of expert — Expert should put before Court all the materials which induce him to come to the conclusion, so that Court, although not an expert, may form its own judgment on those materials: AIR 1934 All 273, Rel. on. (Para 9)

Cases Referred: Chronological Paras

(1959) 1959-3 All ER 389=1960 P 6, 7

52, Whysall v. Whysall

(1934) AIR 1934 All 273 (V 21)=

ILR 56 All 428, Tifli v. Alfred

Robert Jones 6, 7, 9

(1932) AIR 1932 All 233 (V 19)=

33 Cri LJ 714, Pancha v. Emperor 6

(1854) 1 K & J 4=2 WR 612, Harrod

v. Harrod 6

(1843) 10 Cl. & F 200=8 ER 718,

Daniel McNaughten's case 6

S. B. Vakil, for Appellant; D. K.

Pandya, for Respondent.

JUDGMENT:— The petitioner husband has filed this appeal under the Hindu Marriage Act, 1955, hereinafter referred to as "the Act", as his original petition for obtaining decree of the nullity of his marriage or for divorce had been dismissed by trial Court.

2. The short facts which have given rise to this appeal are as under :—

3. The petitioner and the respondent are Brahmins by caste. The petitioner is deaf and dumb from the birth. The petitioner's father originally resided at

Umreth, while the original place of residence of the respondent is Vaso. But the parents of both parties had been residing at Ahmedabad since many years. According to the petitioner he was married to the respondent at Vaso on 15th April 1954 according to the religious rites and as per the custom of the community. It is the petitioner's case that he relied upon the representations made by the respondent's father to the petitioner's father. After the marriage the respondent came to reside with the petitioner when he found that her mental condition was defective and she was insane and did not know how to lead a married life with the petitioner. These facts were not known to the petitioner at the time of the marriage and so, the petitioner contended that as the respondent's mental condition was incurable, he was entitled to a decree of nullity of his marriage or in the alternative to a decree of divorce. After the exchange of notices the petitioner has filed the present petition for the aforesaid reliefs. By her written statement, Ex. 24, the respondent denied that the marriage which was legally performed was on the mere representations of her father. The respondent averred that a writing Ex. 93 had been prepared as per the custom of the community at the time of the engagement and the petitioner and his parents and others had seen the respondent, talked with her and given approval to the engagement. There was also another ceremony known as Kunvaro Mandvo and thus the petitioner and his parents had ample opportunities of seeing her and talking to her and observing her. The case of the respondent was that while she stayed with the petitioner, the petitioner and his parents used to taunt her as she did not bear a child even after long time after the marriage and they did not keep her and this petition was filed only to get a divorce so that the petitioner could marry again. The respondent denied that she was mentally defective. The trial Court held that the petitioner had failed to establish that the respondent was an idiot or lunatic at the time of the marriage or that her mental condition had not been disclosed at the time of the marriage. The learned Judge further held that the petitioner had further failed to establish that the respondent was of an unsound mind for the relevant period or that the said mental condition was incurable. Finally, the learned trial Judge held that the petitioner was guilty of delay and even if he had established the ground there was no case for granting the relief. Accordingly, the petition was dismissed. The petitioner has filed the present appeal.

4. At the hearing Mr. Vakil raised two points:—

(1) That the expression "unsoundness of mind" had a wider connotation and would include even a person like the respondent who was a mentally defective and whose defect was congenital;

(2) On the facts of the case the learned Judge ought to have held that the respondent was of incurably unsound mind and should have passed a decree for divorce

5. In order to appreciate the first contention of Mr. Vakil, it would be proper to consider the scheme of the relevant sections of the Act. Section 5 provides for conditions for a Hindu marriage and section 5(ii) provides that a marriage may be solemnized between two Hindus, if the following condition is fulfilled: Viz., "neither party is an idiot or a lunatic at the time of the marriage." Section 10(1)(e) provides for a decree for judicial separation, if either party to a marriage had been continuously of unsound mind for a period of not less than two years immediately preceding the presentation of the petition. Section 12(1)(b), however, provides that any marriage solemnized, whether before or after the commencement of the Act, shall be voidable and may be annulled by a decree of nullity on the ground that the marriage was in contravention of the conditions specified in clause (ii) of Section 5. Section 13(1)(iii) then provides that a marriage solemnized, whether before or after the Act, could, on a petition presented by the spouse, be dissolved by a decree of divorce on the ground that the other spouse "has been incurably of unsound mind for a continuous period of not less than three years immediately preceding the presentation of the petition". From this scheme it is clear that if the condition in section 5(ii) is not fulfilled the marriage is not a void marriage as provided in section 11, but a voidable marriage, under section 12, which can be annulled by a decree of nullity on the ground that the other party was an idiot or lunatic at the time of the marriage. This type of mental defect which could be called "idiocy or lunacy", if it existed at the time of the marriage, would enable the party to avoid the marriage because under Section 5(ii) this is one of the necessary conditions, the non-fulfilment of which makes the Hindu marriage voidable. On the other hand sections 10 and 13 which deal with the judicial separation and divorce provide for the ground of unsoundness of mind either for two years or three years, but the real difference in the two classes is that for a judicial separation mere unsoundness of mind for the relevant period is a ground, while for divorce such unsoundness of mind for the relevant period is to be further proved to be incurable. The mental infirmity which the

legislature has considered as adequate to be made a ground for avoiding the marriage and getting a decree of nullity is one which amounts to "idiocy or lunacy" and it must exist at the time of marriage while as a ground of divorce it must be proved that the concerned spouse was for the relevant period specified in Section 13(1)(iii) of "incurably unsound mind." We must, therefore, consider the import of these three relevant expressions, "idiot", "lunatic" and a person of "incurably unsound mind" in the context of the aforesaid scheme of the Act.

6. In *Titli v. Alfred Robert Jones*, ILR 56 All 428 = (AIR 1934 All 273), the Division Bench consisting of Sir Sulaiman C. J. and Mukherjee J. had to consider the difference between medical and legal definitions of insanity in the context of a similar legislation viz., Section 19(3) of the Indian Divorce Act, 1869, which provided for a decree of nullity of marriage on the ground of the other spouse being 'an idiot or a lunatic'. It was found that the person concerned in that case could read and take pleasure in reading, could write and could draft a letter for himself, could ride, shoot and fish, that he gave intelligent answers to questions put to him by the Court; that he himself went to the priest and arranged for his marriage; that he knew that by the marriage he would be making the woman his wife. It was held that he was fully able to understand the nature and consequences of his marriage and was not an "idiot" within the meaning of Sec. 19(3) of the Indian Divorce Act, 1869. The Division Bench held that even though the term "idiot" had not been defined in the Divorce Act, 1869, or in any other Indian Act, but undoubtedly idiocy was a form of congenital insanity, due to the absence of development of the mental faculties and intelligence from very childhood. It was also held that the only standard and test of insanity laid down by the law was, according to section 84 of the Indian Penal Code, whether the person was by reason of unsoundness of mind incapable of knowing the nature and quality of the act, or that the act was wrong or contrary to law. Their Lordships also accepted for guidance the definition of the word, "idiots" in England in the Mental Deficiency Act, 1913, as being persons so deeply defective in mind from birth, or from an early age, as to be unable to guard themselves against common physical dangers. The definition distinguished idiots as being a more aggravated type of defectives than imbeciles or feeble minded persons and the said distinction was found to be in perfect accord with medical books of the highest authority. In the case of an idiot there was dementia naturalis or complete amentia, while in the case of imbecility

or partial amentia there was not that marked want of development of the centres of sensorial perception which was present in idiocy. An imbecile has rudimentary intelligence, whereas a feeble minded person has a yet larger amount of intelligence. At page 451 Mukherjea J. observed that the meaning of that term "idiot", according to Murray's English Dictionary, was stated to be a "person so deficient in mental or intellectual faculty as to be incapable of ordinary acts of reasoning or rational conduct." At page 460 Sulaiman C. J. also held that one could not be an idiot unless his faculties had not at all been developed and he had not acquired any appreciable intelligence. The learned Chief Justice considered the definition of an insane person i. e. a man of unsound mind and observed that there had been difference between the points of view between a medical man and a lawyer on the question of insanity. At p. 457 (of ILR All)=(at p. 282 of AIR) Sir Sulaiman C. J. further pointed out that there were many persons who would be considered insane by medical men who did not come upto the standard of insanity as prescribed by law. The medical science had a long category of various degrees of abnormality which were thought to be insanity, including idiocy, imbecility, feeble mindedness, subjectivity to stupor, exaltations, delusions, impulses etc. Indeed, abnormality in one form or another was considered according to medical books as a species of insanity, but that was not the legal view. In law it was a very high standard and the only test which had been laid down was as to whether the person by reason of unsoundness of mind is incapable of knowing the nature of the act, or that he was doing what was either wrong or contrary to law. "In this section 84 of the Indian Penal Code the definition was borrowed from the opinions of the fifteen Judges in Danial McNaghten's case, (1843-10 Cl. & F 200) in AIR 1932 All 233, who unanimously laid down that, "to establish a defence on the ground of insanity, it must be clearly proved that at the time of committing the act the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or if he did know it he did not know he was doing what was wrong." At pages 461 to 462 (of ILR All)=(at p. 284 of AIR) the learned Chief Justice, therefore, concluded that a medical man's conception of an insane, a lunatic or an idiot was utterly different from the legal conception. The medical opinion that a person was an idiot because by the mere deficiency in reasoning power he was unable to manage his affairs was useless in the inquiry as to whether the person was an idiot in the eye of law. The test

which was applied by the Division Bench was that a person who was capable of understanding what marriage was and its consequences could not be held to be an idiot or a lunatic at the time of the marriage. (See at page 453 (of ILR All)=(at p. 281 of AIR) Mukherjea J. and at pp. 463-465 (of ILR All)=(at pp. 285-286 of AIR) Sir Sulaiman C. J.) The learned Chief Justice also found the following passage quoted at pp. 466-67 (of ILR All)=(at p. 286 of AIR) from the case of Harrod v. Harrod, (1854) 1 K. & J. 4 very instructive. At p. 8, the Vice-Chancellor explained the two species of unsoundness of mind as follows:

"Unsoundness of mind may be occasioned either by perversion of intellect, manifesting itself in delusions, antipathies, or the like, or it may arise from a defect of the mind. There is no allegation here of anything like a perversion of the mind, or what is more properly called mania. With respect to defects of the mind, they are of two kinds: The mind may be originally so deficient as to be incapable of directing the person in any matter which requires thought or judgment, which is ordinarily called idiocy or the defect may arise from the weakening of a mind, originally strong by disease or some accident of a physical nature, by which memory is lost and the faculties are paralysed, although there is no perversion of the mind, nor any species of that insanity which is ordinarily called mania". The defendant in that case had tried to put forward a case of simple idiocy invalidating the marriage of a lady, who was shown to have been deaf and dumb and of extremely dull intellect. Other people could not make her comprehend anything. She had never been taught to talk with fingers, nor could she read or write; her mother never allowed her to leave the house alone; she was also unable to tell the value of money and she did not know how to give change. The Vice-Chancellor held at page 8: "It is clearly the law that the presumption is always in favour of sanity, and there is no exception to this rule in the case of a deaf and dumb person; but the onus of proving the unsoundness of mind of such a person must rest on those who dispute her sanity". Even on the evidence for the defence alone he remarked that he should not have been disposed to direct an issue on the question. At page 14 the learned Vice-Chancellor observed: "I am, therefore, of opinion that there is nothing in this case to show that the plaintiff's mother was of unsound mind; and as no case of fraud is alleged there is nothing more to be done". In the result he held that her marriage was not invalid.

The aforesaid decision concisely explains the various terms with which we

have to deal with and brings out the subtle distinction between the medical and legal view on the question of insanity. In the case of idiocy, the insanity is congenital and incurable and the mind is originally so defective as to be incapable of directing the person in any matter which requires thought or judgment or in other words, there is such a complete state of *amentia* from birth or early childhood, that the person is almost without any glimmering of reason at all. On the other hand, in case of lunacy or insanity or unsoundness of mind such mental defect arises from the 'weakening of the mind, originally strong, by reason of some disease, accident or other such cause resulting in some mental illness by which memory, reason or understanding is lost and the faculties are so paralysed. The distinction between the species of that insanity known as lunacy or mania and mere unsoundness of mind is in the fact whether there is perversion of mind or depravity of reason or only a want of it. The passage in Stroud's Judicial Dictionary at page 2141 clearly brings out this distinction in the following terms:

"'Unsound mind' which all persons must understand to be a Depravity of Reason, or want of it. Mere eccentricity is not such an unsoundness of mind as will amount to testamentary incapacity. There is an important difference between 'Unsoundness of Mind' and 'Dullness of Intellect' Unsoundness of mind may arise from perversion of the mental powers, and may exhibit itself by means of delusions or strong antipathies, which is called 'Mania'; or it may arise from what may be termed as defect of mind, as where the mind was originally incapable of directing itself to anything requiring judgment which is 'idiocy' or where a mind, originally strong, has become weakened by illness or age though producing no such insanity as to amount to Mania."

In all these three cases whether of congenital insanity, lunacy or unsoundness of mind, the mental infirmity satisfies the test of legal insanity only when it is to such a degree that a person is unable to understand the nature and consequences of his acts and would, therefore, be considered not responsible for his acts or his acts in the eye of law could not be regarded as his acts at all. Mr. Vakil, however, argued that, "unsoundness of mind" would differ in its import in the context of each legislation. The aforesaid tests evolved in Daniel McNaghten's case, (1843-10 CL & F 200) and embodied in section 84 of the Indian Penal Code might be appropriate in fastening criminal responsibility upon a person in cases where *mens rea* was a necessary ingredient of the offence, but they would not

be appropriate while considering the 'unsoundness' of mind as a ground of divorce. Mr. Vakil also pointed out that under Section 12 of the Indian Contract Act, the expression "unsoundness of mind" was used in the context of consent being given for entering into a valid contract where a person must understand and form a rational judgment as to its effect before entering into such a contract.

Mr. Vakil further argued that in a matrimonial legislation the term "unsoundness of mind" should be widely interpreted, especially when the Legislature had purposely used a different phraseology in Section 13(1) when mental infirmity was considered as a ground of dissolution of marriage as distinguished from the mental defect contemplated in Section 5(ii) when it was considered as in the context a necessary condition for the marriage and which made it voidable under section 12(1)(b), in which case, it must be such a grave mental disorder which must be of the nature of "idiocy or lunacy". Mr. Vakil in this connection vehemently relied upon the decision of Phillimore J. in *Whysall v. Whysall*, 1959 (3) All ER 389, where the learned Judge had interpreted the expression "incurably of unsound mind" in a similar matrimonial legislation in England. On parity of reasoning Mr. Vakil argued that we should include even feeble-minded persons and even persons of dull intellect who would not be able to lead a full matrimonial life as rational persons duly appreciating the marital obligations and rationally controlling their affairs in the society and in married life. It would be futile to continue such an unhappy marriage tie.

7. There is much force in Mr. Vakil's contention that McNaghton Rules could not be strictly applied in civil cases and especially in a matrimonial legislation as their strict application would lead to absurd results, and as in civil cases they could not be applied in the same way. The first limb of the rules may afford a good test, but as far as the second limb is considered, it is interpreted in criminal law so that "wrong" means contrary to law and not as morally wrong. (See, section 84 I. P. C.) Obviously, this meaning cannot be applied to divorce cases. To pay no heed to the consequences of insanity other than that of knowing what one is doing would be to introduce an unjustifiable distinction. There would be neither reason nor logic in making any distinction between these two types of persons who are in fact equally irresponsible so as to permit one to be divorced while not the other, on the ground that his type of insanity does not fall within the strict rigour of those rules. When insanity deprives a man completely of choice or responsibility or volition or even moral

judgment so that a man's acts are not his acts, we must hold that the insanity is of that degree which must be considered as sufficient. Therefore, these McNaughton Rules or their equivalent can be safely accepted as working rules without necessarily picking any one of them to the exclusion of others. That is what is done by the Division Bench in the aforesaid decision of ILR 56 All 428= (AIR 1934 All 273) when the Legislature intended that if the mental infirmity, short of idiocy or lunacy, should not be a ground on which a marriage could be avoided or in other words, if such a person, whose mental defect did not reach this serious state of insanity known as idiocy or lunacy, could enter into a valid marriage tie, it would be absurd to hold that on the very same ground of mental defect which existed at the time of such marriage, it would be open to dissolve the marriage tie by giving such a wide interpretation to the term "unsoundness of mind" in Section 13(1)(ii). Feeble-minded persons or persons of dull intellect in whose cases mental infirmity is not of such a grave mental disorder as to make them incapable of knowing the nature and consequences of their acts or, in other words, who can understand what marriage is as well as the consequences of a marriage tie cannot be considered as persons of "unsound mind" in the legal sense as contemplated in S. 13(i)(iii). We also do not agree with Mr. Vakil that Phillimore J. has laid down any different test in 1959(3) All ER 389. In fact the learned Judge at page 395 observes that in the context of the matrimonial legislation and bearing in mind the definitions afforded by the Oxford Dictionary, the phrase "unsound mind" must have been intended to describe a state of mind variously called unsoundness of mind or insanity and no distinction was meant between the two phrases. At page 396 also the learned Judge observes that the practical test of the degree of the unsoundness of mind or incapacity of mind required for such insanity must be found in the definition of a lunatic in Section 90 of the Lunacy Act, 1890, as a person, "incapable of managing himself and his affairs, provided it was remembered that "affairs" include the problems of society and of married life and the test of ability to manage affairs was that to be required of the reasonable men. Therefore, the learned Judge evolved this test only in the context of legal insanity alone when it reached that high standard which was required in law and did not intend to cover all kinds of mental abnormalities or deficiencies as contended by Mr. Vakil. At page 396 the learned Judge considered the meaning of the term "incurably". At page 397 he finally held that in decid-

ing whether a person "is incurably of unsound mind", the test to be applied is whether by reason of his mental condition he is capable of managing himself and the affairs and, if not, whether he can hope to be restored to a state in which he will be able to do so. Of course he added the rider that the capacity to be required was that of a reasonable person. This test, therefore, really proceeds on the footing that the person is insane. A mere mental defective, whose state of mind being congenital would be incurable would not satisfy this test of insanity as in spite of arrested or incomplete development of his mind he would be able to understand the nature and consequences of his acts and there would be no justification to dissolve the marriage tie. We therefore, do not agree with Mr. Vakil that the expression "incurably of unsound mind" should be so widely interpreted as to cover such feeble-minded persons or persons of dull intellect who understand the nature and consequences of their acts and are able, therefore, to control themselves and their affairs and their reactions in the normal way.

8. Now coming to the facts of the present case, Mr. Vakil frankly conceded that he cannot bring the present case under Section 12 read with section 5(ii) as the respondent could not be considered as an idiot or as a lunatic. The respondent did not suffer from such mental infirmity as would make her an idiot or a lunatic. The only evidence which was relied upon by the petitioner in this connection was of the priest Motilal, Ex. 96, who stated that at the time of her marriage the respondent was not by herself able to perform certain ceremonies and that she had to be helped by another girl Saroj who was sitting by her to perform those ceremonies. In cross-examination he had to admit that even educated persons might commit mistakes in performance of the ceremonies which they corrected on being explained and that in his experience some women had to be given instructions in greater detail than others. The petitioner has also relied upon the maternal uncle Hiralal Dave, Ex. 98, who supported the story of the priest that the respondent was not able to follow instructions at the time of the marriage ceremony. But in cross-examination he had to admit that though he was present near the place where the marriage ceremony had taken place and had seen the girl at the time, he had not felt that the respondent had any mental defect. The respondent and her witness Sarojben, Ex. 106, have emphatically denied this allegation. Even at best the allegation only goes to show that the respondent had to be explained properly in order to enable her to partake in the various

ceremonies at the time of the marriage. This would not be any evidence of a mental defect in the petitioner which made her completely unable to understand the marriage ceremony or the import of marriage. The respondent had given evidence and the learned trial Judge had made a note how she stood the test of a searching cross-examination. She merely did not understand complicated questions but she gave all proper replies to simple questions. Mr. Vakil, therefore, rightly did not rely upon this ground under Section 12 for a decree of nullity as a condition under Section 5(ii) was not fulfilled by the respondent as the alleged mental infirmity in her case was completely short of idiocy or lunacy.

9. Mr. Vakil, however, strongly relied upon certain other symptoms from which he wanted me to infer the petitioner's unsoundness of mind in the context of the aforesaid Phillimore J.'s test. Mr. Vakil argued that it was seen on the petitioner's evidence that the respondent was incapable by herself of managing herself and her affairs, including problems of society and of marriage life, judged by the ability of a reasonable person to manage such affairs, and such incapacity in her case being congenital, was necessarily permanent and incurable. Mr. Vakil in this connection strongly relied upon the evidence of Dr. Rahimutullakhan Ahmedullakhan Hakim, Ex. 101, who is an M.B.B.S. Psychiatrist at the Civil Hospital and B. J. Medical College and an Honorary Consultant at the Mental Hospital. The doctor admitted that he had only once examined the patient and that too without any clinical examination. The doctor has opined and given certificate Ex. 102. He stated that in his opinion the patient was suffering from mental deficiency by birth and this deficiency which he found in her was not curable. She was a low grade moron. She would not be in a position to carry out usual household duties. It is well settled, that an expert opinion would be useful only when the expert gives grounds on which he holds such opinion. The doctor has admitted that while the patient would be clinically examined past history of the patient would be taken into consideration for coming to the conclusion and if the past history was not correctly given there was a likelihood of arriving at an incorrect decision, and that without a clinical examination there would be a difference in the conclusion in the degree of mental deficiency. The doctor further stated that over and above the past history the doctor must ask questions to formulate the decision and that in such personal examination if the patient was nervous or shy, she might give incorrect answers. In fact, he stated that he would definitely

like to see the patient again to confirm the diagnosis. Mr. Vakil was unable to point out from this whole evidence of Dr. Rahimutullakhan as to what was the previous history given or as to what were the questions and answers which led him to the present conclusion. In absence of such data or grounds of opinion the expert opinion would be practically useless for our purpose. As Mukerjee J. pointed out in ILR 56 All 428(450) = (AIR 1934 All 273 at p. 280) the opinion of such an expert would carry very little weight unless it was supported by a clear statement of what the doctor noticed and on what he based his opinion. The expert should, if he expected his opinion to be accepted, put before the Court all the materials which induced him to come to his conclusion so that the Court, although not an expert, may form its own judgment on these materials. In fact to the Court question the doctor had stated that in his opinion he could not call a person "moron low" to be an idiot. Idiocy was mental deficiency of the lowest grade. Thereafter, in answer to the questions by the petitioner's advocate the doctor explained the difference between an idiot and a lunatic and he said that he would call a person an idiot who could not realise danger and would not be able to speak even or carry out all the routine habits of a human being. In fact the doctor's opinion of an idiot could not differ from the accepted sense of the term "idiot" where there must be complete absence of reason or judgment and the doctor rightly stated that he did not consider the petitioner idiot. Similarly, the doctor stated that the petitioner could not be considered a lunatic. In fact what is material for our purpose is lunacy as understood in the legal sense and not in the medical sense. We have mentioned this evidence of Dr. Rahimutullakhan only for showing that there was nothing in his entire evidence which would establish idiocy, lunacy or unsoundness of mind of the respondent. The opinion of the doctor that the respondent could not carry out usual household duties would be merely ipse dixit of the doctor unsupported by any reason or ground or data. Therefore, this evidence could not help the plaintiff.

10. Mr. Vakil next relied upon the fact that from the evidence of the petitioner's witnesses it was clear that:

(1) the respondent did not know how to dress her clothes and she kept the buttons of her blouse open as stated by the petitioner in his evidence. Ex. 54;

(2) that though she was Brahmin she did not take bath daily;

(3) that she did not distinguish between cereals and vegetables as she had stated that she did not know what use may be

made of Mug and that Chola was cooked after putting into water and that it was not eaten, but applied on the head;

(4) that she had no control over her nature discharges as she passed urine and stools even in the kitchen;

(5) that she did not recognise the person and did not give welcome to the visit and she had no sense and recollection of places, roads, neighbours etc., or

(6) she required to be helped.

Mr. Vakild relied upon these symptoms as having been established by the evidence of the various witnesses of the petitioner. It is true as the learned Judge himself has noted the demeanour of the respondent that the respondent is slow of understanding complicated questions and she was not able to answer some questions and some answers were not quite correct. But she was sub-normal in her mental capacity and she was able to give relevant answers to simple questions and the learned Judge has rightly stated that the respondent had stood the test of a searching cross-examination. Merely because she has a weak memory of the roads and places or names of relatives, it would not make her a person of unsound mind. As regards her absence of control over urine and stools, it is only (Sumanben?). Ex. 99 who had stated that she was passing stools and urine in the kitchen but no such suggestion was made to the respondent. The only suggestion to her was that she spoiled her clothes by passing urine or stools and she had denied the same. The learned Judge has rightly not believed this story which was practically not conveyed to anyone else by Sumanben and was not even put up to the respondent. Merely because she did not take bath daily it could not be said that she did not know how to take bath. In fact, in cross-examination of the respondent the petitioner had gone to the extent of suggesting that the bath was given to her by her mother-in-law, which was not even the story of Sumanben, the step-mother Ex. 99. Similarly, a vague suggestion was sought to be made to the respondent that she did not know how to comb her hair and that her mother used to comb her hair. Merely because some buttons of the blouse might have been seen open by the petitioner it is too much for Mr. Vakild to argue that the respondent did not know how to dress. Besides even the petitioner himself had to admit that the respondent did cooking even though his mother denied the same. It may be that bread prepared by her may not be to the satisfaction of the petitioner or his family. Even as regards welcome offered to the guests or talks with them, it would also depend on the coldness with which the guests even might treat such a person, who at best can be said to be of a

dull intellect or a feeble minded person. Therefore, the entire evidence makes it very clear that the respondent is able to manage herself and all her affairs in her own simple way and she would be able to cope with the obligations of a marital life. Even if on some occasions, she needed better instructions or advice, she was able to look after herself and her affairs all alone and is not even seriously sub-normal as it is sought to be suggested by Mr. Vakild. Therefore, in any event, in the present case, the mental defect is not of such a degree or extent which makes the respondent incapable of managing herself and her affairs and even on the practical test adopted by Phillimore J., on which Mr. Vakild strongly relied upon the respondent would not be a person of unsound mind. When this ground of unsoundness of mind is relied upon, as a ground for dissolution of marriage or for avoiding the marriage, the said ground must be proved by cogent and clear evidence beyond reasonable doubt so as to satisfy the Court. There is not an iota of evidence, however, in the present case, for establishing the ground of unsoundness of mind or of idiocy or lunacy and the petitioner was not, therefore, entitled to any relief under section 12 or section 13 of the Act.

11. In this view of the matter it is not necessary for me to consider whether the alleged mental defect was proved to be congenital incurable and whether the petitioner was disentitled to any relief because of any delay.

12. In the result, this appeal must fail and is dismissed with costs.

RSK/D.V.C.

Appeal dismissed.

AIR 1969 GUJARAT 55 (V 56 C 11)

N. G. SHELAT, J.

Union of India owning Western Railway, Appellant v. M/s. Lalji Bhimji, a partnership firm, Respondents.

Second Appeal No. 189 of 1961, D/- 25-4-1967, against decision of Dist. J., Amreli, in Civil Appeal No. 35 of 1959.

(A) Civil P. C. (1908), Or. 21, R. 10 & S. 2(3) — Who may apply for execution — Decree in the name of a joint Hindu family firm by its manager — Firm subsequently made a partnership firm with same family members as partners — The two firms are different entities and the latter cannot execute the decree.

A decree obtained by a joint Hindu family firm represented by its manager cannot be executed by the partnership firm of the same name even though consisting of the same members of the family as partners because the firms are two

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different entities having different incidents. While the former is not governed by the provisions of the Partnership Act but by the normal personal law governing the Hindus, the latter is. Both the firms, even if the sharers are the same, stand on a different footing each governed by different law.

(Paras 6 & 7)

Further, under S. 2, Cl. (3) of the Civil P. C. the term 'decree-holder' means any person in whose favour a decree has been passed or an order capable of execution has been made. Since the conversion of the joint Hindu family firm into a partnership firm does not necessarily put an end to the former firm, the execution petition filed by the partnership firm cannot be said to have been filed by the 'decree-holder' such as contemplated under S. 2(3) of the Code. AIR 1946 Bom 27, Rel. on. (Para 7)

(B) Limitation Act (1908), Sch. I, Art. 182, Cl. 5 — "Application made in accordance with law" — Expression relates to the application as filed and not the order passed thereon — It must be in accordance with law as contemplated by the Article — (Civil P. C. (1908), Or. 21, Rr. 11 to 17).

In considering whether an execution petition is in accordance with law under Art. 182 of the Limitation Act, it is not the order passed on the application that matters, but it has to be examined if the application filed by the decree-holder is in accordance with law as contemplated under Article 182(5) of the Act. It is so because, the execution petition, though in accordance with law, may find itself dismissed for other reasons as want of prosecution etc. Dismissal may also result in cases of non-compliance with any of the rules such as rules 11 to 14 of Or. 21 of Civil P. C. AIR 1945 Bom 380, Rel. on. AIR 1931 Bom 128, Ref. (Para 9)

Therefore, an application containing all the particulars required to be mentioned under rule 11 of Or. 21 Civil P. C. must be held to be "in accordance with law."

(Para 9)

(C) Civil P. C. (1908), Or. 21, Rr. 12 & 11 — Scope — Judgment-debtor himself being in possession of moveables — Description not necessary — Inventory, however, necessary if they are with the agent of the J. D. (Para 9)

(D) Limitation Act (1908), Sch. I Art. 182(5) — Step-in-aid of execution of decree — Application praying issue of notice on the judgment-debtor (Railway) under S. 82 and Or. 21, R. 22 Civil P. C. — Issuance of notice accordingly — Application, held, a step-in-aid towards execution of decree — Neither non-appearance of the judgment-debtor nor non-compliance with R. 12 of Or. 21 of Civil P. C., held, affected the position. (Para 10)

(E) Civil P. C. (1908), Ss. 144 and 151 — Against whom restitution can be granted — Stay of execution on condition that judgment-debtor deposits decree amount — J. D's clerk, by mistake, paying the money to a wrong person instead of depositing into Court — Restitution, held, could not be granted — Court has no control over the alleged receipt of the money — Powers under S. 151 not exercised when there is definite provision under S. 144. (Para 12)

Cases Referred: Chronological Paras
(1946) AIR 1946 Bom 27 (V 33) = 47 Bom LR 728, Kirtilal Jivabhai v. Chunilal Manilal 8
(1945) AIR 1945 Bom 380 (V 32) = ILR (1945) Bom 463, Shankar Hari v. Damodar Vyankaji 9
(1931) AIR 1931 Bom 128 (V 18) = 32 Bom LR 1368, Sakkargauda Basangauda v. Bhimappa Hanmappa 9

R. H. Daru and B. J. Shelat, for Appellant; R. C. Mankad, for Respondents.

JUDGMENT :— One Nanubhai Harjivan as the manager and co-sharer of a Hindu undivided family firm running in the name of Messrs Lalji Bhimji, at Amreli, filed a Regular Civil Suit No. 55 of 1947-48 in the Civil Court of the then State of Baroda, against the Governor General-in-Council of the Indian Dominion as the owner of the Bengal-Assam Railway for recovering an amount of Rs. 8500 in all on the basis of total loss of a consignment booked at Sialda Railway Station of Calcutta in favour of the plaintiff-firm to be delivered at Amreli. The summons was issued on the defendant as described in the plaint and since there was no appearance, the suit proceeded ex parte. A decree for the sum of Rs. 8500 together with running interest at 3% on Rs. 5,141 and odd and costs of the suit came to be passed against the defendant on 13-11-1938. The plaintiff-firm thereafter filed a Regular Darkhast No. 65 of 1951 in the Court of the Civil Judge (J. D.) at Amreli — it being the successor Court of the original trial Court on the merger of the State of Baroda with the Indian Union. That was filed on 13-11-48 for recovering the amount due under the decree by calling upon the judgment-debtor to pay the amount failing which to recover the same by attachment and sale of the movable property of the judgment-debtor. In that Darkhast a notice under O. 21, R. 22 of the Civil Procedure Code was issued against the judgment-debtor and though served no one appeared on behalf of the judgment-debtor. From the endorsement on that Darkhast it further appears that the amount was not paid though the judgment-debtor was directed to pay up the amount. Thereafter since the Court found

that the property sought to be attached was not mentioned by the decree-holder in his Darkhast, the Darkhast came to be dismissed directing the costs to be paid by the judgment-debtor. That order is dated 8-1-52. Thereafter another Darkhast No. 92 of 1953 was filed by the decree-holder in the same Court against the judgment-debtor on 11-11-53 and that came to be disposed of on 29-12-54.

2. The same Nanubhai Harjivan has then filed Regular Darkhast No. 82 of 1955 against the judgment-debtor in the Court of the Civil Judge at Amreli for recovering the amount due under the decree by attachment and sale of the property. He has therein stated that the original joint Hindu family firm running in the name of Messrs. Lalji Bhimji of which he happened to be the manager, has been changed into a partnership firm and that he has been the manager and partner of the said firm. It is that way that he has filed the Darkhast on behalf of the partnership firm running in the name of Lalji Bhimji. So far as the judgment-debtor is concerned, it has been stated that all the rights and liabilities of the Bengal Assam Railway have now merged in the Union of India and that, therefore, a notice may be issued to the Union of India calling upon the same to pay up the amount and on its failure to do so, to recover the amount by attachment and sale of the property found at the Railway Station of Amreli including the cash amount found there. The amount claimed in the Darkhast is Rs. 10,789-6-6. It has been signed by one Kakubhai Kanji, the holder of power of attorney for one Kanji Lalji a partner in the firm of Messrs. Lalji Bhimji and also by Nanubhai Harjivandas in his personal capacity. After the Darkhast was filed on 30-4-55, an order for issuing notice to the judgment-debtor was issued. The Western Railway Administration through its advocate then appeared before the Court and filed his objections at Ex. 8 in that Darkhast. He inter alia contended that the decree under execution was in favour of M/s. Lalji Bhimji, a joint Hindu family firm and the firm executing the decree of Lalji Bhimji is a partnership firm and that way is a separate legal entity; that, therefore, the firm executing the decree cannot be said to be the decree-holder as such entitled to execute the decree; that the execution application is barred by limitation under Art. 182 of the Indian Limitation Act as the previous execution applications No. 65/51 and No. 92/53 were not in accordance with law; that there was no legal entity like the General Secretary, Union of India, Western Railway Board, New Delhi and such a person is not competent to receive notice of execution according to law; that

the decree being against a railway administration of Union of India owning a particular railway administration, a notice should be served on the General Manager of the said Railway Administration and as there is no such proper service, the execution application is liable to be dismissed, that the decree under execution has been obtained by fraud on the Court and that it was void and was not executable; that the decree under execution is without jurisdiction as it was passed without service of the summons on the defendant and in the result, the execution application should be dismissed with costs. The trial Court rejected all the contentions raised on behalf of the Western Railway and directed the Darkhast to proceed further.

3. Feeling dissatisfied with that order passed on 7-8-59 by Mr. I. C. Sheth, Civil Judge (S. D.) Amreli — the opponent filed Civil Appeal No. 35 of 1959 in the Court of the District Judge at Amreli. Along with the appeal, an application Ex. 4 was presented to the Court for staying the execution proceedings taken out against the judgment-debtor. An interim stay was issued and it was to remain in effect till 15-12-59 during which time the appellant was required to deposit the decretal amount with costs and interest up-to-date in the District Court at Amreli. Instead of depositing amount in Court, the appellant through mistake of the pay-clerk sent a cheque to the respondent for the sum of Rs. 10918-91nP. with a covering letter on 8-12-59. One Balubhai Kanji, one of the partners of the firm, has made an affidavit Ex. 18 stating that a cheque was received in satisfaction of the decretal dues and the payment has been appropriated towards the same and the receipt was sent to the railway administration. That payment is said to have been received in the month of December 1959. Sometime after i. e. on 22-8-1960, the learned advocate appearing for the appellant, gave an application Ex. 15 stating inter alia that the cheque for the decretal amount was sent to the opposite side through the mistake of a clerk of the railway administration instead of depositing the amount in Court and that the respondent should be called upon to have the amount deposited in Court under section 144 or under section 151 of the Civil Procedure Code.

4. This application was heard along with the appeal. The learned District Judge found that the Court was not competent to direct the respondent to deposit the amount in Court which came to be realized by him; that it is not a fit case for calling for any such amount from the respondent; that the appeal does not survive in view of the respondent having

recovered the amount in the execution proceedings from the appellant; that the decree passed in the suit was not a nullity as alleged; that the execution proceeding can proceed against the Union of India as owning the Western Railway Administration; that the execution application is not barred by limitation as alleged and that in the result, he dismissed the appeal directing parties to bear their own costs. Feeling dissatisfied with that order passed on 11th November 1960 by Mr. M. D. Manek, District Judge, Amreli, the original opponent has come in appeal before this Court.

5. Mr. Daru, the learned advocate appearing for the appellant, has raised four contentions before this Court. The first is that the present Darkhastdar who had taken out the execution proceedings against the appellant in pursuance of a decree passed in Civil Suit No. 55/47-48 is not the decree-holder entitled to execute the same. (2) The present execution application is barred by Art. 182 of the Indian Limitation Act inasmuch as the earlier Darkhast No. 65 of 1951 was not in accordance with law and that way cannot serve as a step in aid of execution so as to keep alive the decree. (3) The execution taken out against the Western Railway cannot lie inasmuch as the decree was passed against the Bengal Assam Railway and that way quite a different entity in law. (4) Since the amount has been paid under a mistaken belief to the Darkhastdar so as to have the Darkhast stayed as per the order passed by the District Court, it should be called back by the Court and have the same made available provided he is found to be the proper person entitled to recover the same under the decree.

6. I have already set out hereabove that the original Civil Suit No. 55/47-48 was filed in the Civil Court of the then State of Baroda by a joint Hindu family firm running in the name of M/s. Lalji Bhimji through its manager and a co-sharer one Shri Nanubhai Harjivan of Amreli. An ex parte decree was passed against the defendant in that suit on 13-11-38. As to the various allegations about the manner in which the ex parte decree was obtained, we are not concerned in this appeal. The executing Court has obviously to execute the decree as it stands unless it is set aside. The contention of Mr. Daru is that the original decree-holder alone is entitled to file the execution application and that unless it is shown that the decree has been assigned in favour of some other person or has gone to some other person by operation of law, no other person can execute the same. The present Darkhast is undisputedly filed, as I said above, by the partnership firm running in the name of Lalji

Bhimji through one Kakubhai Kanji, the holder of power of attorney of one Kanji Lalji — a partner of that firm, and by Nanubhai Harjivandas in his personal capacity. It has been stated in the Darkhast application that the original joint Hindu family firm running in the name of M/s. Lalji Bhimji has been subsequently converted into a partnership firm running in the same name of Lalji Bhimji in Amreli. On the face of it it appears clear that the present Darkhast is not filed by the original decree-holder but by the firm, constituted under the provisions of the Indian Partnership Act and by one Nanubhai Harjivandas in his individual capacity. The contention of Mr. Mankad, the learned advocate for the respondent, is that the same person, namely, Nanubhai Harjivandas who has filed this Darkhast was described as a manager and co-partner of the joint Hindu family firm running in the name of Lalji Bhimji and that, therefore, there is nothing wrong when he files the Darkhast particularly when the members of the private partnership firm are the same as the members of the joint Hindu family firm. It appears that in the trial Court an attempt was made to produce the partnership deed, but that does not seem to have been proved and was even wrongly referred to in the order of the trial Court. That was not sought to be relied upon in the first appellate Court and also in this Court. The question therefore that arises to be considered is as to whether the decree-holder in the suit is the same person recognised in law who has come forward to execute that decree in this Darkhast proceedings. A joint Hindu family firm is a firm not governed by the provisions of the Partnership Act, but by the normal personal law governing the Hindus. Both the firms, even if sharers are the same, stand on a different footing — each governed by different law. The incidents are different and one cannot be called the same as the other firm. It is clear, therefore, that the firm which has filed the present Darkhast is not the same as described in the suit in which that decree came to be passed.

7. Sec. 2, clause (3) defines the term "decree-holder" as meaning any person in whose favour a decree has been passed or an order capable of execution has been made. In the present case, the decree-holder was then the joint family firm of Lalji Bhimji. By reason of the joint family firm converting into a partnership firm, it cannot necessarily be said that the joint family firm came to an end. Thus the Darkhast cannot be said to have been filed by the decree-holder as such as contemplated in Section 2(3) of the Civil Procedure Code. Besides, Nanubhai Harjivandas was not a decree-holder in his

individual capacity, and he has been described in that suit as a manager and a co-sharer of the joint Hindu family firm running in the name of Messrs. Lalji Bhimji. He has not filed this Darkhast as one managing that joint family firm. On the other hand, Nanubhai Harjivandas has signed the Darkhast application in his individual capacity and that he has no authority to do so. Thus, neither of the two persons who have filed this Darkhast can be said to be the decree-holders under Section 2(3) of the Civil Procedure Code so as to entitle them or any of them to file the Darkhast under O. 21, R. 10 of the Civil Procedure Code. As provided therein, the holder of the decree is entitled to apply to a Court for executing the same. None of them, therefore, can be said to be persons entitled to file the execution application in pursuance of a decree obtained by the original joint Hindu family firm running in the name of Messrs. Lalji Bhimji of Amreli.

8. In *Kirtilal Jivabhai v. Chunilal Manilal*, AIR 1946 Bom 27, it was held that it is only a decree-holder who can ordinarily apply for execution of the decree. Then if there are more than one decree-holders, under O. 21, R. 15 it is competent to one of the joint decree-holders to apply for execution. If the decree is transferred either by assignment in writing or by operation of law, the transferee can also apply for execution under O. 21, R. 16. Then it has been observed that whether the decree-holder applies under O. 21, R. 10, or under O. 21, R. 15, the executing Court can only execute the decree provided his name appears as a decree-holder on the face of the decree itself. The executing Court cannot look to anything outside or beyond the decree in order to satisfy itself that the person who is applying for execution is the decree-holder. The very definition of "decree-holder" contained in S. 2, sub-cl. (3) of the Code, makes this clear. It is no doubt true that a person can become a transferee of the decree by operation of law; and if there are other coparceners in whose favour also the decree becomes transferred, then he may apply as one of the assignees under O. 21, R. 16, read with O. 21, R. 15. But for any such person to execute the decree, the procedure laid down has got to be followed. No such attempt is made to show that the decree has been assigned in favour of the present Darkhastdars so as to entitle them to file the Darkhast under O. 21 R. 16 of the Civil Procedure Code. It appears, therefore, clear that the present Darkhastdars or any of them are not the same decree-holders under the decree passed in Suit No. 55/47-48 which is sought to be executed against the judgment-debtor of that suit. The learned District Judge has passed over that point

by characterising the same being of technical importance particularly as in his view the full amount is paid up, the question such as the one would lose its significance. Howsoever technical the contention may appear, it does touch the root of the matter particularly when altogether a different entity in law has come forward to execute the decree in place of some other persons entitled to execute the same. It makes no difference whether they remain the same persons as such in a different form viz. in the partnership firm so far as the judgment-debtor is concerned. The mere fact that the amount has been paid during the pendency of the appeal would not come in the way of having to decide this question which, in my opinion, goes to the root of the matter. The Darkhastdars are, therefore, not entitled to execute the decree in the manner they have done against the judgment-debtor.

9. The next question that arises to be considered is as to whether the Regular Darkhast No. 65/51 was one which served as a step in aid of execution of the decree or order as contemplated in Art. 182 clause (5) of the Indian Limitation Act. If that Darkhast can be found to be one filed in accordance with law, the present Darkhast would be obviously in time and over which there is no dispute. Art. 182 provides for a period of limitation as three years for the execution of a decree or order of a Civil Court and as contemplated in clause (5) of column 3 of Art. 182 the period of three years would run from the date of the final order passed on an application made in accordance with law to the proper Court for execution or to take some step in aid of execution of the decree or order. In other words, if Darkhast No. 65 of 1951 was one which was in accordance with law, the period of three years would commence from the date of the order passed in that Darkhast. The contention made out by Mr. Daru, however, is that it was not filed in accordance with law inasmuch as it did not comply with the provisions contained in O. 21, R. 12 of the Civil Procedure Code viz., by not annexing to the application an inventory of the property to be attached, containing a reasonably accurate description of the same. In support thereof he invited a reference to the case of *Sakkargauda Basangauda v. Bhimappa Hanmappa*, 32 Bom LR 1368=(AIR 1931 Bom 128). In that case, the decree-holder applied to execute his decree obtained in November 1912, relying on his immediately preceding application, No. 168 of 1964, having been one made in accordance with law, to bring his last application in time. The original Court rejected the application as time-barred. The appellate Court held that this was not so, and directed

the execution to proceed further. In appeal before the High Court of Bombay the question arose as to whether failure to comply with the provisions of Order 21, Rule 14, imparted to the application No. 168 of 1924 the character of being "not in accordance with law" or not. The defect pointed out before the High Court was that "there was actually no description of what was sought to be attached or sold, the reference to it being that," it was described overleaf, "which it was not." It was then observed that looking to the provisions of Rules 11 to 17 of Order 21 of the Civil Procedure Code, the defect, when pointed out, not having been remedied within the time allowed, the application continued to be not in accordance with law. It was a case where the property sought to be attached and sold was an immovable property and defect was one under Rule 13 of Order 21 of the Civil Procedure Code. The observations as I just stated above related to the defect even contemplated under Rules 11 to 17 of Order 21 of the Civil Procedure Code and if that defect is not remedied within the time allowed by the Court, such an application cannot be said to be in accordance with law within the meaning of Article 182 of the Limitation Act. In the present case, however, the argument is that this Darkhast was dismissed by the Court since the decree-holder failed to supply a list of the moveable properties which were to be attached and sold in satisfaction of the decree. It was, therefore, said that there was non-compliance of Rule 12 of Order 21 of the Civil Procedure Code and on that account the Darkhast was not one which was filed in accordance with law as contemplated under Art. 182 of the Indian Limitation Act. It may be said at the outset that it is not the order passed in the Darkhast that matters, as it may well happen that the Darkhast may be in accordance with law, but for some other reason, say for want of prosecution or the like, the Darkhast is not proceeded with and it came to be dismissed. It may as well be a case where Darkhast may not be in accordance with law, in other words not complying with any of the Rules such as Rr. 11 to 14 of O. 21 of the Civil Procedure Code and the Darkhast has come to be disposed of for non-compliance thereof. In *Shankar Hari v. Damodar Vyankaji*, AIR 1945 Bom 380, it was held as under:—

"The expression "in accordance with law" in Art 182(5) does not imply that the application must be successful. It may be in accordance with law for the purpose of Art. 182(5) and yet the applicant may not be entitled to any relief on account of circumstances other than there being any defect in the application itself. A valid application made in accord-

ance with law cannot cease to be in accordance with law by any subsequent default on the part of the applicant. Hence, an application under O. 21, R. 15 (1) or R. 16 is in accordance with law and a step in aid of execution and is sufficient by itself to keep the decree alive irrespective of whether an order under R. 15(2) is passed or not or notices under R. 16 proviso are issued or not."

What is, therefore, essential for us is to see whether the Darkhast filed by the decree-holder was in accordance with law as contemplated under Article 182(5) of the Indian Limitation Act. In that Darkhast the prayers made were to ask the Court to serve a notice on the Government to make payment under Section 82 of the Civil Procedure Code and on its failure to do so, to recover the amount by attachment and sale of the moveable property of the judgment-debtor. Unfortunately the entire record of the proceeding is not before us. But it appears that those Darkhast applications were produced as Exs. 43-C and 43-D before the trial Court. The trial Court had directed a notice to be issued against the judgment-debtor as required under O. 21, R. 22 of the Civil Procedure Code and then again a notice to pay the amount as required by section 82 of the Code. The judgment-debtor remained absent though served with both the notices. As observed by the learned District Judge, it was mentioned in the execution application by the decree-holder that the decretal amount should be given to him by calling for the said amount after serving a notice on the Government of India, as the Bengal-Assam Railway belonged to the said Government, and if the amount was not realised after service of such a notice, he should be granted a warrant for attaching the moveables of the judgment-debtor. The amount was not paid even after service of the notice contemplated by section 82 of the Code of Civil Procedure and there arose the question of issuing the warrant for attachment of the moveables. The executing Court found that the property sought to be attached was not mentioned in the execution proceeding and consequently it dismissed the same. It is on that account viz., by reason of the dismissal of the Darkhast on the ground that the decree-holder had not set out the description of the moveable property sought to be attached, that it is said that he did not comply with Rule 12 of Order 21 and, therefore, it was not a Darkhast filed in accordance with law as contemplated under Art. 182(5) of the Indian Limitation Act. As I said above, it is not the order that matters, but one has to see as to the application itself whether it was in accordance with law as contemplated under Art. 182(5) of the

Indian Limitation Act. Order 21, Rule 11 sub-rule (2) provides as under :—

"11(2). Save as otherwise provided by sub-rule (1), every application for the execution of a decree shall be in writing, and shall contain in a tabular form the following particulars, namely:—

(i) the mode in which the assistance of the Court is required, whether —

(ii) by the attachment and sale, or by the sale without attachment, of any property;

So far as Rule 11 is concerned, the Darkhast was quite in order inasmuch as all that was required to be stated was stated in the Darkhast application including the mode in which the assistance of the Court was required, viz., by attachment and sale of the moveable property of the judgment-debtor. Then comes Rule 12 which says that where an application is made for the attachment of any movable property belonging to a judgment-debtor but not in his possession, the decree-holder shall annex to the application an inventory of the property to be attached, containing a reasonably accurate description of the same. Now if we analyse the section, it appears that the decree is required to give a reasonably accurate description of the property to be attached if that property is to be attached while in possession of the person other than the judgment-debtor. That person may no doubt be an agent of the judgment-debtor or that he may be holding on account of the judgment-debtor. It is only then that the list of the property has to be attached with the application itself. In the present case it is not shown that it was to be attached from altogether some other person who was holding on account of the judgment-debtor. Thus, when the moveable property in the possession of the judgment-debtor was sought to be attached, no such specific description of the property was essential to be given so that it can be said that non-compliance thereof would render the application invalid in the sense that it was not in accordance with law as contemplated under Art. 182(5) of the Indian Limitation Act.

10. Apart from that position, if we turn to the second part of clause (5) of Art. 182, it contemplates ". . . . or to take some step in aid of execution of the decree or order." If any such application were found to be an application for taking some step in aid of execution, it can as well serve the purpose and extend the period of limitation by three years from the date of the order passed in the proceeding. In the present case, in the application there was a two-fold prayer as already set out hereabove. The decree-

holder wanted the Court to issue a notice to the judgment-debtor for paying up the amount before his application can be proceeded for executing the warrant under O. 21, R. 43 of the Civil Procedure Code that may have to be issued against the moveable property of the judgment-debtor for realising his amount. That notice under Section 82 of the Civil Procedure Code was issued against the judgment-debtor and no amount was paid in pursuance thereof. The judgment-debtor did not also appear either in pursuance of that notice, or in pursuance of a notice issued under Order 21, R. 22 of the Civil Procedure Code whereby it was called upon to show cause why the decree should not be executed against it. When such is the position, it can be easily said that it was a step towards the relief which the decree-holder sought for by actually executing the warrant of attachment of the moveable property which may be issued after the judgment-debtor failed to comply with the notices issued against it. Such an application, therefore, is in itself a step in aid towards the execution of a decree for which the decree-holder moved the Court. If the judgment-debtor does not remain present and the Darkhast ultimately comes to be dismissed for the reason that he did not supply the details of the description of the moveable property sought to be attached, it cannot take away the effect of the validity of the application for execution filed by the decree-holder so as to serve as a step-in-aid of execution and thereby save the period of limitation under Art. 182(5) of the Indian Limitation Act. In my view, therefore, the learned District Judge was quite right in saying that the Darkhast No. 65/51 was in accordance with law and that it was a step-in-aid of execution and consequently the period of limitation would begin to run from the date of the order passed on 8-1-53 in that Darkhast. The mere fact that it came to be dismissed on some such ground and that the order remained without being appealed against, cannot help the opponent to say that it was not in accordance with law or that it did not serve as a step in aid of execution within the meaning of Art. 182(5) of the Indian Limitation Act.

11. The third point raised by Mr. Daru was that the person against whom the decree was sought to be executed was altogether a different person from the one — the judgment-debtor — in the decree and that, therefore, the execution proceeding taken out against the appellant was bad in law. In view of my finding that the respondent had no right to execute the decree — he being not the decree-holder as such, this question would not survive. Apart from that position, one thing is clear that the Union of India is the sole proprietor of different

railways running in different parts of the country. It is indeed true, as pointed out by Mr Daru, that there are different units and all accounts have to be kept separate in respect of those units much though the overall control is of the Union Government as one entity. But when the appellant has chosen to appear and resist the execution itself and even gone to the length of paying the amount, though no doubt with the purpose of staying the execution proceedings, it can be said that he did not resist the execution on that ground as such and consequently the execution application filed against the Union of India through Western India Railway cannot be said to be bad in law in the peculiar circumstances of this case.

12. The last point raised by Mr. Daru was to request the Court to exercise inherent powers under section 151 of the Civil Procedure Code calling upon the respondent to return or deposit the amount in Court and it can only be directed to take the amount provided his Darkhast was held to be valid in law. Ordinarily no doubt if the amount was deposited in Court, this Court would have been justified in exercising those powers and direct the respondent to deposit the amount in Court. But in the present case, the amount has been paid though no doubt out of some mistake, to the respondent out of Court, and consequently the Court would have no control over such a person when he was paid the amount rightly or wrongly believing him to be a person entitled to get under the decree passed against the judgment-debtor. It is again clear that Section 144 of the Civil Procedure Code will not apply and it would not be so very proper to apply the provisions contained in Section 151 when we have definite provision for restitution of any such amount under Section 144 of the Civil Procedure Code. At any rate, as I said above, the Court has no control over the person who is said to be a wrong person having received the amount and when that is so, this Court would not be justified in passing an order of directing any such person to deposit the amount in Court, for, after all, the Court can always consider to pass an order which would be effective and not an order which cannot be complied with or in other words be ineffective in the circumstances of the case. I do not, therefore, think that any such order can be passed in this proceeding and the learned District Judge was, therefore, right in not exercising his powers under section 151 of the Civil Procedure Code for directing the respondent to deposit the amount in Court. Since, however, the appellant succeeds on the first point viz. that the respondent was not entitled to file the Darkhast, it is liable to be dismissed. It

may well be open for the appellant to recover the amount by taking any other recourse in accordance with law, from the respondent.

13. In the result, therefore, the appeal is allowed, and the order passed by the trial Court and confirmed by the first appellate Court shall be set aside. The Darkhast shall stand dismissed. The respondent shall pay the costs of the appellant and bear his own.
TVN/D.V.C. Appeal allowed.

AIR 1969 GUJARAT 62 (V 56 C 12)*

J. M. SHETH, J.

Nanalal Harishanker, Appellant v. State of Gujarat, Respondent.

Criminal Appeal No. 521 of 1967, D/- 3-8-1967, against judgment of City Magistrate, 4th Court, Ahmedabad in Summary Case No. 1151 of 1966.

(A) Penal Code (1860), Ss. 279 and 337 and 71 — Offences under Ss. 279 and 337 are distinct — Separate conviction for offences can be recorded at same time — Commission of offence in same transaction — Section 71 governs assessment of punishment. AIR 1939 Pat 388, Diss. from.

The offences under Ss. 279 and 337 are offences of different nature and the conduct referred to therein is penalised with different objects. Therefore a person can be convicted of an offence under S. 279 as well as of an offence under S. 337 at the same time. If these offences, however, are committed in the same transaction, S. 71 will govern the assessment of punishment. Thus while the punishment to be awarded for both the offences in such a case should not exceed the maximum punishment that may be awarded for any of these offences, there is nothing in S. 71 to indicate that no separate punishment can be awarded for both the offences and if it is awarded it is illegal. AIR 1939 Pat 388 Dissented from. AIR 1960 Bom 269 & AIR 1956 Madh Bha 141 (FB), Cri Appeal No. 993 of 1965, D/- 31-7-1967 (Guj), Rel. on.

(Paras 9 and 12)

(B) Criminal P. C. (1898), Ss. 262(2), 362, 263, 264 and 261 — Ahmedabad City Courts Act (19 of 1961), S. 14—Charge for offences under Ss. 279 and 337 IPC — Case tried summarily by City Magistrate who was competent to try so and accused convicted for offences — Sentence of 4 months R. I and to pay fine of Rs. 500 and in default to pay fine or to undergo further R. I. of three months, for offence under

* (Only portions approved for reporting by H. C. are reported here).

GL/IL/C878/68

S. 279, held, illegal as contravening S. 262 (2), Criminal P. C. and S. 65, I. P. C. — (Penal Code (1860), S. 65). (Para 10)

Cases Referred: Chronological Paras

(1967) Criminal Appeal No. 993 of 1965, D/- 31-7-1967 (Guj) 5

(1960) AIR 1960 Bom 269 (V 47)=61 Bom LR 1674=1960 Cri LJ 814 State v. Kamalakar Prabhakar Juvekar 5

(1956) AIR 1956 Madh Bha 141 (V 43)=1956 Cri LJ 624 (FB), State v. Gulam Meer 9, 12

(1939) AIR 1939 Pat 388 (V 26)=40 Cri LJ 759, Ragho Prasad v. Emperor 8

(1909) 9 Cri LJ 23=4 Low Bur Rul 338, Poka v. Emperor 11

R. K. Abhichandani, for Appellant; J. U. Mehta, Asst. Govt. Pleader, for the State.

JUDGMENT:— This is an appeal, filed by the appellant from the jail against the order of conviction and sentences, passed against him in a Summary Case No. 1151 of 1966 of the Court of the City Magistrate, 4th Court, Ahmedabad. He has been convicted of offences, punishable under Sections 279 and 337 of the Indian Penal Code and sentenced to suffer four months' rigorous imprisonment and to pay a fine of Rs. 500 and in default of payment of fine, to undergo three months' further rigorous imprisonment for the offence under Section 279 of the Indian Penal Code, and to suffer one month's rigorous imprisonment and to pay a fine of Rs. 100 and in default of payment of fine, to undergo one month's further rigorous imprisonment for the offence under Section 337 of the Indian Penal Code. The substantive sentences are ordered to run concurrently. This order of conviction and sentences has been passed by the learned City Magistrate, 4th Court, Ahmedabad, Mr. B. J. Shelat.

Paras 2-7. * * *

8. It has been contended by the learned Advocate, Mr. Abhichandani that both these offences are similar and they are of a similar nature and hence, no separate conviction could be recorded for both the offences. In support of his argument, he relied upon the case of Ragho Prasad v. Emperor, AIR 1939 Pat 388. It has been observed therein as under:—

"Section 279 makes rash driving or riding on a public road punishable if such rash driving or riding endangers human life or is likely to cause hurt or injury to any person. Where the rash or negligent driving actually results in grievous hurt being caused to any person, an offence under section 338 is committed and accused can be convicted under section 338 but not both under sections 279 and 338."

In my opinion, with great respect to Agarwala J., the reasoning on which that

judgment is based, is not quite sound. The offence under Section 279 is an offence against the public safety. That is the object of that Section. The object of Section 337 or Section 338 is to punish a person who commits such an act and his act causes hurt or grievous hurt to an individual person.

9. In the case of State v. Gulam Meer, AIR 1956 Madh Bha 141, a Full Bench of Madhya Bharat High Court has observed as under:—

"An offence under Section 279 is distinct from an offence under Sec. 337 or Section 338 and, therefore, a person convicted of an offence under Section 337 or Section 338 can also be convicted for an offence under section 279. If, however, the two offences are committed in the same transaction, Section 71 will govern the assessment of punishment."

A Division Bench of the Bombay High Court, in the case of State v. Kamalkar Prabhakar Juvekar, 61 Bom LR 1674= (AIR 1960 Bom 269) has also observed as under:—

"Where the accused is prosecuted for the offences under Sections 279 and 337 of the Indian Penal Code, 1860, the compounding of the offences under Section 337 of the Code will not prevent the prosecution from being continued under Section 279 of the Code."

At page 1675 (of Bom LR)=(at p. 270 of AIR), the relevant observations made are as under:—

"The offences under Sections 279 and 337, Indian Penal Code, are however, offences of different nature and the conduct referred to therein is penalised with different objects. An act, which is rash or negligent or is likely to endanger human life, may be the result of driving any vehicle or riding on a public way. Undoubtedly, the two sections overlap, but that does not, in our judgment, make those offences of the same character. The offence under Section 279, Indian Penal Code, is non-compoundable, and the compounding of the offence under Sec. 337, Indian Penal Code, will not prevent the prosecution from being continued under Section 279, Indian Penal Code

Mr. Nadkarni, for the accused, contended that whenever on account of rash or negligent driving simple hurt is caused to any other person, a charge under Section 337, Indian Penal Code, may be made, and if grievous hurt is caused, a charge under Section 338, Indian Penal Code, may be made against the accused and in neither case a prosecution for a charge under Section 279, Indian Penal Code, may be sustained. We are unable to accept this argument. If a person drives a vehicle or rides on a public way in a manner so rash or negligent as to endanger human life or to be likely to cause

hurt or injury to any other person, he commits an offence, against public safety. If, by so driving a vehicle or riding on any public way, he causes an injury to any other person, he also commits an offence punishable under Section 337, Indian Penal Code, and if he causes grievous hurt, he commits an offence punishable under Sec. 338, Indian Penal Code. If by such rash or negligent driving the accused has caused injury to some person, offences punishable under Sections 279 and 337, Indian Penal Code, will be committed, and acquittal of the offence under Section 337 or Section 338, Indian Penal Code, as a result of the compounding will still leave the charge under Section 279, Indian Penal Code, outstanding."

I am in respectful agreement with the principle enunciated in this decision. Furthermore, I am bound by that decision, it being a decision given by a Division Bench of the Bombay High Court prior to the date of bifurcation of the Bombay State. I have also taken the same view in Criminal Appeal No. 993 of 1965, D/-31-7-1967 (Guj). I, therefore, reject this argument, advanced by Mr. Abhichandani that a separate conviction for both the offences could not be recorded in law.

10. His another argument was that at any rate no separate sentences can be awarded for these two offences, if they are committed in the course of the same transaction. Before I advert to that argument, I first propose to refer to his another argument. That argument of his was that this case was tried by a City Magistrate summarily. In view of the provisions of Section 262, sub-section (2) of the Criminal Procedure Code, the case having been tried summarily by the City Magistrate, he cannot be awarded punishment in excess of three months. For the offence under Section 279, Indian Penal Code, the learned City Magistrate has awarded sentence of four months' rigorous imprisonment and a fine of Rs. 500. It is, therefore, evident that the substantive sentence awarded by him for that offence is in excess of three months. The learned Assistant Government Pleader, Mr. Mehta contended that the case may not have been really tried summarily. Only an old form, prescribed for a summary trial in the Criminal Procedure Code, 1882 was used. In view of the provisions of S. 370 of the Criminal P. C. the City Magistrate is empowered to record only the prescribed particulars thereunder instead of recording the judgment. He also invited my attention to Section 362 of the Criminal Procedure Code, which relates to maintaining the record of evidence in the Presidency Magistrate's Court. He also invited my attention to Section 260 of the Criminal Procedure Code and certain comments made by the learned Author Mr. Sohoni,

in his book on Criminal Procedure Code, page 1792, Note 7, 16th Edition, 1966. A perusal of the record of this case, clearly shows that the case was tried summarily. There is absolutely nothing to indicate that there was a regular trial, and the case was not tried summarily. On the contrary, Ex. 2 shows that it is referred to as Summary Case No. 1151 of 1966. Heading 'A' is as under :—

"Register of cases tried by City Magistrate, 4th Court, Ahmedabad, in a summary way under Chapter XXII of the Criminal Procedure Code, (Act X of 1882)."

It may be that the old form may have been used, but it is shown as a summary case No. 1151 of 1966. The evidence of the witnesses examined, has not been separately recorded, as contemplated by section 362 in the case of a regular trial by a City Magistrate. Only notes of evidence have been embodied. That Section 362 of the Criminal Procedure Code is subject to the provisions of Chapter 22, Chapter 22, deals with summary trials. It is, therefore evident that in a summary trial, if the case is tried summarily by a Magistrate in which the appeal lies, such Magistrate has to record substance of the evidence and also the particulars mentioned in Section 263. That appears to be the position from Section 264 of the Criminal Procedure Code and that is what is found in the record of the present case. It will also be significant to note that the offences in question were the offences not punishable with death, imprisonment for life or imprisonment for a term exceeding 6 months. In view of it, taking into consideration the provisions of Section 261-A of the Criminal Procedure Code, a City Magistrate has power to try these offences summarily. The comments made by the learned Author Mr. Sohoni, cannot be pressed into service in view of the provisions of the Code of Criminal Procedure, 1998, in its application to this State. In the Bigger Bilingual Bombay State, clause A to Section 261(1) of the Criminal Procedure Code was added by the Bombay Amending Act, No. 54 of 1959. The words added were "any Presidency Magistrate". It is, therefore, evident that in the Bombay State, a Presidency Magistrate was also empowered to try cases summarily in respect of the offences referred to in Section 260 like other Magistrates of the First Class, specially empowered in that behalf. Same provisions are in force in this State of Gujarat. Section 14 of the Ahmedabad City Courts Act, 1961, indicates that any other Magistrate appointed under sub-section (1) shall have and exercise within the limits of the City of Ahmedabad all the powers and jurisdiction of the Chief Presidency Magistrate and a Presidency Magistrate respectively under the Cr. P. C. and all other laws

(1968) AIR 1968 Mys 18 (V 55)=
13 Law Rep 153, Khaje Khanwar
Khadkhan Hushenkan v. Sidda-
vanhalli Nijalingappa

(1966) AIR 1966 Madh Pra 255
(V 53)=1966 Jab LJ 91, Hariram
Singh v. Kamtaprasad Sharma

(1959) AIR 1959 SC 422 (V 46)=
(1959) Supp (1) SCR 623, N. T.
Veluswami Thevar v. G. Raja
Nainar

(1959) AIR 1959 Pat 356 (V 46) =
17 Ele LR 81, Ramkishun Singh v.
Tribeni Singh

(1953) 7 Ele LR 338 (Elec. Trib.,
Ludhiana), Gurnam Singh v. Par-
tap Singh

R. N. Bhalgotra, for Petitioner; Mir
Qasim and K. N. Raina, for Respondent.

ORDER: The petitioner Sheikh Abdul
Rehman of this election petition is a voter
in the Bhaderwah Scheduled Caste As-
sembly Constituency. He filed this election
petition on 10-4-67 before the Election
Commission of India, New Delhi. Shri
Hari Singh Hardesh, District and Sessions
Judge, of Bhaderwah constituted the Elec-
tion Tribunal to try this case under the
orders of the Chief Election Commission.
The petition was received by him on 19-6-
1967. The parties appeared before the
Tribunal. Some seven witnesses, P.Ws. 1
to 7 were examined before him, when the
Tribunal was abolished by an Act of the
Legislature and, thereafter, the case was
transferred to this Court on 15-9-1967.
It came to my file on 19-12-67. The
parties were thereafter, summoned to
appear before this Court. The petitioner
examined before me also himself and one
Hiranand Misra, and respondent examined
four witnesses including himself.

2. By this election petition, the peti-
tioner seeks to challenge the election of the
respondent, Jagat Ram Aryan, from the
Bhaderwah Scheduled Caste Assembly Con-
stituency to the Legislative Assembly of
the State of Jammu and Kashmir at the
last general election of 1967.

3. The series of steps for the conduct of
election were as follows:—

1. Date of filing nomination papers
13-1-1967 to 20-1-67.

2. Date of scrutiny of nomination
papers 23-1-67.

3. Date of poll 21-2-67:

4. Date of counting and declaration of
result 1-3-67.

4. There were seven candidates who
had filed their nomination papers from
this Constituency. They were (1) Jagat
Ram Aryan the respondent (2) Faquir
Chand (3) Narain Dass (4) Nikka Ram
(5) Bhagat Ram, (6) Om Parkash and (7)
Swami Raj. The first five had all filed
their nomination papers on the last date
i.e. 20-1-67 before the Assistant Return-
ing Officer, Shri Kahan Singh, a Tehsil-

dar of Bhaderwah, R. W. No. 1. It is not
brought on the record when the other
two candidates had filed their nomina-
tion papers.

5. The scrutiny of all the seven nomi-
nation papers was taken up on the date
of scrutiny by the Returning Officer,
Shri Abdul Gani, R. W. No. 2, an Addi-
tional Collector. He accepted as valid
the nomination papers of only Jagat Ram
Aryan, the respondent and Faquir Chand,
but rejected the nomination papers of the
other candidates for various reasons. We
are not concerned with the rejection of
nomination papers of Om Parkash and
Swami Raj, for, no ground has been made
in the election petition as to their rejec-
tion.

6. The respondent and Faquir Chand
only went to poll and, eventually, the
respondent was declared elected, having
secured larger votes than his rival.

7. The nomination paper of Bhagat
Ram was rejected as per order of the Re-
turning Officer, Exhibit RW 2/1, that of
Nikka Ram, as per his order. Exhibit
RW 2/2, and that of Narain Dass as
per his order Exhibit RW 2/3, all dated
23-1-67.

8. One common ground for rejecting
the nomination papers of all the three was,
that they were not members of the sche-
duled caste.

9. The next ground for rejecting the
nomination paper of Narain Dass and
Nikka Ram was again common that they
had not made & subscribed to the oath as
required under section 51 of the Jammu
and Kashmir Constitution, to be referred
to hereafter as the State Constitution.

10. There was a third ground for the
rejection of the nomination paper of Nikka
Ram, and it was that, as against serial
number 287 in the Electoral roll, the name
of Nikka Ram was mentioned as son of
Bakan, but this Nikka Ram, in one of his
applications which he had addressed on 24-
4-66 to the Health Minister had described
himself as "Nikka Ram son of Katan
Arya".

11. The respondent in his written state-
ment, which he had filed before the
Election Tribunal, has supported the re-
jection of the nomination papers of these
candidates as proper, taking also an ad-
ditional ground in respect of Narain Dass
that, the Election deposit of Rs. 125 by
that, the Election deposit of Rs. 125 by
him, was not made in the manner as re-
quired obviously under S. 45(2) of the
Jammu and Kashmir Representation of
the People Act, to be referred to here-
after, as the Act.

12. The Election Tribunal, after hear-
ing the parties in the matter of drawing
the issues, framed only one issue under
his order dated 6-7-67 to the following
effect:

"Whether the nomination papers of Sh. Nikka Ram, Sh. Narain Dass and Sh. Bhagat Ram candidates have been improperly rejected."

13. No other issue was canvassed before me.

14. I may first of all dispose of the issue with regard to Bhagat Ram. His nomination paper was rejected only on the ground that he could not prove before the Returning Officer that he was a member of the scheduled caste. Bhagat Ram had examined himself on 24-8-67 before the Election Tribunal, and his evidence was, recorded-in-chief, only in part, he claimed to be "Megh" by caste, which is in the list of scheduled castes. He produced no document in support of his caste, except a certified copy of a certificate from one Om Raj. On an objection being taken on behalf of the respondent to the admissibility of the above document, his further statement was adjourned by the Election Tribunal; but Bhagat Ram does not appear to have turned up thereafter for his further examination and cross-examination by the respondent. He was not produced before me either, although several opportunities were given to the petitioner as will appear from my orders dated 1-3-68 and 12-3-68. On 12-3-68, it was made clear to the counsel for the petitioner that, if Bhagat Ram was not produced by the next date on 18-3-68, his further evidence would be deemed to be treated as dispensed with, and even then, he was not produced on the above date.

15. The mere oral evidence of Bhagat Ram when he could not be produced for his cross-examination, cannot be accepted that he is a member of the scheduled caste. The evidence of some of other witnesses of the petitioner, who spoke to his being a member of the scheduled caste, cannot be accepted, when Bhagat Ram himself has not come forward to press his claim. The counsel for the petitioner, Mr. Bhalgotra also, did not press this point about Bhagat Ram. It must, for all these reasons, be held that the order of rejection of the nomination paper of Bhagat Ram was quite proper.

16. As to the remaining two candidates, Nikka Ram and Narain Dass, I may first of all dispose of the additional ground taken on behalf of the respondent about the election deposit of Narain Dass, having been irregular. As I have indicated earlier, no issue in this regard was framed by the Election Tribunal, and the respondent did not press this issue even before me. At the stage of arguments, however, the learned counsel for the respondent pointed out that the deposit receipt does not mention that it was made in favour of the Govt. of Jammu and Kashmir. This is too technical a ground deserving of any serious notice.

17. As to one of the grounds about the rejection of Nikka Ram, that his father's name, in the electoral roll, against serial number 287, was shown as 'Bakan' but the correct name of the father of Nikka Ram had been admittedly 'Katan'. This, however, was not at all a serious error on which the nomination paper of Nikka Ram could be validly rejected. In the nomination paper, Nikka Ram was not required under the rules, to give the name of his father, and, in fact, he had not given it. His name correctly appeared in the serial number 287 of the electoral roll, with this difference that there the father's name of Nikka Ram was noted as Bakan. There is a phonetic similarity between 'Bakan' and 'Katan' which is the correct name of Nikka Ram's father. Thus the father's name of Nikka Ram in the electoral rolls is obviously an error, which under the proviso to sub-section (4) of Section 44 of the Act, should be ignored. This ground, therefore, in my opinion, was not sufficient to have rejected the nomination papers of Nikka Ram.

18. The next question for consideration is, whether Nikka Ram and Narian Dass are the members of the scheduled caste. In support of this claim, both of them had filed certain papers from the Revenue records before the Returning Officer.

19. Narian Dass had produced a certified copy of genealogical table of his family, exhibit M and certified copy of Jamabandi, Ext. PF in proof of his claim. In both these documents, the name of Narain Dass as son of Ganga Ram appears, and they are described as "Megh" by caste. The Returning Officer does not appear to have been quite right in reading these documents as not showing Narian Dass as "Megh" by caste.

20. Nikka Ram had produced before the Returning Officer, a certified copy of genealogical table of his family in village Nagri, exhibit P.W. and a certified copy of jamabandi, exhibit PE. The name of 'Nikka Ram' as the son of 'Ketan' appears in both these documents as "Megh". The Returning Officer did not act on these documents, because the father's name of Nikka Ram was mentioned in the electoral roll as "Bakan". I have already held that Bakan must have been a mistake for Katan, the father of Nikka Ram.

21. It was before the Returning Officer that the respondent himself had filed an application of Nikka Ram Exhibit P. W. 4/T addressed to the Health Minister, on 24-4-1966. In this application Nikka Ram had described himself as the son of Sh. Katan Arya of Village Nagri, showing, that he belongs to the scheduled caste, being "Megh".

22. In this trial also, Nikka Ram has filed some other documents exhibits PF, PS and PH. Exhibit PF is a genealogical table, showing Nikka Ram as son of Ketan, and 'Megh' by caste. Exhibit PS is a Jamabandi showing Lenu alias Nikka Ram son of "Ketan Megh". Exhibit PH is a State Subject Certificate issued by a Tahasildar on 23-2-54 showing Nikka Ram alias Lenu as son of 'Ketan Megh' then residing in village Nagri.

23. An objection was, however, taken on behalf of the respondent that the documents which were not produced by Nikka Ram before the Returning Officer could not be produced at this trial, but there is no substance in this contention. There is preponderance of authorities of the different High Courts to show that new materials, and even new grounds, can be taken at the trial of an election petition for the simple reason, that the Returning Officer has to decide the validity or otherwise of the nomination papers in a summary manner having no adequate time to allow the parties to adduce their evidence. Some of these authorities are, to refer to only a few:—

1. (1953) 7 Ele. LR 338, Gurnam Singh v. Partap Singh.

2. 17 Ele LR 81 = (AIR 1959 Pat 356), Ramkishun Singh v. Tribeni Singh.

3. AIR 1959 SC 422 at p. 425, N. T. Veluswami Thevar v. Raja Nainar.

24. Apart from the documents referred to above, the petitioner has also examined some witnesses including Narian Dass and Nikka Ram who have all deposed to their being 'Megh' by caste. There is no reason to disbelieve their evidence when it is duly supported by the documentary evidence referred to above. The Returning Officer was in the wrong to have held that Nikka Ram and Narain Dass could not be able to prove that they are the members of the scheduled caste and therefore he was wrong to have rejected their nomination papers on this ground.

25. The last question that falls for consideration is whether Narain Dass and Nikka Ram were not qualified to be chosen to fill a seat in the State Assembly on the ground that they had not made and subscribed the necessary oath or affirmation as required under Section 51 of the State Constitution.

26. Section 51(a) of the State Constitution, is the same as Article 173(a) of the Constitution of India. According to this provision a candidate seeking election to the legislature shall not be qualified to be chosen to fill a seat in the legislature unless, amongst other things, he "makes and subscribes before some person authorised by the Election Commission... an oath or affirmation according to the form set out for the purpose" and this form as prescribed, is printed in

form "C" in schedule. It is both in English and Urdu.

27. This disqualification is a substantial one and the making and subscribing of oath has to be done in the prescribed manner as in form "C" otherwise, the candidate is not qualified to be chosen to fill a seat in the Legislature. This principle of law was not disputed on behalf of the petitioner. The question for consideration, therefore, is, whether Nikka Ram and Narain Dass had made and subscribed oath before any person authorised by the Election Commission in that behalf. The person so authorised was admittedly the Returning Officer or the Assistant Returning Officer, as was notified by the Election Commission of India, New Delhi on 14th May, 1965 in the notification No. 3/4J&K/65 a copy of which was shown to me by the counsel for the respondent.

28. The next question for consideration is when such an oath or affirmation had to be made and subscribed. There is no dispute that it can be made and subscribed any time on any of the dates fixed for filing of nomination paper. It can be made on the last date fixed for the filing of nomination paper, even after its filing. for, there is no provision in the Act or the State Constitution, requiring an oath form, duly sworn, to be accompanied with the nomination paper. The point, however, is not clear whether an oath can be made and subscribed after the last date of filing of the nomination paper and upto the date of scrutiny including it. The Supreme Court in its judgment dated 22-1-68 reported in AIR 1968 SC 1064 in the case of Pashupati Nath Singh v. Harihar Prasad Singh, a copy of which was shown to me, has held that oath or affirmation cannot be made on the date fixed for the scrutiny and it has left the question open whether such an oath or affirmation by a candidate can be made after the last date of filing of the nomination paper and before the date fixed for the scrutiny, as these questions did not then arise.

29. In Pashupati's case, AIR 1968 SC 1064 his claim was that he had taken oath during the course of the scrutiny and the question that actually arose before their Lordships and which they decided was "is a candidate entitled to make and subscribe the requisite oath or affirmation before the scrutiny of nomination commenced". And after a review of the relevant provisions of the Constitution and Representation of the People Act, regarding the existence of qualification or disqualification of a candidate, "on the date fixed for the scrutiny" occurring in Section 36 of the Act, their Lordships interpreted this expression "on the date fixed for the scrutiny" as meaning "on the whole of the day on which the scrutiny of no-

mination has to take place" and they have put the same in other words, "the qualification must exist from the earliest moment of the day of scrutiny" meaning, from the preceding midnight.

30. Section 47 of the Act is exactly the same as Section 36 of the Central Act. It has to be interpreted, therefore, that a qualification cannot be acquired or disqualification cured at any time on the date of scrutiny beginning from the preceding and ending with the succeeding midnight.

31. The learned counsel for the petitioner would call this decision as obiter, so far as, it relates to the time prior to the commencement of the scrutiny since this question did not arise in Pashupati's case, AIR 1968 SC 1064. But I do not agree. The expression, "on the date fixed for scrutiny" has been interpreted on the pleadings of that case, and even an obiter is binding.

32. A contrary view taken in AIR 1968 Mys 18 Khaje Khanwar Khadschan v. Siddavanhalli Nijalingappa and AIR 1966 Madh Pra 255, Hariram Singh v. Kamta Prasad Sharma can have no weight.

33. In the present case the question does not arise, if oath or affirmation could be made at any time, on the date of scrutiny either before, or in the midst, after it had been commenced, because no such claim has been made in the Election Petition.

34. It is true that Nikka Ram and his pleader, Shri Hira Nand Mishra who had represented him and Narain Dass at the time of the scrutiny, have deposed that Nikka Ram and Narain Dass had offered to take oath before the Returning Officer at the time of scrutiny, but this evidence is obviously an afterthought, not having deposed to even by Narain Dass.

35. Their only claim in the election petition is that they had both of them made and subscribed oath on 20-1-67 before the Assistant Returning Officer, R. W. No. 1, at the time, when they had both presented their nomination papers, almost simultaneously, one after the other, and they have not made any claim to have made and subscribed oath any time thereafter, not even at the time of the scrutiny, before the Returning Officer. No doubt, the Returning Officer, R. W. No. 2 has noted in his orders relating to the rejection of the nomination papers of the two candidates (exhibits RW 2/2 and RW 2/3) that both of them, at the time of the scrutiny by him, had been given opportunity to make and subscribe the oath or to prove, having done so before. In his evidence also, he has said the same thing. This may or may not be true that in spite of his asking they did not take oath at the time of the scrutiny, but this

is immaterial when it is not the claim of Narain Dass or Nikka Ram that they had made and subscribed any oath at the time of the scrutiny. In view of the decision of the Supreme Court in Pashupati Singh's case, AIR 1968 SC 1064 it was not within the competence of the Returning Officer to have offered or to have administered any oath to these two candidates, or taken any oath from them, after the scrutiny had been commenced and objections raised. Thus the above offer of the Returning Officer to these candidates is besides the point.

36. Now, it is only a question of fact, if Narain Dass and Nikka Ram had made and subscribed the oath before the Assistant Returning Officer R. W. No. 1 at the time, they had presented their nomination papers on 20-1-67. The evidence in this behalf consists of the oral testimony of Nikka Ram, Narain Dass, Abdul Rahman and Abdul Qayum.

37. The evidence of these witnesses is practically to the same effect in substance.

38. The evidence of Narain Dass is that he presented before the Assistant Returning Officer, two nomination papers, exhibit PJ and Exhibit PK, and when he went to file them, he had also signed the oath form which was marked by the Tribunal as exhibit PL and by the Returning Officer as exhibit A on 23-1-67. The further evidence of Narain Dass is that he had read the oath form in English, and, after that, he had signed it, and handed it over the same to the Assistant Returning Officer. He has further stated that he had not filled the oath form himself, but a Vakil from Jammu belonging to his party had filled it up.

39. It may be mentioned here that the oath form is printed in English and only the name of the candidate was to be written in the blank after the word "I" in the first line; and his signature was to be put above the column "signature of candidate" printed at the bottom of the form. There was nothing also to be filled up in this form. Both the name and the signature of the candidate should be normally affixed by him after he has completed the making and subscribing of the oath or affirmation before the authorised person, but he admittedly, did not write out his name in the first line after "I" after taking of the oath or affirmation. The only thing that remained to be done was to put down his signature above the column meant for it, after the taking of the oath. This witness Narain Dass has also spoken to the making and subscribing of oath by Nikka Ram in his presence, his oath form, being exhibit PC and his signature in Urdu being Exhibit PC/1, marked by the Tribunal. He has said "Nikka Ram had beside, nomination paper, signed the oath

form. Nikka Ram had read the oath in urdu. It was translated by the Assistant Returning Officer into Urdu and Nikka Ram repeated it".

40. Nikka Ram in his evidence in chief first, said about his taking of the oath. He had said "when I deposited the nomination paper I had also signed the oath form which was attached with the nomination paper. I had taken oath on Urdu and I identify the signature on the oath form. It has been marked as Exhibit PC/I".

41. It was, however, in his cross examination that Nikka Ram said "I had obtained oath form from the Tehsildar when I went to deposit the nomination paper; at the time I got the oath form the Tehsildar translated it in Urdu. I had read over the oath". He has also spoken to the making and subscribing of oath by Narain Dass in his presence, in the manner as stated by Narain Dass.

42. Abdul Quayum and Abdul Rehman are the other two witnesses, on this point, who have said practically the same thing as deposed by Nikka Ram and Narain Dass. They have not however, said why they had gone along with the aforesaid two candidates when they had filed the nomination papers, except to say that they had their allegiance to the Jansangh Party to which, these two candidates also belong. They were not even among their proposers.

43. It will appear that these four witnesses are quite interested, and their evidence, therefore, has to be scrutinised with care and caution.

44. The Assistant Returning Officer has denied the claim of the aforesaid witnesses that Narain Dass and Nikka Ram had made and subscribed any oath before him at the time they had presented their nomination papers before him on 20-1-67, or any other date. His evidence is that the oath forms were given along with the nomination papers by Nikka Ram and Narain Dass and he had also given them a receipt for the same on their demand. This part of his evidence finds support from the evidence of Nikka Ram in Chief which I have already quoted, in that, it gives a clear impression that he had filed an oath form, already signed by him, along with his nomination papers.

45. Nothing has come out in the cross examination of the Assistant Returning Officer to shake his credibility. Nothing was even suggested, why he would falsely depose against their claim. He is a responsible officer, being the Tahsildar, and I have no reason to disbelieve his evidence in this regard.

46. It is significant to note that on the oath forms of these two candidates, no endorsement or certificate was appended

by the Assistant Returning Officer that they had made and subscribed oath as claimed by them. He, however, made no endorsement on them even to the contrary that no oath or affirmation had been made and subscribed by these candidates, but, usually, in the ordinary course of human conduct, one may not expect any certificate or endorsement of a negative act. It may be mentioned here that on the oath form of Bhagat Ram exhibit PQ, the Assistant Returning Officer had endorsed a certificate of his having taken oath before him, exhibit RI, as Bhagat Ram has also admitted in his part evidence adduced on the petitioner's own behalf. Admittedly, Bhagat Ram had also filed his nomination paper simultaneously with Nikka Ram and Narain Dass. If the Assistant Returning Officer endorsed a certificate in respect of Bhagat Ram, there is no reason, why he would not endorse a similar certificate on the oath form of Nikka Ram and Narain Dass. There is also no reason why they should not have insisted for such a certificate. On the other hand, Narain Dass has said that on his oath form, the Tahsildar, meaning R. W. No. 1 had recorded a certificate, but he did not know, what he wrote on it. The fact, however, is, that R. W. No. 1 did not even sign it, nor did he sign the oath form of Nikka Ram. It appears that Narain Dass and Nikka Ram did not make and subscribe oath in their ignorance of the law about it, which was a new one, not having been in existence upto the general election of 1962.

47. It is true that there is no provision in the Act or the Rules made thereunder that an Officer authorised to administer an oath to any candidate should endorse a certificate or grant any receipt to him in token of his having made and subscribed the oath. In the oath form also, there is no column provided for the signatures of the authorised officer before whom an oath has to be made and subscribed like the one in the oath form prescribed under the central Representation of the People Act for appending the signature of such officer with date below the column "oath sworn solemnly affirmed". It is rather unfortunate.

48. There is, however, an instruction in para 7 at page 10 of the Hand Book for Returning Officers, issued by the Election Commission, that the authorised officer, should ask the candidates to read aloud the oath or affirmation in English or Regional Language, and the Assistant Returning Officer has admitted that he did not ask these candidates to read out to him the oath form either in English or Urdu, nor did he himself read out to them, as none of them asked him to do so. It was, of course, desirable for the Assistant Returning Officer to have done so, but nothing turns up on the breach of

this instruction. A candidate cannot make out any ground out of such a breach that he failed to make and subscribe the requisite oath or affirmation, because, he was not asked by the authorised officer to do so. The law or the rules made thereunder have imposed no such obligation on the authorised officer. Section 51(a) of the Constitution and also the notification issued by the Election Commission of India referred to before, do not cast any such obligation on the officer before whom oath is to be taken. But they required that a candidate "shall make and subscribe the oath or affirmation according to the form set out for the purpose in the fifth schedule to the Constitution" and for this purpose, the Returning Officer or Assistant Returning Officer of a particular constituency has been authorised before whom oath is to be taken. In the case of a prisoner or detenu the Superintendent of the Jail or the Commandant of the detention camp has been so authorised in the Notification.

49. It will appear that it is the candidate, and not the authorised officer, who has to seek for the candidate to administer oath to him. It is for the candidate to seek the authorised officer and take the oath before him in the prescribed manner.

50. The instruction in the Hand Book above referred to, is only advisory and, by no means, mandatory not being the rule of any law. The same instructions lay down that mere signing on the oath form by a candidate is not sufficient, and that after the oath or affirmation is made and subscribed, the candidate will sign it with date.

51. The oath forms of none of these candidates were even signed by the Assistant Returning Officer. If these candidates had really taken the oath, they were, expected to have asked him, at least, to sign on their oath form or at least give them a receipt, although there is no rule in this regard. It was just an ordinary course of human conduct.

52. On the date of the scrutiny, the Returning Officer R. W. No. 2 had asked these two candidates to adduce evidence in the form of affidavit, if they had already made and subscribed to the oath. Both Narain Dass and Nikka Ram have admitted that they had been asked to produce affidavits. They admit having gone to the Munsiff for swearing their affidavits, after the same had been written by their vakil, Mr. Hira Nand Misra, who also has tried to support their version in this regard. But these affidavits do not seem to have been filed before the Returning Officer, nor at this trial. The explanation of Narain Dass and Nikka Ram, however, is that by the time they returned with their affidavits

which could not be sworn, the Returning Officer had left, having rejected their nomination papers. The affidavits, however, remained with them, and according to Nikka Ram, they were with a worker of Jansang one Swarni Raj, and according to Narain Dass, they were in the office of the Jansang. But no explanation has been given why these affidavits have been withheld.

53. Mr. Hira Nand Misra, a pleader who came to support the version of Narain Dass and Nikka Ram about the affidavits has shown his over-anxiety by saying that they had at the time of scrutiny offered to take oath, although, this is not the case in the election petition, nor was it so spoken, even by Narain Dass.

54. I am not at all impressed with the evidence adduced on behalf of the petitioner that Narain Dass and Nikka Ram had made and subscribed the requisite oath before the Assistant Returning Officer at the time as alleged. The non-making and non-subscribing of oath was a serious disqualification and, therefore, their nomination papers were rightly rejected by the Returning Officer on this ground, though, not on the other grounds, referred to before.

55. In the result the Election petition fails, and is dismissed with cost to be calculated by the office and hearing fee of Rs. 300/- payable by the petitioner to the respondent.

56. Let the result of the case be communicated to the Election Commission and the Speaker of the State Assembly forthwith to be followed by a copy of the judgment.

MYJ/D.V.C.

Petition dismissed

AIR 1969 J & K 22 (V 56 C 7)

M. JALAL-UD-DIN J.

Smt. Vidhya Devi, Applicant v. Shri Harish Chander and another, Non-applicants.

Civil Revn. No. 136 of 1967, D/- 29-7-1968, from order of Dist. J., Jammu, D/- 10-8-1967.

(A) Civil P. C. (1908) O. 38 R. 5 — Attachment before judgment — Notice to show cause is not obligatory — It is in the discretion of court — Discretion has to be exercised according to exigencies of situation.

On being satisfied of the existence of the conditions sufficient to pass an order for attachment before judgment it is in the power of the court to call upon the defendant to furnish security and the court may also pass an order of conditional attachment under clause 3 of

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Rule 5. Sub-clause (b) of clause (I) of Rule 5 gives a discretion to the court to issue notice to the defendant to show cause as to why the security may not be furnished by him. According to the language of the sub-clause no legal obligation is cast on the court to issue notice of show cause in the first instance as the sub-clause gives an option to the Court either to ask the defendant to furnish security, or to appear and show cause as to why such security be not furnished. This discretion of option and also the discretion to pass a conditional order of attachment is to be exercised according to the exigencies of the situation.

Held on facts that the order was an order of conditional attachment. AIR 1967 All 136, Dist. (Paras 7 & 8)

(B) Civil P. C. (1908), S. 151, O. 38 R. 5 and O. 41 R. 23 — Order of attachment before judgment — Remand by District Judge on appeal—Order of remand, held, was one under S. 151 and not under O. 41, R. 23. (Para 5)

Cases Referred: Chronological Paras (1967) AIR 1967 All 136 (V 54)=ILR

(1966) 2 All 733, Krishna Gupta v.

Ram Babu 8

V. S. Malhotra, for Applicant; B. R. Chowdhari, for Non-applicants.

ORDER: This revision petition is directed against the order dated 10th of August 1967 passed by the learned District Judge, Jammu, whereby he has set aside the order of the trial court in proceedings relating to attachment before judgment.

2. It appears that in a suit for the recovery of arrears of rent, an application for attachment before judgment supported by an affidavit was also moved in the trial court of the Sub Registrar Munsiff, Jammu. It was alleged in the said application that the defendants had no immovable property within the local limits of the jurisdiction of the court and that they had closed their business and locked the premises and had, in fact, left the State. That the defendants with intent to obstruct or delay the execution of the decree that may be passed against them were about to dispose of their part of the property, and in these circumstances it was prayed that a warrant of attachment before judgment be issued against them.

The trial court, passed an order of attachment before judgment and directed that if the defendants failed to furnish security in terms of the suit money and costs thereof, attachment should be made forthwith. The said order of the court was executed. Against this order the defendants respondents went up in appeal before the District Judge, Jammu. The learned District Judge by his order set aside the order of the court below and remanded the case (relating to attach-

ment before judgment) for fresh hearing. The learned District Judge observed in his order that the allegations made in the application for attachment before judgment were vague and that no show cause notice was served upon the defendants. Therefore, the order passed by the trial court was not sustainable in the eye of law. Against this order the plaintiff applicant has come up in revision before this Court.

3. I have heard the arguments in the case and have gone through the file.

4. It has been vigorously contended by the learned counsel appearing on behalf of the applicant that the order passed by the court below was not appealable as the said order was passed under Order 38 Rule 5 C. P. C. and, therefore, the District Judge had no jurisdiction to hear the appeal. In this way the order passed in appeal was illegal and without jurisdiction. Secondly, even on a question of fact and law the case of the plaintiff was attracted by the provisions of Order 38 Rule 5, C. P. C. and the trial Court had passed an order quite in accordance with law. The observations of the learned District Judge, that the application contained vague allegations and that no show cause notice was issued to the defendants, were not legally sound.

As against this, the learned counsel appearing on behalf of the defendants respondents has supported the order passed by the learned District Judge in appeal. He has, on the one hand, submitted that the order of the trial court was in essence one passed under Rule 6 and not under Rule 5 and therefore the order was appealable, and because the order of the trial court had some legal infirmities, therefore, the appellate court had rightly set aside the same. He has also raised some preliminary objections (1) that the revision was incompetent inasmuch as the remand order of the District Judge was one passed under Order 41 R. 23 and was therefore appealable. Secondly that the original suit out of which the present proceedings have arisen has now been dismissed for default by the trial court and, therefore, the attachment had ceased. The revision had, therefore, become infructuous.

5. I will first of all deal with the preliminary objections raised before me. The order of remand, purported to have been passed by the learned District Judge, does not at all fall within the ambit of Order 41 R. 23 of the Civil Procedure Code, but it falls under Section 151 of C. P. C., and is not, therefore, appealable but revisable. Secondly, it is conceded before me that an application for restoration of the suit has already been made in the trial court and is pending disposal in that court. When and if that application

is allowed, and the suit is restored to its original numbers, naturally all the proceedings taken in the suit will be revived and the parties will be relegated to the same position as they occupied before the suit was dismissed for default. Therefore, the revision in my opinion has not become infructuous. I, therefore, overrule the preliminary objections raised in the case.

6. Now, on a careful consideration of the language employed in Order 38 Rule 5 of the Civil Procedure Code it should become abundantly clear that the application for attachment before judgment made by the plaintiff in the trial court is precisely covered by its provisions and the application does not contain vague allegations. Order 38 Rule 5 provides; that where at any stage of the suit, the court is satisfied that a defendant with intent to obstruct or delay the execution of a decree that may be passed against him is about to dispose of the whole or any part of his property, or is about to remove the whole or any part of his property from the local limits of the jurisdiction of the court, the court may direct the defendant either to furnish security within the specified time i. such sum as may be specified in the order or to produce....., or to appear and show cause why he should not furnish security. The court may also in the order direct the conditional attachment of the whole or any portion of the property so specified.

7. Thus it is clear that on being satisfied of the existence of the conditions sufficient to pass an order for attachment before judgment it is in the power of the court to call upon the defendant to furnish security and the court may also pass an order of conditional attachment under clause 3 of Rule 5. Sub-clause (b) of clause (I) of Rule 5 gives a discretion to the court to issue notice to the defendant to show cause as to why the security may not be furnished by him. According to the language of the Sub-clause no legal obligation is cast on the court to issue notice of show cause in the first instance as the sub-clause gives an option to the court either to ask the defendant to furnish security, or to appear and show cause as to why such security be not furnished. This discretion of option and also the discretion to pass a conditional order of attachment is to be exercised according to the exigencies of the situation. There may be cases where issuing of a notice to show cause in the first instance within a specified time to the defendant may frustrate the very object for which an application is made under O. 38 R. 5. By the time a notice of show cause is served a clever defendant may try to evade the order of the court and thus defeat the very object for which the notice is

being sent to him. It is, therefore, that discretionary powers have been given to the courts to proceed either way and also to pass conditional orders of attachment under Rule 5.

8. I am, therefore, of the view that the trial court has not misdirected itself and the order passed by it does not suffer from any serious legal infirmity although the order, it appears, is not happily worded. The authorities cited by the learned counsel for the respondents deal with cases where there was no order of conditional attachment. It was held on the interpretation of Order 38 R. 5 that a court could not pass an order of unconditional attachment under Rule 5 and the proceedings taken in pursuance of such a direction were ultra vires: Vide AIR 1967 All 136 (142) Para 17. Here in the instant case no doubt the trial court has passed an irregular order but the same cannot be said to be clothed with any illegality. The court has observed that in case the defendants fail to furnish security to the extent of the suit money, attachment should be made forthwith. The order is undoubtedly a conditional order and therefore, AIR 1957 All 136 cited by the counsel for the respondents, has got no application to the facts of the present case.

9. Again, there is much force in the contention of the learned counsel for the applicant that the District Judge, Jammu, had no jurisdiction to hear the appeal against the order of the trial court because the order was not appealable. Order 43 Rule 1 Sub-clause (q) makes an order passed under Rule 6 of Order 38, appealable. But no appeal is provided against an order passed under Rule 5. The order purported to have been passed by the trial court appears to have been passed under Rule 5 and not under Rule 6, therefore, the order passed by the learned District Judge in appeal is beyond jurisdiction, as no appeal lay to it.

10. The result is that this revision is allowed, the order of the learned District Judge is set aside and the order of the trial court is restored. However, the defendants will be at liberty to approach the trial court with their objections regarding the order of attachment and the trial court after considering the objections and hearing the parties will pass an appropriate order according to law.

GGM/D.V.C.

Revision Petition
allowed.

AIR 1969 J. & K. 25 (V 56 C 8)

FULL BENCH

J. N. BHAT, JASWANT SINGH AND ANANT SINGH, JJ.

The Jammu & Kashmir Bank, Appellant v. Lal Mohamed Bangroo, Respondent.

First Appeal No. 83 of 1966, D/- 26-8-1968.

(A) Civil P. C. (1908), S. 96 — Appeal — Appeal against decree — Party is entitled to appeal against that part of decree which adversely affects him.

A decree holder can approbate the decree as to what it awards him and reprobate the decree as to what it refuses him. In other words, if a decree adversely affects him and negatives a part of his claim, he can appeal against that part of the decree. In some cases it has been held that an appeal will lie even against a finding which is necessary and will operate as res judicata as against the party by implication. AIR 1917 Pat 350 and AIR 1924 Mad 689 and AIR 1926 Mad 974, Rel. on. (Para 7)

(B) Jammu and Kashmir Constitution Act (1996), Ss. 1 to 8 and 5A and 5B (as amended in 2001) — Companies are excluded from purview of 'State subjects' — They are not permanent residents — Mortgage of immovable property in their favour is invalid.

By virtue of provisions contained in Ss. 5-B and 5-C of the Constitution Act, every company which before the 14th May 1954 was recognized as a State Subject within the meaning of State Subject Notification No. 1.L/84 dated 20th April, was to be deemed to be a permanent resident and continue to be regarded as such subject to the provisions of any law that might be made by the State Legislature. Consequently a bank which was incorporated as a company under J. and K. Companies Act continued to be regarded a permanent resident subject to any future law. This position continued upto the day preceding the 17th November 1956, when Sections 1 to 8 and 158 of the Constitution of the Jammu and Kashmir came into force. According to provisions of sub-section (3) of Section 6 of the Constitution, the expression "State subject" of class I or of class II had to be given the same meaning as in the State Notification No. 1.L/84 dated 2-4-1927 read with State Notification No. 13-L/? dated 27-6-1932. Thus like the Constitution Act of 1996 as amended by Act No. XLVII of 2007 the J & K Constitution has done away with the division of the State subjects into several classes and instead recognized only one class namely permanent residents. One important result however of the provisions contained in the

J and K Constitution of the State is that it is not possible for any person who had not lawfully acquired immovable property in the State and resided therein for full ten years prior to the 14th day of May 1954, to become a State subject. Another significant change brought about by the J and K Constitution is the omission of a provision corresponding to Section 5-B of the Constitution Act. It is therefore manifest that companies were excluded from purview of "permanent subjects". (Paras 23 & 25)

Whatever may be the position regarding the acquisition of citizenship by a natural person, reference to Section 2(1)(F) of the Citizenship Act indicates that the word "person" does not include any company, or association or body of individuals whether incorporated or not. In other words, a juristic or an artificial person cannot acquire the status of citizenship. Thus the position that emerges as a result of the combined reading of the provisions of Articles 5 and 6 of the Constitution of India, of the Citizenship Act and of Section 6 of the Constitution of the State, is that the juristic or artificial persons like companies or corporations have not been included within the ambit of the term "permanent resident". (Para 26A)

A bank incorporated under J and K Companies Act ceases to be permanent resident on the coming into force of the Constitution of the Jammu and Kashmir and consequently a mortgage of immovable property in its favour is invalid. AIR 1963 SC 1811, Rel. on. (Para 28)

Cases Referred: Chronological Paras
(1967) AIR 1967 SC 795 (V 54)=1966
Supp SCR 311, Barium Chemical Ltd. v. Company Law Board 28
(1965) AIR 1965 SC 40 (V 52)=(1964) 6 SCR 885, Tata Engineering and Locomotive Co., Ltd v. State of Bihar 33
(1963) AIR 1963 SC 1811 (V 50)= (1964) 2 SCA 201, State Trading Corporation of India Ltd v. Commercial Tax Officer 28
(1926) AIR 1926 Mad 974 (V 13)=51 Mad LJ 211, Raghava Aiyangar v. Irula Thevan 7
(1924) AIR 1924 Mad 689 (V 11)=ILR 47 Mad 633, Venkateswarlu v. B. Lingayya 7
(1917) AIR 1917 Pat 350 (V 4)=40 Ind Cas 771, Raghunath Kurmi v. Deo Narain Rai 7
J. N. Bhan and Ishar Singh, for Appellant; S. N. Dhar and M. N. Khardori, for Respondent.

JASWANT SINGH J.: A division bench of this court composed of Hon'ble Bhat J. and Hon'ble Mukerjee has referred this case to the full bench as in its opinion it raised important questions of Law of far reaching importance.

2. The facts material for the purpose of and leading to this reference are:

On 28-12-1963, the Jammu and Kashmir Bank Ltd. the appellant herein, brought a suit, being suit No. 43 of 1963 against Lal Mohammad Bangroo, the respondent herein, on the original side of the court, for recovery of Rs. 59,166.14 by sale of an orchard measuring 76 Kanals and 9 Marlas and house etc. described in Para No. 3 of the plaint which were mortgaged in favour of the former by the latter as also by sale of the movable properties hypothecated in favour of the former by the latter. In the petition of plaint, it was averred by the plaintiff that a sum of Rs. 60,000 on cash credit system was advanced to the defendant on the basis of a promote executed on 17-2-1962 by the latter on behalf of himself and Aerosound, whose sole proprietor he was, that in order to secure the loan, the defendant conveyed by way of simple mortgage on the same day, the aforesaid orchard measuring 76 Kanals and 9 marlas and other immovable property described in Para No. 3 of the plaint, that the payment of loan was further secured by means of a deed of hypothecation of goods mentioned in the Schedule annexed hereto which was also executed on the same day by the defendant, that the defendant had only paid Rs. 15,000 towards the aforesaid loan account and in spite of several demands, had failed to liquidate the balance and hence the suit.

3. The suit was resisted by the defendant contending inter alia, that though cash credit limit of Rs. 60,000 was sanctioned in his favour and several deeds were executed but no amount was paid to him on 17-2-1963, that promote was without consideration, that the documents got executed by him were in English language with which he was not familiar, that the mortgage and the hypothecation deeds were invalid and unenforceable in law and could not be availed of by the plaintiff and that the interest charged was excessive.

4. On the pleadings of the parties, the following issues were framed by the learned trial Judge:

1. Whether the Pro-note dated 17-2-1962 was duly executed and signed by the defendant and if so was it for consideration? O. P. Plaintiff.

2. (a) Was the mortgage deed and hypothecation deed dated 17-2-1962 duly executed and signed by the defendant and were they for consideration? O. P. Plaintiff.

(b) If the execution of these documents is proved by the plaintiff, whether the documents were invalid in law? O. P. Defendant.

3. Was the affidavit dated 17-2-1962 signed and sworn by the defendant? O. P. P.

4. To what amount is the plaintiff entitled by way of principal and interest and insurance charges? O. P. Plaintiff.

5. Is the rate of interest exorbitant? O. P. D.

6. Had the defendant made any part payments over and above those admitted by the plaintiff, if so to what extent? O. P. D.

7. To what relief if any, is the plaintiff entitled? O. P. P.

5. Hon'ble Ali J. (as his Lordship then was) after recording the evidence adduced by the parties and hearing their counsel found all the issues in favour of the plaintiff excepting that the mortgage in question in so far as it related to the land (Orchard) was invalid as the plaintiff Bank was not a permanent resident of the State. In the result, the learned Judge granted a preliminary decree for Rs. 50,894-13 Paise in favour of the plaintiff Bank by sale of the mortgaged and hypothecated properties (except the orchard measuring 76 Kanals and 9 Marlas mentioned at item No. 1 of the mortgage deed) in terms of Order 34 Rule 4 of the Code of Civil Procedure and the defendant was given six months time to pay the decretal amount falling which the plaintiff was held entitled to apply to the court for passing a final decree.

6. Aggrieved by this judgment and decree in so far as it prohibited sale of the orchard, the plaintiff preferred an appeal to this court which came up for hearing before a Division Bench who as already stated, have referred it to a Full Bench in view of the great importance of the points involved.

7. A preliminary objection as to the maintainability of the appeal has been raised by the learned counsel for the respondent on the ground that the decree being in favour of the plaintiff no appeal lay.

I have given my earnest consideration to the preliminary objection but am of opinion that it cannot be allowed to prevail. It is well settled that a decree holder can appropriate the decree as to what it awards him and reprobate the decree as to what it refuses him. In other words, if a decree adversely affects him and negatives a part of his claim, he can appeal against that part of the decree. In some cases it has been held that an appeal will lie even against a finding which is necessary and will operate as res judicata as against a party by implication (See AIR 1917 Pat 350; AIR 1924 Mad 689 and AIR 1926 Mad 974). In the instant case, the decree not being absolutely in favour of the plaintiff and the reliefs sought for by it not having been granted in their entirety in its favour, it was open to the appellant to assail that part of the decree which went against it. In

the circumstances the preliminary objection raised by the learned counsel for the respondent cannot be sustained and is therefore overruled.

8. Mr. J. N. Bhan the learned counsel, appearing in support of the appeal has contended that Jammu and Kashmir Transfer of Property (Second Amendment) Act, 1961 (Act No. 26 of 1961) on the basis of which the mortgage of land has been held to be invalid by the learned trial Judge, is merely an enabling Act and does not take away the right conferred on the appellant bank by Order No. 24-H of 1940 issued by the Command of His Highness under Notification No. 1. L/ 84 dated 20-4-1927, as amended by Notification No. 98-H dated 22-12-1939 declaring the bank to be a State Subject. He has further submitted that the bank having been declared to be a State Subject, it was competent to acquire interest in land or other immovable property in the State and the position remained wholly unaffected even after the coming into force of New (Present) Constitution of Jammu and Kashmir.

9. Mr. S. N. Dhar, learned counsel for the respondent has on the other hand, submitted that the appellant can no longer be regarded as a permanent resident of the State in view of the provisions contained in Section 6 of the constitution of the State and that the findings of the learned Single Judge that the mortgage deed in favour of the appellant in respect of the land was invalid, was perfectly correct and could not be interfered with.

10. The points for determination in this appeal are as to whether the plaintiff Bank which is a Company incorporated under the Companies Act of the State is a permanent resident of the State and whether the land (orchard) was or was not validly mortgaged in its favour as security for loan advanced by it to the defendant.

11. For a proper appreciation of the legal and constitutional point involved in this appeal, it is necessary to go into the history of the legislation relating to "hereditary State Subject", "State Subject" and "permanent resident" of the State.

12. It was for the first time on 29 Maghar, 1943 that the late Maharaja Sir Partap Singh Bahadur by means of an * Irshad No. 226 prohibited the mortgage of any land situate in the State in favour of a Zamindar who was a resident of British India, i.e. a person who was not a State Subject.

13. Nearly 14 years later i.e. on 9th Maghar 1957 the ruler made another order

ordaining as follows: (Original in Urdu omitted—Ed).

14. The restriction contained in the aforesaid order dated 9th Maghar 1957 was reiterated on 30th Har 1960 in civil case entitled Aroda, Phaga, and Mangtu and others, residents of Charwah Tehsil Zafarwal v. Chaudhori Ghulab Lambar-dar and ors. residents of chak Jawahar Tehsil Sambat where His Highness was pleased to observe inter alia, as follows:** (Original in Urdu omitted—Ed.)

About score & three and half years later his successor, His Highness Maharaja Hari Singh Bahadur, was pleased to issue Circular order No. PS 2349 dated 31-1-1927 commanding that every new entrant into the State Service should be a hereditary State Subject. The term "hereditary State Subject" was defined in the Circular to mean and include:

All persons born and residing within the State before the commencement of the reign of His Highness the late Maharaja Ghulab Singh Sahib Bahadur and also persons who settled therein before the commencement Samvat 1942 and have since been permanently residing therein.

A few months later, the said Ruler was pleased to sanction the issue of another *** Notification No. IL/84 dated 20-4-1927 which ran as follows:

Class I

"All persons born and residing within the State before the commencement of the reign of His Highness the late Maharaja Ghulab Singh Bahadur, and also persons who settled therein before the commencement of Samvat year 1942 and have since been permanently residing therein.

Class II

All persons other than those belonging to class I who settled within the State before the close of Samvat year 1968 and have since permanently resided and acquired immovable property therein.

Class III.

All persons other than those belonging to classes I and II permanently residing within the State who have acquired under a Rayatnama any immovable property therein or who may hereafter acquire such property under an Ijazatnama and may execute a Rayatnama after ten years continuous residence therein.

.....
Note I. In matter of grant of State scholarship, State lands for agriculture and house building purposes and recruit-

**See page 128 of Majmua Circular at Judicial (1955-1960 Bikarmi)
Note. This Hidayat is repeated in essence at page 128 of Special Laws.

***See J&K Laws 1958 Edition, Volume II, page 585.

*See Circulars Nos. 104 and 105 contained in Majmua Circularat Judicial in (Urdu) 1946-50 at page 274.

ment to State Service, State Subject of class I should receive preference over other classes and those of class II over class III subject however to the order dated 31st January 1927 of His Highness the Maharaja Bahadur regarding employment of hereditary State Subject in Government Service.

Note II. The descendants of the person who have secured the status of any class of the State Subject will be entitled to become the State Subject of the same class. For example if A is declared State Subject of class II his sons and grandsons will ipso facto acquire the status of the same class (II) and not of class I*.

15. It will be seen that while omitting the use of the term "hereditary State Subject" and dividing the State Subjects into three classes, the latter Notification made it possible for persons other than those belonging to class I or class II permanently residing within the State who had before the 20 April, 1927, acquired under a Riyatnama any immovable property there or who might thereafter have acquired immovable property under an Ijzatnama and executed a Riyatnama after ten years continuous residence therein to acquire the Status of State Subject though of inferior class.

16. The * terms on which the Ijzatnama was to be given are reproduced below for facility of reference:

1. "The person who is granted an Ijzatnama and the residential property acquired by him shall be subject to Laws and Regulations of Jammu and Kashmir Government for the time being in force.

2. The person in whose favour this Ijzatnama is granted shall be subject to the jurisdiction of the Criminal, Civil, and Revenue Courts of Jammu and Kashmir Government.

3. If the person in whose favour the Ijzatnama is granted fails to submit the details of the property acquired and its site plan within six months from the date of the receipt of the Ijzatnama he shall have to apply for renewal of the Ijzatnama without which his deed will not be registered.

4. Whoever is granted Ijzatnama under these rules shall be bound to acquire State Subject Certificate after ten years. In case of failure to acquire this certificate the property acquired by him under the Ijzatnama shall be liable to be forfeited to the Government.

*See Booklet entitled State Subject and Permanent Resident: Definition and Ijzatnama Rules, (as amended up-to-date) with orders, and instructions relating thereto published in June 1956 by Government of Jammu and Kashmir (Revenue Department).

If the person to whom an Ijzatnama was granted or his successor-in-interest has failed to acquire a State Subject Certificate at the end of 10 years, he will be at liberty to transfer the property to a State Subject within six months of the end of the period of 10 years and in such a case there will be no forfeiture.

5. The maximum area of residential land which can be acquired under an Ijzatnama shall not exceed four Kanals in any case.

6. The dependants of a person in whose favour an Ijzatnama for purchase of a residential house or land has been granted shall not be eligible to any Ijzatnama in their name.

7. More than one renewal of an Ijzatnama already granted shall not ordinarily be allowed.

After ten years continuous residence in the State, it was open to a person wishing to become a State Subject to apply to the Wazir Wazarat concerned for grant of a State Subject Certificate."

17. The following Note numbered as* Note No. 111 was added to Notification No. 1-L/84 vide Notification No. 51-D/1989 as amended by Notification No. 6-L/1990 (Published in the Government Gazette dated 8th Baisakh 1990 and Government Gazette dated 23rd Bahdoon 1990 respectively—

"The wife or a widow of a State Subject of any class shall acquire the status of her husband as State Subject of the same class as her husband, so long as she resides in the State and does not leave the State for permanent residence outside the State."

Nearly five years thereafter, i.e. 1995 (1938 A.D.) **The Jammu and Kashmir Alienation of Land Act, (Act No. V of 1995) was enacted. Section 4 of this Act which came into force on 24th Har 1995 prohibited transfer of land (as defined in the Act) in favour of any person who was not a State Subject.

18. To the categories of the State Subject enumerated in Notification No. 1-L/84 dated 20-4-1927 another class of State Subject was added vide ***Order No. 98-H/39 published in the Government Gazette dated 27th Poh 1996. This class comprised of the following:

Class IV. "Companies which have been registered as such within the State and which being Companies in which Government are financially interested so as to the economic benefit to the State or to the financial stability of which the Government are satisfied have by a special order of His Highness been declared to be State Subject.

***See Government Gazette dated 27th Poh 1996 and also page 586 of J&K Laws Vol. II 1998 Edition.

19. By the same order His Highness further directed that notwithstanding any law, rule, or other order to the contrary, no disability as regards acquisition of any interest in land or other immovable property in the State would attach to a company which is a hereditary subject within the meaning of Notification No. 1-L/84 dated 20-4-1927 as amended.

20. By the same order i.e. Order No. 98-H/39 another note numbered as Note IV was also added to the State Subject Definition Notification dated 20-4-1927, reproduced above. This Note read as follows:

"For the purpose of the interpretation of the terms 'State Subject' either with reference to any law for the time being in force or otherwise, the definition given in this Notification as amended upto date shall be read as if such amended definition existed in this Notification as originally issued."

Then came order No. 24 of 1940 which was issued under the Command of His Highness. This order ran as follows:

"Under Notification No. 1-L/84 dated 20th April, 1927 as amended by Notification No. 98-H dated 22nd December 1939, His Highness is pleased to declare the Jammu and Kashmir Bank Ltd., to be a State Subject."

By Command.

Sd./N. Gopaldaswami
Prime Minister.

Under the aforesaid Command order, the Jammu and Kashmir Bank came to be clothed with the status of a State Subject and thus became competent to acquire interest in land and other immovable property in the State. Consequently it was enabled to advance loans against mortgages of immovable property.

21. After a lapse of about a decade and a half during which the State underwent many momentous changes another epoch making event, as a result of, what is popularly known as Delhi Agreement took place in the history of the State. This was the long awaited application to the State of some of the provisions of the Constitution of India, including those relating to fundamental rights by the President of India by means of the *Constitution (Application to J & K) Order 1954 dated 14-5-1954, made under Article 370(1) of the Constitution.

22. Simultaneously with the issue of this order by the President of India, the Jammu and Kashmir Constitution Act, 1996 was amended by the **Jammu and Kashmir Constitution (Amendment) Act No. XLVIII of 2011. By this Amend-

ing Act, the term "State Subject" was substituted by the term "permanent resident" and the following six Sections namely 5-A to 5-F relating to the permanent resident were inter alia inserted in the Constitution Act, 1996. These Sections read as under:

5-A. Every person who is or is deemed to be a citizen of India under the provision of Part II of the Constitution of India as applied to the State of Jammu and Kashmir under the Constitution (Application to Jammu and Kashmir) Order 1954, shall be a permanent resident of the State of Jammu and Kashmir, if at the date of the commencement of the Jammu and Kashmir Constitution (Amendment) Act, 2011 namely the 14th May, 1954,

(a) he was a State Subject of (Class I or) class II as defined in the State Subject Notification No. 1-L/84 dated 20th April, 1927, read with Notification No. 13/L dated 27th June, 1932, or

(b) after having acquired immovable property in the Jammu and Kashmir State in pursuance of an ijazatnama granted under the Ijazatnama Rules for the time being in force, he has been ordinary resident in the territory of the State for not less than ten years prior to the date of such commencement.

Explanation: All persons who before the commencement of the Constitution (Application to Jammu and Kashmir) Order 1954, were State Subjects of Class II as defined in the State Subject Notification No. 1-L/84 dated 20th April, 1927 read with Notification No. 13/L dated 27th June 1932, and who having migrated after the first day of March 1947, to the territory now included in Pakistan returns to the State under a permit for resettlement in the State or permanent return issued by or under the authority of any law made by the State Legislature shall continue to be deemed permanent residents of the State.

5-B. Status of permanent residency of certain juristic persons: Notwithstanding anything contained in the foregoing provisions of this Act every company which immediately before the commencement of the Constitution (Application to Jammu and Kashmir) Order 1954 was recognized to be a State Subject within the meaning of State Subject Notification No. 1-L/84 dated 20th April 1927 shall be deemed to be a permanent resident at such commencement.

Explanation: In this Section "Company" shall have meaning assigned to it in the Jammu and Kashmir Companies Act, 1977.

5-C. Continuance of the Status of permanent residency:

Every person who is or who is deemed to be permanent resident of the State of

*See page 587 of J&K Volume II 1958 Edition.

**See page 137 of J&K Laws Volume III 1959 Edition.

Jammu and Kashmir shall be subject to the provisions of any law that may be made by the State Legislature continue to be such permanent resident.

5-D. State Legislature to define and regulate the rights of permanent residents by 2/3rd majority:

The power of the State Legislature to define the term "permanent resident" of the State and to regulate their special rights and privileges shall be exercisable only by a majority of not less than two thirds of the total membership of the Legislative Assembly.

5-E. State Legislature to make laws respecting the acquisition of the status of permanent resident:

Nothing contained in the foregoing provisions shall derogate from the power of the State Legislature to make such laws as it thinks fit with respect to the acquisition of the status of the permanent residents and until the State Legislature enacts provisions in that behalf the existing Jazatnama Rules shall continue to remain in force and the existing procedure for obtaining a State Subject Certificate shall be followed for the purpose of securing the certificate of being a permanent resident of the State.

5-F. Reference to the term of the State: Unless the context otherwise requires all references in the existing laws of the State to the expression "State Subject" shall be construed as references to the permanent residents of the State."

23. It will be noticed that by virtue of the provisions contained in Sections 5-B and 5-C of the Constitution Act as reproduced above, every company which before the 14th May 1954 was recognized as a State Subject within the meaning of State Subject Notification No. 1/L/84 dated 20th April, was to be deemed to be a permanent resident and continue to be regarded as such subject to the provisions of any law that might be made by the State Legislature. Consequently the J & K Bank was to continue to be regarded a permanent resident subject to any future law. This position continued upto the day preceding the 17th November 1956, when Sections 1 to 8 and 158 of the present Constitution i. e. the Constitution of the Jammu and Kashmir came into force.

24. We have now to see whether with the enactment of these provisions Sections 1 to 8 of the New Constitution of the J & K the position underwent any change or not. It is relevant at the stage to reproduce Sections 6 and 7 of

the Constitution of Jammu and Kashmir for facility of reference. The said sections read thus:

Permanent residents:

1. Every person who is or is deemed to be a citizen of India under the provisions of the Constitution of India shall be a permanent resident of the State if on the fourteenth day of May, 1954,

(a) he was a State subject of class I or of class II or,

(b) having lawfully acquired immovable property in the State he has been ordinarily resident in the State for not less than ten years prior to that date.

2. Any person who before the fourteenth day of May 1954, was a State Subject of class I or of class II and who having migrated after the first day of March 1947, to the territory now included in Pakistan returns to the State under a permit for resettlement in the State or for permanent return issued by or under the authority of any law made by the State Legislature shall on such return be a permanent resident of the State.

3. In this Section the expression "State Subject of class I or of class II" shall have the same meaning as in the State Notification No. 1-L/84 dated the twentieth April, 1927 read with the State Notification No. 13/L dated the twenty-seventh June, 1932.

7. Construction of reference to State Subject in existing laws; Unless the context otherwise requires, all references in any existing laws to hereditary State Subject or to State Subject class I or of class II or of class III shall be construed as reference to permanent residents of the State.

From a perusal of Section 6 of the present Constitution of Jammu and Kashmir it would be clear that in order to be able to qualify as a permanent resident of the State, it is necessary for a person to fulfil two requirements, viz.

(i) He must be a citizen of India under the provisions of the Constitution of India, and

(ii) on the 14th day of May 1954, he should have been:

(a) A State Subject of class I or II or

(b) having lawfully acquired immovable property in the State been ordinarily resident therein for not less than ten years prior to the 14th day of May 1954.

25. It is further clear that according to the provisions of sub-section (3) of Section 6 of the Constitution, the expression "State subject" of class I or of class II has to be given the same meaning as in the State Notification No. 1/L/84 dated 2-4-1927 read with State Notification No. 13/L dated 27-6-1932.

*See Section 1(2) of the Constitution of Jammu and Kashmir.

*See Appendix to the Constitution of India (as modified upto the 15th April, 1967) at page 371.

*See J&K Constitution Act, 1956 published by the order of the Government of J & K in 1956.

26. From the above it is abundantly clear that like the Constitution Act of 1996 as amended by Act No. XLVII of 2007 the present Constitution has done away with the division of the State Subject into several classes and instead recognized only one class namely permanent residents. One important result however of the provisions contained in the present constitution of the State is that it is not possible for any person who had not lawfully acquired immovable property in the State and resided therein for full ten years prior to the 14th day of May 1954, to become a State Subject. Another significant change brought about by the present Constitution is the omission of a provision corresponding to Section 5-B of the Constitution Act of 1996 which ran as follows:

"Notwithstanding anything contained in the foregoing provisions of this Act, every company which immediately before the commencement of the Constitution (Application to Jammu and Kashmir Order No. 94) was recognized to be a State Subject within the State Subject Notification No. 1.L/84 dated 20-4-1927 shall be deemed to be a permanent resident at such commencement."

It is, therefore, manifest that the companies were excluded from the purview of the "permanent residents".

It is relevant in this context and at this stage to consider also the provisions of Articles 5 and 6 of the Constitution of India, as well as the provisions of the Citizenship Act. Articles 5 and 6 of the Constitution which define the persons who are to be deemed as citizens of India at the commencement of the Constitution ran as under:

5. At the commencement of this Constitution every person who has his domicile in the territory of India, and

(a) who was born in the territory of India, or

(b) either of whose parents was born in the territory of India, or

(c) who has been ordinarily resident in the territory of India for not less than five years immediately preceding such commencement, shall be a citizen of India.

6. Notwithstanding anything in Article 5 a person who has migrated to the territory of India from the territory now included in Pakistan shall be deemed to be a citizen of India at the commencement of this Constitution, if

(a) he or either of his parents or any of his grand parents was born in India as defined in the Government of India Act 1935 (as originally enacted) and

(b) (i) in the case where such person has so migrated before the nineteenth

day of July 1948, he has been ordinarily resident in the territory of India since the date of his migration, or

(ii) In the case where such person has so migrated on or after the nineteenth day of July 1948, he has been registered as a citizen of India by an officer appointed in that behalf by the Government of the dominion of India on an application made by him therefor to such officer before the commencement of this Constitution in the form and manner prescribed by that Government. Provided that no person shall be so registered unless he has been resident in the territory of India for at least six months immediately preceding the date of his application. Article 10 of the Constitution of India, provides for the continuance of such persons as citizens subject to any law that may be made by the Parliament. "The Constitution, it will be noticed does not as such contain any provision with respect to the acquisition of citizenship after its commencement or the termination of that status thereafter. By Article 11 of the Constitution the Parliament has, however, been empowered to make laws to supplement the provisions of the Constitution with respect to the acquisition and termination of citizenship and all other matters relating thereto.

26A. Whatever may be the position regarding the acquisition of citizenship by a natural person, one thing is at least clear by reference to Section 2(1)(F) of the Citizenship Act, that the word "person" does not include any company, or association or body of individuals whether incorporated or not. In other words, a juristic or an artificial person cannot acquire the status of citizenship. Thus the position that emerges as a result of the combined reading of the provisions of Articles 5 and 6 of the Constitution of India, of the Citizenship Act and of Section 6 of the Constitution of the State, is that the juristic or artificial person, like companies or corporations have not been included within the ambit of the term "permanent resident".

27. Now let us see as to what is the position of the Jammu and Kashmir Bank. Although by virtue of Section 5-B inserted in the Constitution Act of 1996, by Act No. XLVII of 2011, which was in force at the commencement of the present Constitution, the Jammu and Kashmir Bank a juristic or artificial person who was a permanent resident of the State and as such was capable of acquiring any interest in land or in any other immovable property, it cannot be doubted that it ceased to be able to do so after the coming into force of the Constitution because it would no longer be regarded as a citizen of India in view of Section 6 of

the State Constitution read with Articles 5 and 6 of the Constitution of India, under which only natural persons could be permanent residents.

28. It has now been settled by the Supreme Court in *State Trading Corporation of India Ltd v. Commercial Tax Officer*, AIR 1963 SC 1811 that only a natural person as distinguished from juristic or artificial person can be a citizen of India. The following observations made by their Lordships in that ruling, may be reproduced in this connection with advantage:

"It would appear that the makers of the Constitution had altogether left out of consideration juristic person when they enacted Part II of the Constitution relating to "Citizenship" and made a clear distinction between "persons" and "citizens" in Part III of the Constitution. Part III which proclaims fundamental rights, was very accurately drafted, delimiting those rights like freedom of speech and expression, the right to assemble peaceably, the right to practise any profession, etc. as belonging to "citizens" only and those more general rights like the right to equality before the law, as belonging to 'all persons'.

In view of what has been said above, it is not necessary to refer to the controversy as to whether there were any citizens of India before the advent of the Constitution. It seems to us, in view of what we have said already as to the distinction between citizenship and nationality, that corporations may have nationality in accordance with the country of their incorporation, but that does not necessarily confer citizenship on them. There is also no doubt in our mind that *Part II of the Constitution when it deals with citizenship refers to natural person only*. This is further made absolutely clear by the Citizenship Act which deals with Citizenship Act which deals citizenship after the Constitution came into force and confines it only to natural persons. We cannot accept the argument that there can be citizens of this country who are neither to be found within the four corners of Part II of the Constitution or within the four corners of the Citizenship Act. We are of opinion that these two provisions must be exhaustive of the citizens of this country. Part II dealing with citizens on the date the Constitution came into force and the Citizenship Act dealing with citizens thereafter. We must, therefore, hold that these two provisions are completely exhaustive of the citizens of this country and these citizens can only be natural persons. The fact that corporations may be nationals of the country for purpose of international law will not make them citizens of this coun-

try for purpose of municipal law or the "Constitution."

In view of this unequivocal pronouncement of their Lordships, I have no doubt in my mind that the Jammu and Kashmir Bank ceased to be permanent resident on the coming into force of the Constitution of the Jammu and Kashmir. In coming to this conclusion I should not be deemed to be unconscious of the provisions contained in Section 157(3) of the Constitution of the State on which strong reliance has been placed by the learned counsel for the appellant in support of his contention that Jammu and Kashmir Bank continues to enjoy the status of a State Subject. But that provision cannot in my opinion be of any avail to the appellant, as it saves only those Notifications, orders, etc. which are not inconsistent with the provisions of the present Constitution. When person falling under classes I and II of Notification No. 1.L/84 dated 20-4-1927 read with Notification No. 13.L dated 27th June 1932, and those who before the 14th day of May 1954, had acquired immovable property in the State and had been resident therein, for not less than 10 years prior to that date have only been recognized as permanent residents and class IV State Subjects have not been included within the scope of the term, it is obvious that companies have been excluded from the category of the permanent residents. If Companies like the Jammu and Kashmir Bank had been intended to be included in the category of the permanent residents, one would have expected a provision on the line of Section 5-B of the Jammu and Kashmir Constitution Act, 1966 in the present Constitution of the State the inconsistency between the Notifications and order of His Highness on the one hand and the present Constitution of the State on the other is apparent. Consequently the Jammu and Kashmir Bank ceased to be a permanent resident as a result of the provisions contained in the present Constitution and was rendered incapable of acquiring any interest in land or other immovable property as according to Sections 138 and 139 of the Transfer of Property Act, no transfer of immovable property or interest therein could be effected in favour of non-permanent resident.

29. Feeling this void, the State Legislature, firstly by means of Act No. 20 of 1961, and then by means of Act No. 26 of 1961 amended Section 140 of the Transfer of Property Act, making it possible thereafter for the Jammu and Kashmir State, Financial Corporation,

*This ruling has been affirmed in the *Tata Engineering and Locomotive Co. Ltd v. The State of Bihar*, AIR 1965 SC 40 and AIR 1967 SC 295.

sideration and allow them only such damage as they did not suffer voluntarily".

7. The above decision was followed by our learned brother, Krishnamoorthy Iyer J. in *Sreedevi Amma v. Rugmini Amma*, 1966 Ker LJ 844. In that case also, the plaintiff obtained a decree for redemption of a mortgage, and took delivery of the property from the defendants in execution, after depositing the mortgage amount. The defendants filed an appeal; and during the pendency of the appeal, the tenancy law was amended. On the basis of the amendment, the trial Court's decree was reversed; and the defendants claimed restitution. The plaintiff contended, among other things, that he should be given credit for interest which the defendants would have earned, if they withdraw the amount deposited in Court by the plaintiff as mortgagor. The learned Judge accepted the contention on the authority of the above decision of the Allahabad High Court. He also quoted a passage from page 544 of Civil Procedure Code by Mulla, 13th Edition, in support of his view. It may be seen that the only authority that the learned author relies on for the proposition contained in the said passage is the decision of the Allahabad High Court. Our learned brother has extracted also the following passage from the judgment of the Privy Council in *Rodger v. The Comptoir D'Escompte De Paris*, (1871) 3 PC 465, in support of his decision:—

"It is contended, on the part of the Respondents here, that the principal sum being restored to the present petitioners, they have no right to recover from them any interest. It is obvious that, if that is so, injury, and very grave injury, will be done to the petitioners. They will by reason of an act of the Court have paid a sum which it is now ascertained was ordered to be paid by mistake and wrongfully. They will recover that sum after the lapse of a considerable time, but they will recover it without the ordinary fruits which are derived from the enjoyment of money. On the other hand, those fruits will have been enjoyed, or may have been enjoyed, by the person who by mistake and by wrong obtained possession of the money under a judgment which has been reversed. So far, therefore, as principle is concerned, their Lordships have no doubt or hesitation in saying that injustice will be done to the petitioners, and that the perfect judicial determination which it must be the object of all Courts to arrive at, will not have been arrived at unless the persons who have had their money improperly taken from them have the money restored to them, with interest, during the time that the money has been withheld".

The above passage does not seem to support the learned Judge's view. It only indicates the contrary.

8. With great respect, we are unable to accept the view expressed by the two learned Judges of the Allahabad High Court, and

our learned brother in the two decisions (Sic) referred to above. The right of a party, who has been wronged by an erroneous decision consequent on its variation or reversal, is governed by the statutory provision contained in Section 144 of the Civil Procedure Code. There is no scope to bring into it conceptions of "justice, equity and good conscience", which are bound to vary from Judge to Judge. Section 144 Civil P. C. provides as follows:—

"144. (1) Where and in so far as a decree is varied or reversed, the Court of first instance shall, on the application of any party entitled to any benefit by way of restitution or otherwise, cause such restitution to be made as will, so far as may be, place the parties in the position which they would have occupied but for such decree or such part thereof as has been varied or reversed; and, for this purpose, the Court may make any orders, including orders for the refund of costs and for the payment of interest, damages, compensation and mesne profits, which are properly consequential on such variation or reversal.

(2) No suit shall be instituted for the purpose of obtaining any restitution or other relief which could be obtained by application under sub-section (1)".

It is clear from the above provision that what an aggrieved party is entitled to get by way of restitution or otherwise is that which would place the parties, so far as may be, in the position, which they would have occupied but for the decree, which was varied or reversed. In the case of a defendant, who has been deprived of his property in execution of a decree, which the plaintiff should not have got, the least that would do justice is to restore to him the property with mesne profits. It is the duty of the Court to do justice to a party who has been wronged by its decision. We fail to see how the fact that the plaintiff deposited money in accordance with his action, which he should not have instituted, would affect the position of such a defendant. We also fail to see any logic in the reasoning that a defendant, who never wanted the plaintiff's money and who rightly contested that the plaintiff had no right to file this suit, should have drawn the money from Court and mitigated the loss of the plaintiff. This could have been possible, only if the defendant drew the money, and invested it profitably. The more proper thing would have been for the plaintiff not to file the action, and if he does so, not to deposit the money and take delivery of the defendant's property, until the decree became final. If he elects to execute a decree pending in appeal, he takes the risk of the decree being reversed; and if the decree is reversed, he must restore to the defendant the benefits which the plaintiff received under the reversed decree. This is plainly, what Sec. 144, Civil P. C. requires.

9. A Division Bench of this Court had occasion to deal with the scope of the provi-

sion in Central Bank of India Ltd. v. Chat-tanath Karayalar, 1966 Ker LJ 197 = (AIR 1966 Ker 225). There is a very elaborate discussion of the matter in this decision; which fully supports our view. In Bhagwant Singh v. Sri Kishen Das, AIR 1953 SC 138, dealing with the principles underlying Section 144 C. P. C. The Supreme Court said:

".....the principle of the doctrine of restitution is that on the reversal of a judgment the law raises an obligation on the party to the record who received the benefit of the erroneous judgment to make restitution to the other party for what he had lost, and that it is the duty of the Court to enforce that obligation, unless it is shown that restitution would be clearly contrary to the real justice of the case".

We, therefore, hold that the appellant's claim that, when assessing his liability for mesne profits, he should be given credit for interest on the amount deposited by him in Court along with the filing of this suit, is untenable.

10. In the result, we dismiss this appeal with costs. We make it clear that the amount, if any, deposited by the appellant towards his liability for mesne profits, or made available for being drawn towards the said liability, should be credited towards the said liability as determined by the Court below, on the dates on which notice of such deposit or of the fact that any such amount was so available to the respondents, was given to them by the appellant. In other respects, the order of the lower Court is confirmed.

JHS/D.V.C.

Appeal dismissed.

AIR 1969 KERALA 34 (V 56 C 11)

T. S. KRISHNAMOORTHY IYER, J.

Narayanan Namboodiri Karnavan, Appellant v. Appukutty Nair and others, Respondents.

Second Appeal No. 297 of 1964, D/-30-11-1967, from order of Sub. J., Badagara, in A. S. No. 287 of 1959.

Transfer of Property Act (1882), S. 105 — Lease or licence — Absence of document — Intention of parties and surrounding circumstances to be considered — A engaged as karaistha of illom entrusted with disputed property — Subsequently A ceasing to be Karaistha but out of consideration for him property not resumed and he was allowed to be in enjoyment of property — On A's nephews trespassing on property, illom filing suit for their ejection — After recovery of property in execution illom again putting A in possession on same terms — Possession of A held not that of licensee but of lessee — Case law discussed.

(Paras 7, 8)

Cases Referred: Chronological Paras
(1968) AIR 1968 SC 175 (V 55)=
1967-2 SCWR 406, B. M. Lall v. Dunlop Rubber & Co. Ltd. 6
(1959) AIR 1959 SC 1262 (V 46)=
(1960) 1 SCR 368, Associated Hotels of India Ltd. v. R. N. Kapoor 6
(1958 1958-1 QB 513=1957-3 All ER 563, Addiscombe Garden Estates Ltd. v. Crabbe 6
(1952) 1952-1 KB 290=1952-1 All ER 149, Errington v. Errington and Woods 6
(1952) 1952-1 TLR 1037=1952-1 All ER 1199, Cobb v. Lane 6
(1952) 1952-1 TLR 1386=96 SJ 395, Facchini v. Baryson 6
(1952) 1952-2 TLR 659=96 SJ 747, Torbett v. Faulkner 6
(1952) Decided on 26-3-1952 in Gorham Contractors Ltd v. Field 6
(1951) Decided on 24-10-1951 in Webb Ltd. v. Webb 6
(1949) 65 TLR 138=1949-1 All ER 483, Ford v. Langford 6
(1948) AIR 1948 Cal 8 (V 35)=51 Cal WN 517, Governor General of India v. Corporation of Calcutta 7
(1944) AIR 1944 PC 42 (V 31)=71 Ind App 31, Corporation of Calcutta v. Province of Bengal 7
(1922) AIR 1922 Bom 70 (V 9)=24 Bom LR 54, Nippon Menkwa Kalmshiki v. F. Portlock 6
(1890) 24 QBD 147=59 LJ QB 100, Marsh v. Estcourt 7
(1875) 10 CP 285=44 LJ CP 42, Fox v. Dally 7
(1875) 10 QB 422=44 LJ MC 114, Smith v. Seghill Overseers 7
A. Achuthan Nambiar and T. P. Kelu Nambiar, for Appellant; P. C. Balakrishna Menon and A. P. Chandrasekharan, for Respondents.

JUDGMENT:— The suit instituted by the plaintiff who is the appellant for declaration of his title to and for recovery of the plaint schedule property was concurrently dismissed by the Courts below.

2. The plaint property admittedly belongs to the Illom of the plaintiff. The plaintiff's case is that it was entrusted to the first defendant who was the karaistha of the Illom for some time by the plaintiff's father deceased Kesavan Nambudiri. The first defendant ceased to be the karaistha of the Illom in the year 1132. But out of consideration for the first defendant the property was not resumed and he was allowed to be in enjoyment of the property. The first defendant executed Ext. A-1 lease on 12-2-1958 in favour of his son who is the second defendant. In view of Ext. A-1 the plaintiff is entitled to recover possession of the property.

3. The first defendant while admitting the title of the plaintiff's Illom to the plaint property contended that he is a

lessee of the plaint item. Ext. A-1 was executed in favour of the second defendant with the consent of the plaintiff and he has no right to recover possession of the plaint schedule property.

4. According to the plaintiff, the entrustment of the property by his father to the first defendant is only in the nature of a licence and not a lease and therefore he is entitled to recover possession of the property. The Courts below found that the first defendant is a lessee of the plaint schedule property and not a mere licensee and even though the plaint property belongs to the plaintiff's Illom the plaintiff has no right to recover possession. To appreciate the controversy between the parties it is necessary to take note of certain admitted facts in the case.

5. There is no document to evidence the transaction between the plaintiff's father and the first defendant. The plaint property was outstanding on registered kanom from 1887 in favour of the first defendant's brother Kanaran Nair who was also the Karyastha of the Illom. After his death the first defendant who was even then the karyasthan of the Illom continued in possession of the property under that lease paying rent to the Illom. While so, the nephews of the first defendant trespassed upon the property and forcibly harvested the crops. The Illom therefore filed O. S. 201 of 1929 to remove the trespass. Ext. A-7 is the copy of the extract of the suit register evidencing the institution of O. S. 201 of 1929. After the property was recovered in execution of the decree in O. S. 201 of 1929 it was again given to the first defendant. Ext. A-7 shows that the kanom was for Rs. 75/- and the annual rent fixed for the property is 108 1/2 edangazhies of paddy. The evidence is not quite specific regarding the date of death of Kanaran Nair. The delivery in execution of O. S. 201 of 1929 was on 14-10-1929. According to the first defendant, the institution of O. S. 201 of 1929 by the Illom was at his instance to eject his nephews who were trying to put forward certain rights against him and the property was after delivery entrusted back to him by the Illom. The Courts below held that the entrustment of the property to the first defendant by the Illom was in continuation of the kanom in favour of Kanaran Nair.

6. The plaintiff's case is that during the time when the first defendant was taking the yield of the property he was not being paid any salary and the arrangement was that the yield should be appropriated towards his remuneration for the service he was rendering as Karyastha and therefore he was a licensee and not a lessee. To support his contention the learned Counsel for the plaintiff relied

on the decision in *B. M. Lall v. Dunlop Rubber & Co. Ltd.*, 1967-2 SC WR 406= (AIR 1968 SC 175). In that case the question arose whether the occupation by an officer of a company of a building belonging to the company while in company's services is in the nature of a licence or lease. Their Lordships observed:

"The transaction is a lease, if it grants an interest in the land; it is a licence if it gives a personal privilege with no interest in the land. The question is not of words but of substance and the label which the parties choose to put upon the transaction, though relevant, is not decisive. The test of exclusive possession is not decisive. see *Errington v. Errington and Woods*, (1952) 1 KB 290 (292); *Associated Hotels of India Ltd. v. N. N. Kapoor*, 1960-1 SCR 368 at pp. 381-385= (AIR 1959 SC 1262 at pp. 1268-1270) though it is a very important indication in favour of tenancy. See *Addiscombe Garden Estates Ltd. v. Crabbe*, (1958) 1 QB 513 at p. 525. A servant in occupation of premises belonging to his master may be a tenant or a licensee, see *Halsbury's Laws of England Third Edition*, Vol. 23, Article 990, p. 411. A service occupation in a particular kind of licence whereby a servant is required to live in the premises for the better performance of his duties. Formally, the occupation of the servant was regarded as a tenancy unless it was a service occupation, see *Nippon Menkwa Kalmshiki v. F. Portlock*, AIR 1922 Bom 70. Now it is settled law that a servant may not be in service occupation. In *Torbett v. Faulkner*, (1952) 2 TLR 659 at p. 660, Denning L. J., said:

"A service occupation is, in truth, only one form of licence. It is a particular kind of licence whereby a servant is required to live in the house in order to do his work better. But it is now settled that there are other kinds of licence which a servant may have. A servant may in some circumstances be a licensee even though he is not required to live in the house, but is only permitted to do so because of its convenience for his work: see *Ford v. Langford*, (1949) 65 TLR 138, per Lord Justice Asquith, and *Webb Ltd. v. Webb* unreported, 24-10-1951 and even though he pays the rates, *Gorham Contractors Ltd. v. Field* (unreported, 25-3-1952) and even though he has exclusive possession, *Cobb v. Lane*, (1952) 1 TLR 1037."

The Lord Justice then continued.

"If a servant is given a personal privilege to stay in a house for the greater convenience of his work, and it is treated as part and parcel of his remuneration, then he is a licensee, even though the value of the house is quantified in money;

but if he is given an interest in the land, separate and distinct from his contract of service, at a sum properly to be regarded as a rent, then he is a tenant, and nonetheless a tenant because he is also a servant. The distinction depends on the label which the parties choose to put upon it; see *Fachini v. Baryson*, 1952-1 TLR 1386."

7. The decision in the case turned on the terms of the written agreement between the parties. The principle in such cases is stated thus by their Lordships of the Judicial Committee in *Corporation of Calcutta v. Province of Bengal*, AIR 1944 PC 42:

"The general principles upon which a tenancy as opposed to an occupation as servant is created are not in dispute. The mere fact that it is convenient to both parties that the servant should occupy a particular house and that he is put in possession of it for that reason does not prevent the servant from being a tenant: his possession is that of a tenant unless he is required to occupy the premises for the better performance of his duties though his residence is not necessary for that purpose or if his residence there be necessary for the performance of his duties though not specifically required. See per Brett, J., in (1875) 10 CP 285 at p. 295.

The position is unaffected by the circumstance that the servant is entitled to occupy the house only so long as he retains his position as servant or the particular office in virtue of which the house is provided. The same principles apply though he may be a tenant at will. See (1875) 10 QB 422 and (1890) 24 QBD 147." In *G. G. of India v. Corporation of Calcutta*, AIR 1948 Cal 8, B. K. Mukherjee, J., after a review of several decisions on the subject observed thus:

"If it is a requirement of the contract of service that a servant should live in a house owned by the master whether it is suitable to him or not or if the occupation is necessary and subservient to the service it should be deemed to be the occupation of a servant and not of a tenant."

On the other hand, if residence is merely optional or is a matter of convenience to the employee and is not required for the better or more efficient performance of his service the occupation will be deemed to be that of a tenant and not of a servant."

It is in the light of these principles that question has to be considered. It cannot be disputed that the ultimate answer to the question will depend upon the intention of the parties to the transaction. In the absence of any document we have to be guided by the surrounding circum-

stances and the way in which the first defendant began to enjoy the property. The institution of O. S. 201 of 1929 by the Illom was for purpose of putting back the first defendant into possession of the plaint schedule property when he was dispossessed by his nephews. This obviously shows that the Illom of the plaintiff wanted the 1st defendant to continue in possession on the same terms on which he was in possession prior to the filing of O. S. 201 of 1929. That possession was not that of a licensee but a lessee.

8. It was also pointed out by the learned Counsel for the appellant that in Ext. A-1 there is no reference to any lease. The expression used is " * * " (Original in Malayalam omitted). It is not possible from those words to infer that the 1st defendant is only a licensee. In these circumstances, the findings of the Courts below are correct and they do not require any interference. The Second Appeal is therefore dismissed but in the circumstances, I make no order as to costs.

LGC/D.V.C.

Appeal dismissed.

AIR 1969 KERALA 36 (V 56 C 12)

P. T. RAMAN NAYAR, J.

Manninkal Krishna Kurup, Appellant v. Swamiyar Avergal and another, Respondents.

Second Appeal No. 803 of 1964, D/- 6-11-1967, from order of Sub. J., Palghat, in A. S. No. 42 of 1963.

Specific Relief Act (1877), S. 42, Proviso — Dismissal of servant of religious institution — No compliance by trustee, in spite of order of Dy. Commissioner's setting aside dismissal — Declaration that dismissal is void can be granted by Civil Court — Proviso not attracted merely because second relief of reinstatement was refused.

A servant of religious institution was dismissed by the trustee and in spite of the order of the Deputy Commissioner, setting aside the dismissal and remanding the case, no action was taken by the trustee.

Held that the order of dismissal having been set aside by the competent authority the servant was entitled to seek declaration from the Civil Court that the order of dismissal is void. As the order of dismissal affects civil rights of the servant, it is proper for the Civil Court to make declaration in his favour and proviso to S. 42 could not be attracted merely because the second relief of reinstatement was not granted to him.

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when it was not found that the prayer for a further unavailable relief was a mere subterfuge to avoid the provisions of S. 42. AIR 1967 SC 436, Foll. (Para 2)

Cases Referred: Chronological Paras (1967) AIR 1967 SC 436 (V 54)=

(1966) Supp SCR 270, Vemareddi

Ramaraghava Reddy v. K. Seshu

Reddy

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V. R. Venkitakrishnan, for Appellant;
D. Narayanan Potti, for Respondents.

JUDGMENT:—The appellant plaintiff was a clerk in a religious institution governed by the provisions of the Madras Hindu Religious and Charitable Endowments Act, 1951. The hereditary trustee of this institution had been removed from office and the management of the institution taken over by the Endowments Board which acted through an executive officer, and it would appear that the plaintiff was first appointed as clerk by the executive officer. However, consequent to the provisions of the Act authorising such assumption of management having been struck down, the management was restored to the trustee, the 1st defendant herein who appointed the 2nd defendant as a manager under him. On application made by him to the 2nd defendant on 1-7-1956, the plaintiff was appointed as a clerk on probation, and, that being so, it is clear that the plaintiff's right to the office of clerk depends solely on his appointment under the 1st defendant and cannot in any way relate to his previous appointment by the executive officer.

On 20-11-1956, the 2nd defendant placed the plaintiff under suspension, and, after framing charges against him and holding an inquiry, made the order Ext. B-1 (c) dated 7-5-1957 dismissing the plaintiff from service. It is the finding of the Courts below that the dismissal was in fact ordered by the 1st defendant trustee and that all that the 2nd defendant manager did was to issue the order which the 1st defendant had authorised. Under Section 49 (2) of the Act any office-holder or servant punished by a trustee may appeal against the order to the Deputy Commissioner. The plaintiff accordingly appealed to the Deputy Commissioner against his dismissal, and, on 16-9-1957, the Deputy Commissioner made the order, Ext. A-3, setting aside the order of dismissal passed against the plaintiff and remanding the case to the 1st defendant trustee for fresh disposal in accordance with the procedure laid down by the Act and the rules framed thereunder.

This order of the Deputy Commissioner, the defendants admittedly ignored and they have kept the plaintiff out of office, paying him no salary and making not the least attempt whatsoever to hold

a fresh inquiry. Therefore, on 22-10-1959, the plaintiff brought the present suit for a declaration that the orders of suspension and dismissal made by the 2nd defendant were void and for a mandatory injunction directing the defendants to reinstate the plaintiff in office with back wages. The suit having been dismissed by the Courts below, the plaintiff has come with this Second Appeal.

2. Notwithstanding that Section 49 of the Act affords the servants of religious institutions some measure of protection in the matter of punishment, there can be no doubt that the plaintiff's right to the office derives from a contract for personal service. The Courts below were therefore quite right in declining to order his reinstatement, and his prayer for reinstatement with back wages was in effect a prayer not merely for reinstatement but for arrears of salary without paying court-fee therefor and without regard to the question of limitation. But I do not think that the courts should have refused the plaintiff the declaration he sought in so far as it relates to the order of dismissal. It has not been contended that Section 49 of the Act is bad, and, that being so, it follows that the order of dismissal made against the plaintiff having been set aside by an authority duly empowered by the statute to do so, that order is no longer in force. I think that the plaintiff is entitled to a declaration to that effect.

I do not think that the proviso to Section 42 of the Specific Relief Act stands in the way, for, in the first place, I doubt whether a declaration that the order of dismissal is void would be a claim to a legal character so as to attract the section. It is now put beyond doubt by the decision in Vemareddi Ramaraghava Reddy v. K. Seshu Reddy, AIR 1967 SC 436 that Section 42 of the Specific Relief Act is not exhaustive of the cases in which a declaratory decree may be made by the Court, and, since the order of dismissal affects the plaintiff's civil rights, I think it only proper that the Court should make a declaration in his favour. Secondly, the plaintiff did ask for the further relief of reinstatement, and, that the Court found that he could not be given this further relief would not, to my mind, attract the proviso to the section unless it be further found that this prayer for a further unavailable relief was a mere subterfuge to evade the provisions of the section. Thirdly, I am not sure that there is any further relief that the plaintiff ought to have sought. It is suggested that the plaintiff ought to have asked for arrears of salary, but this, I should think, was not really consequential on the declaration for which he has asked.

3. So far as the order of suspension is concerned that, it would appear, has not been set aside by the Deputy Commissioner in appeal.

4. I have already pointed out that the order of dismissal, although issued by the 2nd defendant manager, was really made by the trustee, and I see no force in the argument that the order of suspension and dismissal are bad in that, under sub-section (1) of Section 49 of the Act, the person competent to suspend or dismiss is the trustee. In fact, in this case, the appointment also was issued by the 2nd defendant manager whereas, under Section 48 of the Act, the power of appointment is vested in the trustee. I am not going into the question whether the trustee of an institution can or cannot delegate his powers of appointment and punishment, for, it seems clear that, as a matter of fact, in making the appointment and the suspension and the dismissal in this case the 2nd defendant manager was acting under orders of the 1st defendant trustee. I do not think that the plaintiff can afford to press his case that the orders of suspension and dismissal made against him are void in that they were made by the manager whereas under Section 49 (i) of the Act the powers of suspension and dismissal are vested in the trustee. For, if that contention be upheld, his very appointment would go since, on his own showing, it was made by the manager and not by the trustee whereas under Section 48 of the Act the power of appointment is with the trustee.

5. I allow this appeal in part and grant the plaintiff a declaration that the order of dismissal made against him has been duly set aside and is not in force. The defendants will pay the plaintiff his costs throughout.

BNP/D.V.C.

Appeal partly allowed.

AIR 1969 KERALA 38 (V 56 C 13)

FULL BENCH

M. MADHAVAN NAIR, T. S. KRISHNA-MOORTHY IYER AND V. BALAKRISHNA ERADI, JJ.

The State of Kerala and others, Appellants v. Annam and others, Respondents.

Writ Appeals Nos. 30, 76, 77, 78, 79 and 80 of 1968, D/- 1-4-1968.

(A) Kerala High Court Act (1959-66), S. 5 (1) — Constitutional validity of impugned provision decided as preliminary point and case posted for further hearing — It is preliminary judgment and appealable — Letters Patent (Bom. Cal. & Mad.) Clause 15 — Civil P. C. (1908), Ss. 2 (2), 2 (9).

Where in a writ petition the judgment of a single Judge determines the main point, namely the constitutionality of the impugned Orders, on which the reliefs sought depend, and orders the writ petition to be posted for further hearing and appropriate orders, it is a preliminary judgment within the meaning of the Civil P. C. and is appealable under S. 5 (1) of the Kerala High Court Act. 1947 Mad WN 723 and (1895) ILR 17 All 112 (PC) and (1890) ILR 15 Bom 155 (PC). Relied on: AIR 1951 SC 14 and AIR 1953 SC 198, Distinguished. AIR 1960 All 692 (FB). Considered. (Para 7)

(B) Kerala Rice and Paddy (Procurement by Levy) Order (1966), Cl. 2 (b) — "Cultivator" — Definition is plain and simple — Does not include labourer through whom owner of land does the cultivation — "Actually" means "really" — Words and Phrases — "Actually".

The definition of 'Cultivator' in Cl. 2 (b) is plain, simple and expressive of the ordinary sense of the term with particular emphasis on paddy being the object of the cultivation. (Para 9)

The expression "a person who actually cultivates" would not signify "one who actually puts his hand to the plough and plough to the soil" and would not include a servant or labourer of an owner of land to be regarded as a "cultivator". 1968 Ker LT 223, Reversed. (Para 9)

When one does an act through the hand of another, one is in law and in fact doing it oneself really. The expression "actually" in the definition does not cause any confusion. The dictionary meaning of the word "actually" is "really"; in actual fact; and of the word "actual", is "real, existing in fact". Qui facit per alium facit per se (He who does anything by another does it himself). AIR 1953 SC 278, Applied. AIR 1957 SC 768 (788). Relied on.

The definition of 'cultivator' in the Levy Order must be construed in consonance with the other provisions of the Order and its object. AIR 1957 SC 628 and AIR 1958 SC 353 and AIR 1965 SC 871 and AIR 1965 SC 1839 (1843). Relied on. (Para 10)

The person who directs the agricultural operations on a piece of land and takes the yield on harvest with a right or power to dispose it is the person who actually cultivates the land. Such appears to be the intent and meaning of the Levy Order. (Para 11)

Even if the definition of "cultivator" be assumed to be vague, the procedure prescribed in Cl. 3C leaves little room for any mistake in fixing the cultivator for purposes of levy. (Para 12)

(C) Kerala Rice and Paddy (Procurement by Levy) Order (1966), Cl. 7 — Clause does not violate Art. 31 (2) of the

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Constitution — Constitution of India, Art. 31 (2) — 1968 Ker LT 223, Reversed.

Clause 7 requires the Government or its officer or nominee purchasing paddy to pay its price "at the prevailing market rate but not exceeding the maximum price specified by the Government for the time being under" the concerned Maximum Prices Order. The price paid to the cultivator for the paddy procured by the Government should be a "just equivalent" to the commodity taken from him. But the material question is what is the "just equivalent". It cannot be price that is "adequate", which is placed beyond judicial review by the Article 31 (2) of the Constitution. When fixation of maximum price is in force the market price cannot rise above it: It may be anything equal to or less than the maximum price. Any sale at a price above it will not be lawful and therefore cannot afford a standard for "just equivalent" for the commodity. The word 'just' repels consideration of any illegal transaction as its standard. The provision in the Levy Order for payment of price to the cultivator "at the prevailing market rate subject to the maximum price specified by the Government for the time being under the concerned Maximum Prices Order does not therefore spell any negation of a just equivalent or a violation of Article 31 (2) of the Constitution. 1968 Ker LT 223, Reversed. (Para 13)

(D) Kerala Rice and Paddy (Procurement by Levy) Order (1966) — Levy order is governed by S. 3 (3B) of Essential Commodities Act and not S. 3 (3) of the Act — Essential Commodities Act (1955), S. 3 (3) and (3B). (Para 14)

(E) Kerala Rice and Paddy (Procurement by Levy) Order (1966), S. 7 — Essential Commodities Act (1955), S. 3 (3B) — Levy Order does not transgress limits of delegation conceded to State — The Order contains specification of price — Constitution of India, Art. 31 (2) — 1968 Ker LT 223, Reversed.

Article 31 (2) of the Constitution uses two different verbs 'fixes' and 'specifies' and requires the law of acquisition either to fix the amount of compensation or to specify the principles on which the compensation is to be determined. The direction in S. 3 (3B) of the Essential Commodities Act is only to specify the price. In not using the word 'fix' in relation to the price, the Act expresses its intention not to require the price to be given in Rupees and paise in the Order itself. The expression 'specify' is deliberately used in the Act to mean only that the price should be indicated in the Order with such particularity as to make it capable of definite ascertainment. The description "at the prevailing market rate but not exceeding the maximum price specified by the Gov-

ernment for the time being under the relative Maximum Prices Order" is specific within the meaning of the said subsec. (3B). It cannot therefore be said that the Levy Order does not specify the price as such; The State has not transgressed the limits of the delegation conceded to it and the Levy Order is not invalid. 1968 Ker LT 223, Reversed.

(Para 16)

(F) Kerala Rice and Paddy (Procurement by Levy) Order (1966), Cl. 7 — The order does not ignore direction in S. 3 (3B) of the Essential Commodities Act, that cultivator is to be given price specified in the Order having regard to the price "likely to prevail during the post-harvest period" — Essential Commodities Act (1955), S. 3 (3B). 1968 Ker LT 223, Reversed.

Under S. 3 (3B) of the Essential Commodities Act, the cultivator is entitled to be given a price specified in the Order having regard to the price "likely to prevail during the post-harvest period in the area to which that Order applies" and the same is not ignored by the Levy Order. The sub-section in question does not say that any possible future price should necessarily be taken into account when the cultivator is paid for the procured foodgrains. It mentions 'the price likely to prevail during the post-harvest period' only as an alternative to the 'price prevailing' as a factor for consideration in specifying the price to be paid for the grains procured. The "price prevailing" must necessarily relate to the current time, and not to any future and that is the alternative that the Levy Order has adopted when it provided that the cultivator shall be paid "at the prevailing market rate but not exceeding the maximum price". When both the controlled price and the prevailing or likely-to-prevail price are directed to be taken into consideration, the latter can only be envisaged as one below the controlled price and not exceeding it. Since the cultivators have, since the date of promulgation of the Levy Order, been paid the maximum price fixed by the Government, they cannot have any legitimate grievance in this regard. 1968 Ker LT 223, Reversed. (Para 17)

(G) Kerala Rice and Paddy (Procurement by Levy) Order (1966) — Essential Commodities Act (1955), S. 3 (2) (f) — Levy Order is constitutional — Concurrence of Central Government was not necessary — Civil P. C. (1908), Preamble — Interpretation of Statutes — Repeal and supersession.

The constitutionality of an Act must be judged on the basis of the Constitution as it was on the date the Act was passed, subject to any retrospective amendment of the Constitution. The same

principle should apply when the question is of constitutionality or vires of a Statutory Order and other pieces of subordinate legislation. AIR 1963 SC 1019 (Pr. 14), Relied on. (Para 19)

The Levy Order was made by the State Government on 1st July, 1966, under authority conferred on it by G. S. R. No. 906 dated June 9, 1966. That G. S. R. did not require any concurrence of the Central Government for Orders relating to matters specified in Cl. (f) of S. 3 (2) of the Essential Commodities Act. Nor has G. S. R. No. 1508 dated 30th September, 1967, that prescribed prior concurrence of the Central Government, been made to apply to Orders already made. The Levy Order has therefore to be held to have been lawfully made on the date of its promulgation and not to require a concurrence of the Central Government for its validity. The contention, that, with the supersession of G. S. R. No. 906 by G. S. R. No. 1111 on July 24, 1967, the Levy Order lost its validity cannot also be accepted.

Distinction between a supersession and a repeal of statute pointed out. AIR 1945 Oudh 214 and 1963-1 Cr LJ 372 (Mys) and AIR 1962 SC 945, Relied on.

(Para 20)

G. S. R. No. 906 was not 'temporary'. The Levy Order made under it is also not 'temporary' but is obviously intended to last for an indefinite time. G. S. R. No. 906 was not repealed but only superseded by G. S. R. No. 1111. There is nothing in the latter Rule or in any subsequent Order or Rule indicating an intention to annul Orders issued under any prior G. S. R. True, G. S. R. No. 906 contained a clause and a proviso "that the Orders specified in the Schedule below shall stand rescinded: Provided that, notwithstanding such rescission, any order made by a State Government in pursuance of the orders so rescinded shall continue in force according to its tenor." There is no similar proviso or saving clause in G. S. R. No. 1111, for the obvious reason that it does not purport to rescind anything. AIR 1962 SC 945 and AIR 1961 SC 838 and AIR 1955 SC 84, Applied. 1968 Ker LT 223, Affirmed. (Para 28)

(H) Essential Commodities Act (1955), S. 3 (6) — Laying of Order before Parliament is not condition precedent for validity of Order — Kerala Rice and Paddy (Procurement by Levy) Order (1966) is not invalid.

By its expression sub-s. (6) of S. 3 of the Essential Commodities Act does not make the laying before the Parliament a condition precedent to the validity of the Order made under the Act: nor does it annul the Order if it is not laid before the Parliament within a specified time. A law once brought to force nor-

mally continues in force till it is determined by a statutory provision therefor. To interpret the expression in the subsection 'as soon as may be' to mean 'within a reasonable time' would make the duration of the law uncertain and therefore cannot be accepted. The obligation is not laid on the State Government to lay Orders made by it before the Parliament. It cannot therefore be contended that the Kerala Rice and Paddy (Procurement by Levy) Order (1966), made under the Act is invalid because it was not laid before the Parliament. AIR 1954 SC 210 and AIR 1966 SC 385, Relied on. 1968 Ker LT 223, Affirmed. (Paras 21, 22)

(I) Essential Commodities Act (1955), S. 3 (2) (f) — S. 3 is not invalid because it did not contain legislated guidance as to the scope and ambit of Govt's powers to make Orders under it.

Section 3 of the Act cannot be attacked as unconstitutional because it contains no legislated guidance as to the scope and ambit of the Government's powers to make Orders under it, and particularly Section 3 (2) (f) which did not prescribe the minimum limit of stock to attract a liability to sell. (Para 23)

Considering the object of the Levy Order, which is to secure "equitable distribution and availability at fair prices" of food-grains for all at a time of countrywide food shortage, the determination of quantity to be procured from or to be allowed to be retained by a producer must necessarily be left to the State Government who is the best appraiser of the pressure of the time, the urgency of the situation and the maintenance of public morale. Even a monopoly procurement may be justified if circumstances require such a course. (Para 23)

(J) Essential Commodities Act (1955), S. 3 (2) (f) — "Person holding the stock" does not mean that he should have both possession and title — Two-fold idea cannot be imported in definition of "cultivator" in Cl. 2 (b) of Kerala Rice and Paddy (Procurement by Levy) Order (1966).

It cannot be said that the word 'holds' includes invariably possession and title of the thing held. What it means in a particular context must necessarily depend upon the context itself.

The expression "a person holding in stock" in S. 3 (2) (f) of the Act does not include a two-fold idea of actual possession of a thing and also being invested with a legal title and this limitation of possession and title cannot be imposed into the definition of "Cultivator" in the Levy Order. In a legislation designed to meet urgent public need for foodgrains, the title to property in the paddy, which is a matter of individual concern between

the rival claimants thereto, cannot enter seriously for consideration. Procurement for price paid involves little deprivation of property: it works only a conversion of the commodity into its equivalent in cash. In the circumstances of the Levy Order an investigation on ultimate title is neither relevant nor practical. AIR 1966 SC 1191, Expl. (Para 24)

(K) Essential Commodities Act (1955), Ss. 3 (2) (f) and 3 (3c) — Kerala Rice and Paddy (Procurement by Levy) Order (1966), because it deals with cultivators only has not travelled beyond the Act.

Section 3 (2) (f) of the Act does not use the expression 'producer'. Section 3 (3c) which uses that expression is unrelated to paddy or rice with which only the Levy Order is concerned. In the context of the Levy Order it is also difficult to say that the cultivator of paddy is not one of the class of producers of foodgrains. It cannot therefore be said that the Levy Order has travelled beyond the Act. (Para 25)

(L) Essential Commodities Act (1955), S. 3 (2) (f) — "Stock" of food grains does not mean stock for sale — Kerala Rice and Paddy (Procurement by Levy) Order (1966) is not ultra vires because it directs procurement as soon as paddy is harvested and before requirements of produce are ascertained.

The expression 'stock' in Section 3 (2) (f) appears to mean a collection or store. When a crop of paddy is harvested, threshed and the harvesting workers' charges are paid, what the cultivator takes thereafter is his 'stock' of paddy within the meaning of Section 3 (2) (f) of the Act, and the Levy Order made in relation thereto is therefore well within its purview. There is nothing in that sub-section to indicate that the stock means only a stock for sale after providing for one's requirements. The Order is not ultra vires because it directs procurement as soon as paddy is harvested and before the requirements of the producer are ascertained and allowed for. (Para 25)

(M) Essential Commodities Act (1955), S. 3 (2) (f) — "Person holding stock" does not postulate holding in quantities in excess of one's requirement — Kerala Rice and Paddy (Procurement by Levy) Order (1966), is not ultra vires.

The expression "any person holding in stock any essential commodity" in S. 3 (2) (f) of the Act must, in the context, comprehend all persons having possession of any appreciable quantity of the commodity. In the nature and purpose of the Act it cannot be said that the Levy Order that directs sale of a relative excess of the production of a large scale cultivator, has outstepped the Act. The expression 'holding in stock' does not ne-

cessarily postulate "holding in quantities in excess of one's own requirements". 1966 Ker LT 931, Relied on. (Para 26)

(N) Kerala Rice and Paddy (Procurement by Levy) Order (1966), Cls. 3, 6, 3-C — Notification under Cl. 3 is not violative of rule of equal protection in Art. 14 of the Constitution — Levy is not unrelated to actual yield — Constitution of India, Art. 14.

Even if the scales of levy notified under Cl. 3 of the Order, classified according to taluks and areas cultivated by each cultivator is found hard for any individual farmer to comply, the Order provides by its clause 6 for an objection by the cultivator, enquiry and decision thereon by a Taluk Supply Officer and an appeal, if needed, from his decision to the District Supply Officer and an overall access to the Government, the Commissioner or Director of Civil Supplies. Considering the enormosity of the range of operation of the Levy Order and the speed with which it has to be worked, ample justice has to be held met by the above provisions. The constitution of official staff to survey and inspect all paddy fields in the State to assess their actual yield would involve an administrative machinery so stupendous and costly that the very object of the Order would be frustrated. It has to be kept in mind that Courts are not to sit tight on every governmental action. A judicial review of governmental action should not involve excessive timidity that would encourage arbitrariness in administration nor temerity that would paralyse the administration. (1930) 282 US 499 (501), Relied on. 1968 Ker LT 223, Affirmed, AIR 1967 SC 1458 and AIR 1961 SC 552, Distinguished. (Para 27)

The basis of classification under the Order is not area alone but area and general productivity. For regulation by a general law only the general yield of a locality can be taken as the standard. For assessing general yield a taluk is taken as the unit by the Levy Order. It is too much to assume that the yield from lands similarly situated would vary so widely. Clause 3C also affords opportunity to every cultivator to inform the Village Officer 7 days before harvest, the extent of lands cultivated by him and the date of the harvest and the estimated yield thereof, and that affords the basis of further proceedings under the Levy Order. The contention that the levy is unrelated to the actual yield of the land does not bear much merit. (Para 28)

It cannot therefore be said that the scale of levy notified under Cl. 3 of the Levy Order pays no regard to the actual production of a cultivator and is therefore arbitrary and violative of the rule of equal protection in Article 14 of the Constitution. (Para 27)

(O) Kerala Rice and Paddy (Procurement by Levy) Order (1966), Cl. 3 — Classification is not unreasonable — Constitution of India, Art. 14.

Article 14 of the Constitution does not prohibit reasonable classification and the classification made under the Levy Order is not unreasonable. All cultivators are given exemption from levy for the first 2 acres of cultivated land and all have to measure the same measure of paddy for every acre cultivated beyond 2 acres, the same measure though at a higher rate per every acre beyond 5 acres, and the same measure though at a still higher rate per acre above 10 acres. That the rates rise as the slabs rise cannot spell any unreasonable discrimination within the meaning of Article 14 of the Constitution. The merit of equal protection of the laws does not lie in giving the same treatment to every member of the society, for all are not of the same condition; but in giving to those in want according to their needs and taking from those in plenty according to their stocks. AIR 1952 Pat 220 (226) (FB), Relied on. (Para 29)

(P) Kerala Rice and Paddy (Procurement by Levy) Order (1966), Cls. 13, 6, 11 — Clause does not give Govt. unbridled power and is not arbitrary — Discretion of administrative officers under Cl. 6 is not unguided and arbitrary — Constitution of India, Art. 14.

The power to exempt from the operation of the Order any class of cultivators is given to the Government only and that has been specified, in the clause itself, to be exercised only "in the public interest" having regard to the conditions prevailing in any area". This itself is some safeguard against the abuse of this power. AIR 1954 SC 465 and AIR 1957 SC 895 and AIR 1957 SC 510 and AIR 1961 SC 1731, Relied on. (Para 31)

The power to reduce levy on objections by cultivators under Clause 6 (2) of the Order is left to the discretion of the Taluk Supply Officers. The Court cannot presume that the administration of a particular law would be done "with an evil eye and unequal hand". The jurisdiction to decide is conferred on a responsible officer, and the subjection of his decision to the supervision (under Clause 11) of the Government and the Commissioner and Director of Civil Supplies is a sufficient safeguard against abuses by individual officers. AIR 1954 SC 465, Relied on. (Para 32)

(Q) Kerala Paddy and Rice (Declaration and Requisitioning of Stocks) Order (1966), Cl. (4) — Clause does not give arbitrary power to officers to order, stock-holder to sell specified quantity paddy without any enquiry as to stock

in his possession — Essential Commodities Act (1955), S. 3 (2) (f). 1968 Ker LT 223, Reversed.

The Declaration Order has been made under S. 3 (2) (f) of the Essential Commodities Act, along with the Levy Order, Rice (Purchase by Levy) Order and the Rationing Order, as part of a scheme designed to secure "equitable distribution and availability at fair prices" of food-grains to ease the food shortage in the country. Every stock-holder — not being a cultivator who has sold the levy paddy and not been specially required by the Government, Commissioner (Or Director) of Civil Supplies, District Collector or District Supply Officer to declare — has to declare the quantity of paddy and rice in his possession or control to the Tahsildar or the Taluk Supply Officer. The Taluk Supply Officer has a record, under the Rationing Order, of the number of members in every house, taken from the head of the family. It cannot therefore be said that the officers concerned have no data for determining the stock and the number of members in the stock-holder's family to assess their requirements of the foodgrain. As the information on the above matters is given by the stock-holder himself, no enquiry is normally needed to fix the quantity of paddy to be requisitioned from him, unless the officer suspects suppression of facts in which case he has to make an enquiry in the matter. If, in any particular case, the stock-holder is not satisfied with his decision, an appeal is provided for under Cl. 6; and the Government and the Commissioner (which term includes the Director also) of Civil Supplies have powers to revise any order of any officer. Clause 4 of the Declaration Order cannot be attacked on the ground that it is arbitrary in that it allows officers even of the status of a Panchayat Executive Officer to order a stock-holder to sell a specified quantity of paddy to a nominee of the Government without any enquiry as to the volume of the stock in his possession and his requirements for the maintenance of himself and his family. 1968 Ker LT 223, Reversed. (Para 34)

(R) Kerala Paddy and Rice (Declaration and Requisitioning of Stocks) Order (1966), Cl. 4 — Classification is not unreasonable — Essential Commodities Act (1955), S. 3 (2) (f) — Constitution of India, Art. 14. 1968 Ker LT 223, Reversed.

Though under S. 3 (2) (f) of Essential Commodities Act, the power of the State Govt. to requisition extends to the whole of the stock of paddy and rice in the possession or control of the stock-holder, the State Government has, in the Declaration and Requisitioning Order, made a concession to him to retain a part of it

and has for that purpose classified the stock-holders according to their relation with the stock and their co-operation with the Government in the administration of the Order. Article 14 of the Constitution guarantees equality before the law and equal protection of the laws. But that does not exclude a reasonable classification of persons, objects or transactions, for attaining certain objectives. If a classification is based on some real and substantial distinction, bearing a just and reasonable relation to the objects sought to be achieved, it is valid. It cannot be said that the classification made in Cl. 4 of the Order does not have a real relation to the object of the Order. AIR 1966 SC 619. Relied on. (Para 35)

Allowing concessions at different rates to producers, rent-receivers and non-producers among the stock-holders, all of which are at a rate much above that given to other citizens and even to persons engaged in essential services like the Defence, is also not unreasonably discriminatory. An incentive to cultivators of foodgrains to enhance production in the country in the context of shortage of foodgrains in the country cannot be said to be an unreasonable discrimination. A larger concession shown to persons concerned in the production of paddy is not unrelated to the objects of the Order, one of which is "for maintaining the supplies of rice and paddy." AIR 1952 Pat 220 (FB), Relied on.

(Para 36)

"Allowance of 1.5 quintals of paddy for every acre of land cultivated by the cultivator with paddy" is not arbitrary and unrelated to its purpose viz., meeting the cultivation expenses. Harvest charges do not come in the picture, as they are invariably given at the threshing ground and therefore do not form part of the stock in the possession of the producer. Moreover in the absence of reliable data, to show that 1.5 quintals of paddy per acre would not suffice for the seed and other requirements like food to agricultural labourers at work which have to be met with the grain, and since there is no large difference in labour conditions between one part of the State and another, there cannot be said to be any prejudice to the producers caused by the fixation of an allowance of 1.5 quintals per acre of cultivated area. 1968 Ker LT 223, Reversed.

(S) Kerala Paddy and Rice (Declaration and Requisitioning of Stocks) Order (1966), Cl. 4 — Fixation of compensation for rice and paddy requisitioned at controlled price is "just equivalent" — Constitution of India, Art. 31 (2). 1968 Ker LT 223, Reversed.

The fixation of compensation for the rice and paddy requisitioned under the Order at the controlled price, which is

defined in the Order itself as the maximum price fixed under the Maximum Prices Orders, cannot be attacked as negation of the stock-holder's right to get a "just equivalent" for the grains taken from him. It is one thing to say that the Maximum Prices Orders need periodical revision, and another thing to say that payment of the maximum price fixed by law is not a just equivalent for a thing procured by the Government. In the light of the fact that on sales by private treaty the stock-holder is not entitled to a larger price it cannot be said that the provision to pay the maximum price is anyway unjust in the matter of payment of compensation within the meaning of Article 31 (2) of the Constitution. AIR 1952 Pat 220 (FB), Relied on. (Para 38)

(T) Kerala Paddy and Rice (Declaration and Requisitioning of Stocks) Order (1966), Cl. 3 (1) — Absence of provision to oblige officer to take excess paddy does not result in discrimination — Constitution of India, Art. 14. 1968 Ker LT 223, Reversed.

The preamble and various provisions of the Order indicate clearly the intent and purpose of the law and they afford sufficient guidance to the action of the officers administering the law. It is hardly legitimate to presume that the administration of law entrusted with the executive officers will be exercised 'with an evil eye and an unequal hand'. There is ample power conceded by our Constitution to the Courts to correct the vagaries of any erring individual officer.

(Para 39)

Clause 3 (1) of the Order cannot be attacked on the ground that obliges a stock-holder to declare his stock, but there is no corresponding provision to oblige any officer to take the excess paddy in that stock; nor is any time fixed for making a demand in case the officer proposes to take such excess, and that the absence of a provision for an expeditious demand empowers officers to keep mum in the case of certain persons and to be vigilant in the case of others, and thereby to discriminate largely, tacitly allowing some to sell their stock in open market for prices far above the controlled price and at the same time compelling others to sell their stock to the State at controlled rates. 1968 Ker LT 223, Reversed.

(Para 39)

(U) Kerala Paddy (Maximum Prices) Order (1965) — Kerala Rice (Maximum Prices) Order (1965) — Maximum Prices fixed under conditions prevailing, in 1965 — Absence of any data to show that under the present conditions in the State the maximum prices fixed by the Maximum Prices Orders, 1965, do not leave a fair margin of profit over the cost of production — No material to declare the

maximum prices now in vogue to be unreal and arbitrary — Expression "the maximum price specified by the Government for the time being under the Kerala Paddy/Rice (Maximum Prices) Order 1965" indicates categorically that the intention behind the Maximum Prices Orders is to revise the price from time to time as conditions may require — Orders cannot be attacked on ground that maximum price fixed in 1965 remains the same, in view of the undertaking by the Govt. that it will be checked from year to year. (Para 41)

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In W. A. No. 30/68:

Advocate General, for Appellants; T.
S. Venkiteswara Iyer, (for Nos. 1 and 2),
C. Sankaran Nair (for No. 3), for Respon-
dents.

In W. A. No. 76/68:

K. V. Suryanarayana Iyer, for Appel-
lant; Advocate General, for Respondents
(Nos. 1, 3 and 4).

In W. A. No. 77/68:

K. V. Suryanarayana Iyer, for Appel-
lant; Advocate General, for Respondents.

In W. A. No. 78/68:

K. V. Suryanarayana Iyer, for Appel-
lant; Advocate General, for Respondents
(Nos. 2 to 7).

In W. A. No. 76/68:

M/s. K. Velayudhan Nair and N. R. K.
Nair, for Appellant; Advocate General,
for Respondents.

In W. A. No. 80/68:

E. Easwara Iyer, for Appellant; Advoca-
te General, for Respondents (Nos. 1 to
3); M/s. T. N. Subramania Iyer, V. R.
Krishna Iyer, M. T. Paikaday, K. T. Ha-
rindranath, Cheriyan Manjooran and T.
P. Kelu Nambiyar, Intervened.

MADHAVAN NAIR, J.:— Writ Appeal
No. 30 of 1968 is by the State against the
judgment* dated February 8, 1968, of
Gopalan Nambiyar, J., in O. P. No. 4134
of 1967, wherein the Kerala Rice and
Paddy (Procurement by Levy) Order,
1966, and Clause 4 of the Kerala Paddy
and Rice (Declaration and Requisitioning
of Stocks) Order, 1966, have been held

violative of Constitutional provisions.
The two Orders will be referred to here-
inbelow as 'the Levy Order' and 'the Decla-
ration Order' adopting the short-names
used by the learned Judge.

2. The petitioners in the above-said
O. P. (a mother and son) are admittedly
cultivators of paddy in 30.49 acres of
land — according to the State they culti-
vate 34.91 acres — who challenged the
Levy Order which compels them to sell
paddy to Government on a graduated
scale according to acreage against pay-
ment of price not exceeding the maxi-
mum price fixed by the Government, and
the Declaration Order under which they
might be compelled to declare the paddy
in their possession or control and to sell
it to the Government, as unconstitutional.
By consent of parties, this O. P. was
heard by the learned Judge, along with
720 others that challenged the above-said
Orders as also the Kerala Paddy (Maxi-
mum Prices) Order, 1965, and the Kerala
Rice (Maximum Prices) Order, 1965 —
hereinafter 'the Maximum Prices Orders'
— on "the question of the constitutional
validity of the Orders" as a "preliminary
point" and by a judgment common for all
the 721 O. Ps. the learned Judge has
held:

"The expression 'cultivator' has been
defined as 'one who actually cultivates
any land with paddy.' On the definition,
it seems to signify one who actually puts
his hand to the plough, and the plough
to the soil. It seems also immaterial that
the land he cultivates is one in which he
has himself no proprietary or beneficial
interest. If this be the meaning to be at-
tributed to the term 'cultivator' the
working of the Levy Order would be re-
duced to an absurdity. It would mean
that even a servant or labourer of an
owner of land is to be regarded as a
cultivator to be dealt with under the
provisions of the Order. (T) he
meaning of the term 'cultivator' may
range from the one who actually puts
the plough to the soil to the one who is
stationed far away from the lands and
who directs or supervises the cultivation
or causes the same to be done by mem-
bers of his family, dependants or rela-
tions, or with his own or hired labour.
To say that 'cultivator' means one who
actually cultivates any land is to lay
down no definite standard as to the cir-
cumstances under which the different
categories of persons would be answer-
able for the levy. As the definition of
the term 'cultivator' as given in the Levy
Order is artificial and arbitrary, and as
the same is inextricably woven through-
out the texture of the Levy Order, the
entire Order must be held to be affected
by the vice of the definition.

... Under the Maximum Prices Orders
1965, it is the case of the State that the

* (Reported in 1968 Ker LT 223)

maximum prices have been fixed so as to ensure a reasonable margin of profit to the cultivator, and taking into account the burden on the consumer. Granted that this is so it is a well known fact that the prices of rice and paddy have been spiralling in this State in the past few years. I can find no justification for denying the cultivator for all time the benefit of any increase in the market price of rice and paddy over the level fixed by the Maximum Prices Orders 1965. The Maximum Prices Orders themselves contain no indication that the Maximum Prices fixed by the Schedule therein are capable of periodical revision and adjustment. That the market value has for all time been tied down to the price fixed in the Maximum Prices Orders is a matter that pertains to the principles of compensation and not to its adequacy. It must therefore be held that Clause 7 of the Levy Order in so far as it imposes a ceiling on the price to be paid, fails to specify the principles on which compensation for the paddy taken is to be assessed, and thereby violates Article 31 (2) of the Constitution.

..... It is a matter of some doubt, and of controversy, as to which of the two sub-sections viz., sub-section (3) or sub-section (3B) of Section 3 of the Act has application. Be that as it may, whichever be the sub-clause that applies, it is clear that the controlled price is not the sole determinant of the price to be paid to a person required to sell an essential commodity in compliance with an Order made with reference to Section 3 (2) (f) of the Act. It is only one of the factors to be taken into account. Turning to the provisions of the Levy Order, the controlled price is the sole determinant of the price to be paid. To that extent the Levy Order seems to have travelled beyond the provisions of the parent Act, viz., the Essential Commodities Act, in respect of the provision as to payment of price for the rice or paddy acquired.

..... In the result I hold that the definition of the term 'cultivator' in the Levy Order is vague and does not lay down even the broad principles for a satisfactory administration of the provisions of the Order and is productive of arbitrariness. As the definition is the very crux of the Order and is inextricably woven throughout the texture of the Order the entire Order is liable to be struck down under Article 14 of the Constitution. I am further of the view that, in any event, the proviso to Clause 7 of the Order in so far as it places a ceiling on the market value of the price to be paid to the paddy acquired is violative of Article 31 (2) of the Constitution.

..... It will be noticed that, as in the case of the Levy Order, the Declaration Order also inelastically fixes the price to be paid for rice and paddy as the maximum prices fixed by the Maximum Prices Orders of 1965. The stock-holder is denied the benefit of any rise in the market value of these commodities subsequent to 1965. I therefore hold that Clause 4 of the Declaration Order in so far as it directs the stock-holder to sell paddy or rice to the Government at the "controlled price" offends Article 31 (2) of the Constitution.

In the result, as far as the Declaration Order is concerned I hold that only Clause 4 thereof to the extent to which it directs sale to the Government at the "controlled price" is unconstitutional and invalid.

..... Nothing was made out to show that the Maximum Prices Orders 1965 are unconstitutional or invalid.

In the light of my above conclusion regarding the constitutional validity of the Orders, these writ petitions will now be posted for further hearing and appropriate orders."

3. The State has come up in appeal under Section 5 (i) of the Kerala High Court Act, 1959-1966, which reads:

"5. Appeal from judgment or order of Single Judge. — An appeal shall lie to a Bench of two Judges from —

(i) a judgment or order of a Single Judge in the exercise of original jurisdiction;

(ii)"

4. On a motion (C. M. P. No. 1567 of 1968) in this Writ Appeal "to stay the operation of the declaration by the learned Judge that the Levy Order, 1966, and Clause 4 of the ... Declaration Order, 1966, are illegal, till the disposal of the appeal", the learned Chief Justice and Mr. Justice Govindan Nair ordered: "..... Issue notice also to the Advocates for the petitioners in the O. Ps. dealt with by the common judgment appealed against in the W. A." and we are told, at the bar, that such notice has been given to counsel Mr. T. P. Kelu Nambiar, appearing in response to the above-said notice, contended that this appeal is incompetent as the judgment impugned is not a final judgment in the O. P., which is still pending before the learned Single Judge. Comparing Section 5 (i) of the Kerala High Court Act with Clause 10 of the Letters Patent of the Allahabad High Court, counsel commended to us the dissenting judgment of Srivastava, J., in Standard Glass Beads Factory v. Shri Dhar, AIR 1960 All 692 (FB) where the question was whether an order of a Single Judge dismissing an appeal against an order granting a temporary injunction in a suit can be appealed

against before a Division Bench. The learned Judge said:

"All kinds of decisions are, however, given in a suit or proceeding from the date of its institution to the date of its termination. It is obvious that it could not have been the intention to include all these decisions in the term 'judgment' and make them appealable irrespective of their nature or importance. If a decision amounts to a decree as defined in the C. P. C., it would certainly amount to a judgment within the meaning of the Letters Patent."

But, Mootham, C. J., with whom Dayal, J., agreed, has observed in the abovesaid case, AIR 1960 All 692 (FB):

"Now the order the nature of which we have to determine is an order which finally determines the right of a party to a specific temporary relief. It stems from a suit and its purpose is to make the judgment, if obtained, fully effective. It is neither an order which merely regulates procedure nor an order made on an application which is merely a step towards obtaining a final adjudication. Such an order is in my opinion neither a final judgment nor a preliminary judgment which had been assumed to mean (and I think correctly) a judgment which determines the right to the relief claimed but which requires further proceedings to be taken before the suit or appeal is finally disposed of."

The grant or refusal of an interim injunction may cause substantial loss to a party adversely affected by the order; and the refusal to grant this provisional relief may result in the suit becoming largely infructuous. Such an order if made by a subordinate Court is appealable under Order 43 Rule 1 Clause (r) Civil Procedure Code. I would accordingly answer the question referred to us in the affirmative."

5. I do not think it necessary to refer here to *Prem Chand v. State of Bihar*, AIR 1951 SC 14 which concerned with the meaning of the term 'judgment' in a Letters Patent; or to *Asumati Debi v. Rupendra Deb*, AIR 1953 SC 198 where the order concerned was one transferring a suit from one Court to another without adverting to the merits of the controversy in the suit or a part of it.

More pertinent seems to me the observations of the Judicial Committee in *Rahimbhoy Hibibbhoy v. C. A. Turner*, (1890) 18 Ind App 6 (PC) where the suit was for accounts and the defendant denied liability to account, but the High Court found him liable to account and remitted the suit to the Court of trial for settling accounts:

"Now that question of liability was the sole question in dispute at the hearing of the cause, and it is the cardinal point

of the suit. The arithmetical result is only a consequence of the liability. The real question in issue was the liability, and that has been determined by this decree against the defendant in such a way that in this suit it is final. The Court can never go back again upon this decree so as to say that, though the result of the account may be against the defendant, still the defendant is not liable to pay anything. That is finally determined against him, and therefore in their Lordships' view the decree is a final one within the meaning of Section 595 of the Code (present Sec. 109, C. P. C. 1908)." In *Syed Muzhar Husein v. Bodha Bibi*, (1895) 22 Ind App 1 (PC) the plaintiff based his claim under a will whose validity was challenged by the defendant. The High Court upheld the will and sent back the case for decision of other issues. The Privy Council held an appeal from that order of remand *entertainable* because the cardinal point in the case was about the will and that had been decided by the High Court leaving only certain subordinate enquiries to be made thereafter.

6. In *Kasi v. Ramanathan Chettiar*, 1947 Mad WN 723 the question was whether an appeal would lie against an order directing a fresh report by a commissioner on the accounts of a partnership, when that order contained an adjudication on the substantive rights of the parties with regard to several matters in controversy in the suit. *Patanjali Sastri, J.*, (as he was then), with concurrence of *Tyagarajan, J.*, observed:

"Even under the old Code which did not expressly provide for the passing of a 'preliminary decree' in any suit, their Lordships of the Judicial Committee stressed the expediency of passing such decrees so as to make it possible to prefer an immediate appeal to settle that part of a case on which the decision of the other parts depended. They observed in *Muhammad Abdul Majid v. Muhammad Abdul Aziz*, (1897) ILR 19 All 155 at p. 164 (PC):

"The learned Judges of the High Court have examined the Code minutely to show that Subordinate Judge Kashi Nath Biswas acted under its provisions. Their Lordships think that such an examination is hardly necessary. The Subordinate Judge had before him a case consisting of two parts, a question of title, and an incidental question of account depending largely on the title. It was for the obvious advantage of the parties, and they proposed, that the first part should be decided and the second reserved for decision. In point of fact the first part has been the subject of successive appeals by the defendant, who successfully struggled against the trial of the second part

pending these appeals. If the Code forbade the parties and the Court so to arrange the disposal of a law suit, it would be a very starting thing. It is not pretended that the Code contains any such prohibition.'

..... It is next contended for the respondent that the decision of the 20th August, 1946, amounts to no more than findings recorded on certain parts of the case and no appeal lies therefrom. (Referring to the definition of a decree in the C. P. C. his Lordship continued). The sub-section does not say that the adjudication should conclusively determine the suit. Indeed it says the contrary: 'determines the right of parties with regard to all or any of the matters in controversy in the suit', and by adding the 'explanation' further makes it clear that the adjudication in order to be a decree, need not dispose of the suit. The new Code has enacted a comprehensive definition of 'decree' and has imposed upon the suitor, by Section 97 the necessity of appealing against preliminary decrees, and the only question can be whether a particular decision falls within the definition. No doubt, it is not always easy to determine this question owing to the somewhat vague language employed, and there may be room for divergence of opinion, as can be seen from the variety of cases referred to above. We are, however, satisfied that the decision under appeal fulfils the condition of Section 2 (2) and we hold that this appeal is maintainable under Section 96 of the Civil Procedure Code."

7. Applying the principle in the above-cited precedents, I hold that the present 'judgment' — it is styled so by the learned Judge who delivered it — which determines the main point in the case (namely, the constitutional validity of the impugned Orders) on which the reliefs sought in the O. Ps. depend largely is a preliminary judgment within the meaning of the C. P. C. and is appealable as such under Section 5 (i) of the High Court Act.

8. As arguments on the merits of Writ Appeal No. 30 of 1968 proceeded, Mr. Velayudhan Nair, Mr. Suryanarayana Iyer and Mr. Easwara Iyer (who have already entered appearance in response to the general notice referred to above) stated that they have, on behalf of petitioners in five of the 721 O. Ps. disposed of by the judgment under appeal, filed Writ Appeals Nos. 76 to 80 challenging the validity of the Maximum Prices Orders and of the entirety of the Declaration Order as also the findings of the learned Judge against points urged by them against the Levy Order, and requested that those appeals may be heard along with the Writ Appeal No. 30 of

1968 in the present hearing itself. As the learned Advocate General took notice of those appeals and agreed to their being heard now, it was so ordered by us on March 8, 1968 and the hearing continued as on all these writ appeals together.
I. The Kerala Rice and Paddy (Procurement by Levy) Order.

9. The learned Judge has struck down the Levy Order on the ground that the definition of 'cultivator' therein is vague and arbitrary, and "the same is inextricably woven throughout the texture of the Levy Order." The latter observation appears well justified as Clause 3 of the Order compels 'every cultivator' to sell to Government or its agent or nominee paddy derived from lands cultivated by him, Clause 3-C directs 'every cultivator holding more than 2 acres of land' to inform the Village Officer concerned 7 days before harvest of his intention to harvest the crop and the anticipated production thereof, Clause 4 authorises officers to issue a notice to 'each cultivator' to sell a specified quantity of paddy, Clause 6 allows 'any cultivator' who is not in a position to comply with such notice to file an objection petition before the Taluk Supply Officer who will hear the matter, Clause 9 empowers Taluk Supply Officers to order seizure of the quantity of paddy due from a defaulting 'cultivator', and Clause 13 concedes a power to Government to exempt a class or classes of 'cultivators' from the operation of the provisions of the Order; but the observation that the definition of a cultivator in the Order is vague and arbitrary does not appear warranted.

Clause 2 (b) of the Levy Order defines a cultivator thus:

"'Cultivator' means a person who actually cultivates any land with paddy." To me this definition appears to be plain, simple and expressive of the ordinary sense of the term with particular emphasis on paddy being the object of the cultivation. Pertinent seems to be the observation of the Supreme Court in *Sek-saria Cotton Mills Ltd. v. State of Bombay*, AIR 1953 SC 278 para 23:

"it is not till one is learned in the law that subtleties of thought and bewilderment arise at the meaning of plain English words which any ordinary man of average intelligence, not versed in the law, would have no difficulty in understanding."

The assumption of the learned Single Judge that the expression "a person who actually cultivates" would, "signify one who actually puts his hand to the plough and plough to the soil" and would therefore include "even a servant or labourer of an owner of land to be regarded as a cultivator" does not appear to be correct. If I engage a servant or employ a

labourer to plough my land or to sow seeds thereon, the common man would mention me to have cultivated the land, and not the servant or the labourer who did the manual work more or less as a machine and for my sake. When one does an act through the hand of another, one is in law and in fact doing it oneself really. The expression "actually" in the definition does not appear to cause any confusion. The dictionary meaning of the word "actually" is "really" "in actual fact"; and of the word "actual" is "real, existing in fact". If facts are assessed in proper perspective there can be little doubt that, when I engage a servant or a labourer to do a work for me, the work is mine, and mine only. Further, cultivation is not mere putting of the plough to the soil. As has been observed in *Commissioner of Income-tax West Bengal v. Benoy Kumar Sahas Roy*, AIR 1957 SC 768 at p. 788 "cultivation of land in the strict sense of the term means tilling of the land, sowing the seeds, planting and similar operations on the land" like manuring and watering. If I purchase seed and manure and employ a labourer to strew or spread them on the land, will he be said to have planted and manured the land? *Qui facit per alium facit per se* (He who does anything by another does it himself) is a maxim well known in law and in practice.

10. The learned Advocate General urged that the attempt of the Court should be to uphold the law made by a responsible Government if that be fairly possible and submitted that, even if the definition clause in the Order is found to be too wide for its purpose, the Court may limit its sense to make it consistent with the object of the statute and that, in the context of the Levy Order that aims at large scale purchase of paddy by the Government, the cultivator is a person who raised the crop of paddy and has the capacity to sell it.

In *R. M. D. Chamarbaugwalla v. Union of India*, AIR 1957 SC 628 Venkatarama Ayyar, J., speaking for a Constitution Bench of the Supreme Court, has observed:

"The definition of 'prize competition' in S. 2 (d) is wide and unqualified in its terms. There is nothing in the wording of it, which limits it to competitions in which success does not depend to any substantial extent on skill but on chance. To arrive at the real meaning, it is always necessary to get an exact conception of the aim, scope and object of the whole Act. Having regard to the history of the legislation, the declared object thereof and the wording of the statute, we are of opinion that the competitions which are sought to be controlled and regulated by the Act are only those

competitions in which success does not depend to any substantial degree on skill."

Similarly, in *Workmen of the Dimakuchi Tea Estate v. Management of the Dimakuchi Tea Estate*, AIR 1958 SC 353 the expression 'any person' in the context of its use in the definition of an industrial dispute was held to mean not anybody in the world but one of a limited class and therefore not to include an assistant medical officer of the Tea Estate though his dismissal was challenged by the workmen. The Supreme Court observed:

"A little careful consideration will show, however, that the expression 'any person' occurring in the third part of the definition clause cannot mean anybody and everybody in this wide world. First of all, the subject matter of dispute must relate to (i) employment or non-employment or (ii) terms of employment or conditions of labour, of any person; these necessarily import a limitation in the sense that a person in respect of whom the employer-employee relation never existed or can never possibly exist cannot be the subject-matter of a dispute between employers and workmen. Secondly, the definition clause must be read in the context of the subject-matter and scheme of the Act, and consistently with the objects and other provisions of the Act. ... Having regard to the scheme and objects of the Act, and its other provisions, the expression 'any person' in Section 2 (k) of the Act must be ... one in whose employment, non-employment, terms of employment or conditions of labour the workmen as a class have a direct or substantial interest."

In *Kanwar Singh v. Delhi Administration*, AIR 1956 SC 871 the Supreme Court held:

"In the context in which it occurs in Section 418 (1) (of the Delhi Municipal Corporation Act) the meaning which can reasonably be attached to the word 'abandoned' is 'let loose' in the sense of being 'left unattended' and certainly not 'ownerless'."

The ratio of these decisions is reiterated by Gajendragadkar, C. J., in *Sheikh Gulfan v. Sanat Kumar Ganguli*, AIR 1965 SC 1839 at p. 1845 in these words:

"Often enough, in interpreting a statutory provision, it becomes necessary to have regard to the subject-matter of the statute and the object which it is intended to achieve. That is why in deciding the true scope and effect of the relevant words in any statutory provision, the context in which the words occur, the object of the statute in which the provision is included, and the policy underlying the statute assume relevance and become material. As Halsbury has ob-

served, the words 'should be construed in the light of their context rather than what may be either their strict etymological sense or their popular meaning apart from that context.'

It follows from these precedents that the definition of cultivator in the Levy Order must be construed in consonance with the other provisions of the Order and its object.

11. Before the learned Judge the Government pleaded "that ownership of the land is not the criterion for demanding levy and that the test is actual cultivation;" but it was repelled with the observation "All the same to enforce a sale of paddy from the actual cultivator, without any regard to his property or beneficial interest in the lands — or the lack of these — is inequitable in the extreme". In the context of the Levy Order, which aims at procurement of paddy for equitable distribution in a period of food shortage in the country, the cultivator from whom the paddy is to be purchased under the Order can only be a person who has such beneficial interest in the paddy (not the land) concerned as to be capable of transferring the goods to the Government. He cannot be a mere servant or labourer who merely "puts the plough on the soil"; but his interest need not amount to a proprietary interest in the land. An imposter or even a trespasser who has raised and harvested a crop of paddy unlawful may be a cultivator within the meaning of the Levy Order; and that will be so even if a suit is pending for his eviction. To me, that person who directs the agricultural operations on a piece of land and takes the yield on harvest with a right or power to dispose it is the person who actually cultivates the land. Such appears to me the intent and meaning of the Levy Order.

12. Mr. T. N. Subramonia Iyer exhorted us to condemn the definition of a cultivator in the Levy Order "as it cuts across the known norms of land-holding and of interests in landed property and is therefore arbitrary and invalid" and explained it by pointing out that the cultivator of a land may be the owner, a co-owner, a tenant, a sub-tenant, an agent, or a servant, but there is no provision in the Levy Order to oblige the officer who makes a demand for the levy to make any enquiry as to the interest of the cultivator in the paddy raised by him. I see little force in this contention. Whatever might have been the position before September 4, 1967 — which need not be canvassed here as the paddy raised then, whether procured by the Government or left with the cultivator, must have been disposed of long ago and therefore cannot now be made the subject of an effective writ or direction (cf. K. N. Gura-

swamy v. State of Mysore, AIR 1954 SC 592 Last Para) — after the introduction of Clause 3C in the Levy Order there can be little chance for error in naming the cultivator for purposes of the levy. That clause obliges every cultivator, who is liable for a levy, to inform in writing, 7 days before harvest, on penalty of a year's imprisonment, the Village Officer concerned the extent of land cultivated by him, the proposed date for harvest and the anticipated production. If any Officer turns down the information so given and the request for permission to harvest, the cultivator can appeal to the Government or to the Commissioner or Director of Civil Supplies for relief. If the Officer did nothing in 7 days after the information is furnished he will be presumed to have accepted it and given permission to the informant-cultivator to harvest the crop. The learned Judge has observed, and I agree with it:

"that the notice under Clause 4 is to be issued only after receipt of the information furnished by Clause 3-C and it cannot be lightly assumed that the officers in question would arbitrarily magnify either the extent of the holding or the yield from the harvest. It may be that the Levy Order does not in terms provide for investigation of an objection as to whether a person is a cultivator within the meaning of the Levy Order or not. But this is a jurisdictional fact on which depends the jurisdiction of authorities to issue the requisite notices and to take the requisite action under the Order. It was rightly conceded by the Government Pleader that this jurisdictional fact, if denied by the person concerned, is liable to investigation and decision by the authorities functioning under the terms of the Order."

As the levy under the Order is of the paddy harvested, it is difficult to imagine that a person other than the one who was permitted to harvest the crop under Clause 3-C would be asked to deliver the levy. However, if any officer chooses to demand levy from a person who is not the cultivator thereof, or says that he has cultivated more than 2 acres when he has cultivated only two acres or less, he can prefer his objections thereto under Clause 6 (1) of the Order before the Taluk Supply Officer who is directed to enquire and decide the same; and in case he does not get relief thereby he can appeal under Clause 6 (3) before the District Supply Officer and/or approach the Government or the Commissioner or Director of Civil Supplies for relief under Cl. 11. If a principal or a co-owner or an employer has cultivated his land through his agent, co-owner or labourer, it is upto him to claim the crop and give written information, under Clause 3-C, of his cultivation to the VII-

lage Officer and then to harvest it. The procedure prescribed in Clause 3-C leaves little room for any mistake in fixing the cultivator for purposes of levy even if the definition be assumed to be vague. I do not find any inequity, much less arbitrariness, in the definition of a cultivator or in the procedure laid down in the Levy Order for procuring the levy paddy from the cultivator.

13. The learned Judge has held that "Clause 7 of the Levy Order, in so far as it imposes a ceiling on the price to be paid, fails to specify the principles on which compensation for the paddy taken is to be assessed, and thereby violates Article 31 (2) of the Constitution." Clause 7 requires the Government or its officer or nominee purchasing paddy to pay its price "at the prevailing market rate but not exceeding the maximum price specified by the Government for the time being under" the concerned Maximum Prices Order. Mr. K. V. Suryanarayana Iyer cited *State of West Bengal v. Mrs. Bela Banerjee*, AIR 1954 SC 170, *State of Madras v. D. Namasivaya*, AIR 1965 SC 190, *Vajravelu Mudaliar v. Special Deputy Collector for Land Acquisition, West Madras*, AIR 1965 SC 1017, *N. B. Jeejeebhoy v. Assistant Collector, Thana*, AIR 1965 SC 1096, *Union of India v. Metal Corporation of India*, AIR 1967 SC 637 and *Deputy Commissioner and Collector, Kamrup v. Durganath Sarma*, AIR 1968 SC 394 to urge that the price paid to the cultivator for the paddy procured by the Government should be a "just equivalent" to the commodity taken from him. Nobody disputes that proposition here. But the material question is what is the "just equivalent". It cannot be price that is "adequate" which is placed beyond judicial review by the Article 31 (2) of the Constitution, which commands "..... no such law shall be called in question in any Court on the ground that the compensation provided by that law is not adequate." Counsel urges that both the Essential Commodities Act and the impugned Levy Order refer to a market price different from the controlled price of the commodity, and that it must be common knowledge that at a time of food shortage the market price will always be far above the controlled price. It is well known that the market price for seasonal crops, like paddy, changes largely from time to time, particularly to fall considerably in the wake of a harvest and to rise thereafter till the next harvest takes place. Public interest in maintaining the price of foodgrains at a fair level, without a flare up on account of scarcity which has come to stay as a fact for some time in our country, requires the market to be controlled by the State. Section 3 (2) (c) of the Essential Commodities Act — hereinafter

'the Act' — contemplates an order "for controlling the price at which any essential commodity may be bought and sold." Such a control may be exercised by fixing the actual price of the commodity at a particular time or by fixing a maximum price for the commodity which may stand good till modified, or by fixing a minimum price. By the Maximum Prices Orders, made on September 3, 1965, the State Government has fixed maximum prices at which rice or paddy might be sold by any person in the State. When such an Order has been issued any violation of it becomes a wrong punishable under Section 7 (i) (a) (ii) of the Act with a prison-term which may extend to five years and with fine. When such fixation of maximum price is in force the market price cannot rise above it: it may be anything equal to or less than the maximum price. Any sale at a price above it will not be lawful and therefore cannot afford a standard for "just equivalent" for the commodity. The word 'just' in 'just equivalent' seems to repel consideration of any illegal transaction as its standard. If dealings with racketeers or other anti-social elements in black market are to rule the price of paddy procured for equitable distribution, the object of the Act and the Levy Order — 'for securing availability at fair prices' — is certain to be defeated. They cannot afford a standard for governmental action or judicial considerations. The contention that the Government is empowered by the Maximum Prices Orders to sell the foodgrains to the consumers at prices above the maxima fixed under them is not correct as the said Orders have only allowed the Government to fix separate maximum prices for the rice and paddy procured and sold by the Government "after taking into consideration expenses on account of transport, storage and other incidental charges." I do not find anything unfair or illegal therein. The provision in the Levy Order for payment of price to the cultivator "at the prevailing market rate subject to the maximum price specified by the Government for the time being under" the concerned Maximum Prices Order does not therefore spell any negation of a just equivalent or a violation of Article 31 (2) of the Constitution.

It is conceded at the bar that ever since 1966 cultivators have been paid at the maximum price fixed by the Maximum Prices Orders, besides other cash incentives by way of bonus to step up production and co-operation with the scheme for levy.

14. There is a controversy in the case whether the Levy Order is governed by sub-section (3) or sub-section (3B) of Section 3 of the Act.

Mr. Justice Gopalan Nambiyar felt no necessity to solve it as his Lordship held: "Whichever be the sub-clause (either sub-section (3) or sub-section (3B) that applies the controlled price is not the sole determinant of the price to be paid" and to the extent the Levy Order has recognised so it has "travelled beyond the provisions of the parent Act viz., the Essential Commodities Act." I am afraid that the above observation cannot be correct, particularly when the learned Judge has accepted the Maximum Prices Orders as valid and constitutional. Mr. K. T. Harindranath characterised Section 3 (3) as a general provision in respect of all essential commodities and Section 3 (3B) as a particular provision in respect of foodgrains, edible oilseeds and edible oils only, and contended that sub-section (3B) alone governs. The learned Advocate General submitted that Section 3 (3B) is not attracted to this case, and what applies is only Section 3 (3) of the Act. He pointed out that an Order made under Section 3, as indicated in its sub-section (5), may be either one of the general nature, or one directed to a specified individual, and contended that Section 3 (3) applies to Orders of the former category like the instant Levy Order, while Section 3 (3B) applies to Orders of the latter kind.

The argument is ingenious and seemingly attractive. But I do not think it to be quite right. The distinction drawn between the expression in Section 3 (3) "Where any person sells any essential commodity in compliance with an order" and the corresponding one in Section 3 (3B) "Where any person is required by an order" evaporates when they are put in juxtaposition with the primary expression in Section 3 (2) (f) "(an order made) for requiring any person to sell". I would therefore accept Mr. Harindranath's distinction and hold that Section 3 (3B) governs the instant Levy Order.

15. Mr. V. R. Krishna Iyer urged that the cultivator is entitled to the current market price of the foodgrains procured from him by the Government. He cited the observation in AIR 1967 SC 637.

"Under Article 31 (2) of the Constitution, no property shall be compulsorily acquired except under a law which provides for compensation for the property acquired and either fixes the amount of compensation or specifies the principles on which and the manner in which compensation is to be determined and given." I urged that Section 3 (3B) of the Act, it said "there shall be paid to that person such price for the foodgrains as may be specified in that order" imperatively insists on the first of the alternatives, namely fixation of the amount of

compensation itself in the Order, but the State Government has ignored those commands of the Act in the impugned Order professedly made under the Act itself. In other words, the contention is that, in not specifying the price as such in the Order the State Government has transgressed the limits of the delegation conceded to it and the Levy Order is for that reason invalid. Sub-section (3B) commands:

"Where any person is required by an order made with reference to Clause (f) of sub-section (2) to sell any grade or variety of foodgrains to the State Government or to an officer or agent of such Government there shall be paid to that person such price for the foodgrains as may be specified in that order having regard to —

(i) the controlled price, if any, fixed under this section or by or under any other law for the time being in force for such grade or variety of foodgrains; and

(ii) the price for such grade or variety of foodgrains prevailing or likely to prevail during the post-harvest period in the area to which that order applies.

Explanation:— For the purposes of this sub-section, 'post-harvest period' in relation to any area means a period of four months beginning from the last day of the fortnight during which harvesting operations normally commence." This sub-section requires the price to be paid for the paddy to be procured to be specified in the Order. It is contended that the provision in the Levy Order that such price "shall be at the prevailing market rate but not exceeding the maximum price specified by the Government for the time being under the (relative) Maximum Prices Order" would not satisfy the requirement of the sub-section. The force of this contention depends on the import of the word "specified".

16. It is pertinent to note here that Article 31 (2) of the Constitution uses two different verbs 'fixes' and 'specifies' and requires the law of acquisition either to fix the amount of compensation or to specify the principles on which the compensation is to be determined. The direction in the Section 3 (3B) of the Act is only to specify the price. I am afraid that in not using the word 'fix' in relation to the price, the Act expresses its intention not to require the price to be given in Rupees and pises in the Order itself. To me the expression 'specify' is deliberately used in the Act to mean only that the price should be indicated in the Order with such particularity as to make it capable of definite ascertainment. In *Davidson v. Carlton Bank Ltd.*, (1893) 1 QB 82, Lord Esher M. R. (with concurrence of the other two learned

Judges of the Court of Appeal) held an entry in a bill of sale "Study — 1800 volumes of books as per the Catalogue" to be "a specific description of the books" within the meaning of Section 4 of the Bills of Sale Act, 1882, that required the chattels assigned under a bill of sale to be "specifically described" in a schedule annexed to it. Likewise, in *Carpenter v. Deen*, (1889) 23 QBD 566, Fry, L. J. observed:

"In considering the meaning of the words 'specifically described', we should look at the scope and object of the section. They are in my opinion plain. I think they are to render the identification as easy as possible, and to render any dispute as to the intention of the parties as rare as possible, That is to be done as far as possible; by which I mean, as far as is reasonably possible — so far as a careful man of business trying to carry the object of the Act into execution could and would do without going into unreasonable particulars." The Bengal Foodgrains (Disposal and Acquisition) Order, 1947, directed that a notice or Directive issued to a cultivator "shall specify the price" of the paddy directed to be sold by him. The notice given to Ramachandra Pal was to sell paddy to K. M. Dey at a price not exceeding Rs. 7-8 per maund subject to deduction on account of poorness of quality and cost of transportation and other incidental charges incurred by the Government. Bose, J., cited Attorney General v. Marquis of Hertford, (1845) 153 ER 484 (488) where Baron Parke held "£700 or less" to be a "specific sum" for purposes of exemption from legacy duty and held:

"To construe the words 'specify the price' to mean that a definite or fixed or unalterable amount must be set out in the Directive as the price, is in my view too rigid a construction to be put on the terms of Clause 3 (2) of the Bengal Foodgrains Order, 1947. If a definite basis for ascertaining the price is indicated there is sufficient compliance with the Statute." (*Ramachandra v. Hiramba Kumar*, AIR 1952 Cal 502).

Sub-section (3B) was inserted in Section 3 of the Essential Commodities Act 14 years after this pronouncement, by the Act 25 of 1966 on September 3, 1966. I think likewise must be the import of the expression therein "there shall be paid to that person such price for the foodgrains, edible oilseeds or edible oils as may be specified in that order." If that be so the description "at the prevailing market rate but not exceeding the maximum price specified by the Government for the time being under the relative Maximum Prices Order" is spe-

cific within the meaning of the said sub-section (3B).

17. It was then urged that the cultivator is entitled under sub-section (3B) to be given a price specified in the Order having regard to the price "likely to prevail during the post-harvest period in the area to which that Order applies" and that the same is ignored by the instant Levy Order. I do not feel persuaded by this argument. The area to which the instant Order applies is the State of Kerala — the whole of it. The sub-section in question does not say that any possible future price should necessarily be taken into account when the cultivator is paid for the procured foodgrains. It mentions 'the price likely to prevail during the post-harvest period' only as an alternative to the 'price prevailing' as a factor for consideration in specifying the price to be paid for the grains procured. The "price prevailing" must necessarily relate to the current time, and not to any future and that is the alternative that the Levy Order has adopted when it provided that the cultivator shall be paid "at the prevailing market rate but not exceeding the maximum price." As has already been said, when both the controlled price and the prevailing or likely-to-prevail price are directed to be taken into consideration, the latter can only be envisaged as one below the controlled price and not exceeding it. As it is conceded that the cultivators have, since the date of promulgation of the instant Levy Order, been paid the maximum price fixed by the Government, they cannot have any legitimate grievance in this regard. The contention fails.

18. Thus, the grounds on which the learned Judge has struck down the Levy Order or its Clause 7 do not appear to me substantial.

19. Mr. K. Velayudhan Nair's attempt was to sustain the declaration of invalidity of the Levy Order on certain grounds that have been repelled by the learned Judge. He contended that the promulgation of the Order is beyond the authority delegated to the State Government and therefore void, and explained it thus: The Levy Order has been made on 1st July, 1966, in exercise of powers conferred by the Central Government on the State Government as per G. S. R. No. 906 dated 9th June, 1966; that G. S. R. had been superseded by G. S. R. No. 1111 dated 24th July, 1967; supersession implies a repeal of the superseded Order; and therefore when G. S. R. No. 906 was superseded and thereby repealed without a provision to save existing orders, the Levy Order lost its legislative authority and became an ultra vires piece from the date of supersession. It was pointed

out that G. S. R. No. 1111 contained no clause to save Orders issued under the prior G. S. R. while G. S. R. No. 906 had such a clause; and that G. S. R. No. 1111 itself had been amended by G. S. R. No. 1508 D/- 30-9-1967 directing prior concurrence of the Central Government to be taken before the State Government made an order under clauses (a), (c) or (f) of Section 3 (2) of the Essential Commodities Act, but no concurrence has so far been obtained to the impugned Levy Order.

Mahendra Lal Jaini v. State of U. P., AIR 1963 SC 1019 para 14 declares it to be "absolutely elementary that the constitutionality of an Act must be judged on the basis of the Constitution as it was on the date the Act was passed, subject to any retrospective amendment of the Constitution". I do not see reason why the same principles should not apply when the question is of constitutionality or vires of a Statutory Order. No authority has been cited to avoid its applicability to Orders and other pieces of subordinate legislation.

The Levy Order was made by the State Government on 1st July, 1966, under authority conferred on it by G. S. R. No. 906 dated June 9, 1966. That G. S. R. did not require any concurrence of the Central Government for Orders relating to matters specified in Clause (f) of Section 3 (2) of the Act. Nor has G. S. R. No. 1508 dated 30th September, 1967, that prescribed prior concurrence of the Central Government, been made to apply to Orders already made. The Levy Order has therefore to be held to have been lawfully made on the date of its promulgation and not to require a concurrence of the Central Government for its validity.

20. The contention that, with the supersession of G. S. R. No. 906 by G. S. R. No. 1111 on July 24, 1967, the Levy Order lost its validity cannot also be accepted. The distinction between a supersession and a repeal is pointed out in Nand Kishore v. Emperor, AIR 1945 Oudh 214 thus:

"..... It was argued that the Notification of 26th August, 1943, having been superseded it should be deemed never to have existed at all. It is true that, as stated by Tindal, C. J., in (1830) 6 Bing 576, the effect of repelling a statute is to obliterate it as completely from the records of the Parliament as if it had never been passed; and it must be considered as a law that never existed except for the purpose of those actions which were commenced, prosecuted and concluded whilst it was an existing law. The effect of an Act or Order which is superseded is not to obli-

terate it altogether. An Act or order is said to be superseded where a later enactment or order effects the same purposes as an earlier one by repetition of its terms or otherwise. The order of 1943, for the breach of which the petitioner was prosecuted was never repealed, or in other words it was never obliterated altogether. On the other hand it continued to exist till Government decided to effect the same purpose as was contemplated by that order by another order. There is nothing in the law which would justify the contention that after the supersession of that order no proceedings in respect of its breach could be commenced. The provisions of Section 6, U. P. General Clauses Act, apply only to repealed Acts and not to Acts which are superseded by others. There is, as shown above, an essential distinction between an Act or Order which is repealed and one which is superseded. The first contention must, therefore, be rejected."

This has been followed by the Mysore High Court in Syed Mustafa Mohamed Ghouse v. State of Mysore, 1963-1 Cri LJ 372.

Even in regard to the expiration of a temporary statute the Supreme Court has observed in State of Orissa v. Bhupendra Kumar Bose, AIR 1962 SC 945:

"What the effect of the expiration of a temporary Act would be, must depend upon the nature of the right or obligation resulting from the provisions of the temporary Act and upon their character whether the said right and liability are enduring or not. If the right created by the statute is of an enduring character and has vested in the person, that right cannot be taken away because the statute by which it was created has expired."

If such be the effect of expiry of a temporary legislation, it must be more strongly so in case of a repeal and simultaneous re-enactment — same thing as supersession — of an enduring legislation by another. G. S. R. No. 906 was not 'temporary'. The Levy Order made under it is also not 'temporary' but is obviously intended to last for an indefinite time. G. S. R. No. 906 was not repealed but only superseded by G. S. R. No. 1111. There is nothing in the latter Rule or in any subsequent Order or Rule indicating an intention to annul Orders issued under any prior G. S. R. True, G. S. R. No. 906 contained a clause and a proviso "that the Orders specified in the Schedule below shall stand rescinded: Provided that, notwithstanding such rescission, any order made by a State Government in pursuance of the orders so rescinded shall continue in force according to its tenor." There is no

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similar proviso or saving clause in G. S. R. No. 1111, for the obvious reason that it does not purport to rescind anything. To me the following observations of the Supreme Court in regard to repeal and re-enactment of a statute appear pertinent here:

"One may pause here to remember that regulations framed under an Act are of the very greatest importance. Such regulations are framed for the successful operation of the Act. Without proper regulations, a statute will often be worse than useless. When an Act is repealed, but re-enacted, it is almost inevitable that there will be some time lag between the re-enacted statute coming into force, and regulations being framed under the re-enacted statute. However efficient the rule-making authority may be it is impossible to avoid some hiatus between the coming into force of the re-enacted statute and the simultaneous repeal of the old Act and the making of regulations. Often, the time lag would be considerable. It is conceivable that any legislature could have intended that the re-enacted statute, for some time at least, will be in many respects, a dead letter? The answer must be in the negative." (Chief Inspector of Mines v. Karam Chand Thapar, AIR 1961 SC 838).

"When the appeal is followed by fresh legislation on the same subject we would undoubtedly have to look to the provisions of the new Act, The line of enquiry would be, not whether the new Act expressly keeps alive old rights and liabilities but whether it manifests an intention to destroy them." (State of Punjab v. Mohar Singh Pratap Singh, AIR 1955 SC 84).

There is no reason why the abovesaid principles should not apply mutatis mutandis to supersession of Statutory Orders as well — particularly since it is said "subordinate legislation has, if validly made, the full force and effect of a statute" (Halsbury's Laws of England 3rd Edn. Vol. 36, para 732). It follows that on the mere supersession of G. S. R. No. 906 by G. S. R. No. 1111 of almost identical import, the Levy Order made under the former would not lose its life or vitality.

21. Mr. Velayudhan Nair read sub-section (6) of Section 3 of the Act:

"Every order made under this section by the Central Government or by any officer or authority of the Central Government shall be laid before both Houses of Parliament, as soon as may be, after it is made."

and contended that as the Levy Order, admittedly made under Section 3 of the Act, has not been so far laid before the Parliament it is for that reason invalid.

Mr. S. Easwara Iyer added that as an unbridled discretion to make Orders for various matters is envisaged in Section 3 of the Act, the only legislative control adumbrated in the sub-section (6) has to be held mandatory. The learned Judge has overruled these contentions with the observation:

"The requirement of laying before Parliament is enjoined only with respect to an Order made by the Central Government under Section 3 of the Act and not with respect to one made by the delegate under Section 5 thereof. There is also sufficient authority to hold that the requirement of laying before the Parliament without any time limit therefor, nor any penalty for disobedience or default, is in the circumstances, only directory and not mandatory. (Vide AIR 1966 SC 385 and 1960 Ker LJ 1319.)"

It is obvious that, by its expression, the sub-section does not make the laying before the Parliament a condition precedent to the validity of the Order: nor does it annul the order if it is not laid before the Parliament within a specified time. A law once brought to force normally continues in force till it is determined by a statutory provision therefor. To interpret the expression in the sub-section 'as soon as may be' to mean 'within a reasonable time' as counsel would have it, would make the duration of the law uncertain and therefore cannot be accepted. As indicated by the Supreme Court in *Jesan Nath v. Jaswant Singh*, AIR 1954 SC 210:

"It is one of the rules of construction that a provision like this is not mandatory unless non-compliance with it is made penal."

In *Jan Mohammad Noor Mohammad v. State of Gujarat*, AIR 1966 SC 385, a direction in the Bombay Agricultural Produce Markets Act that rules made under it "shall be laid before each of the Houses of the Provincial Legislature at the session thereof next following" is held by the Supreme Court not to be mandatory:

"It is true that the Legislature has prescribed that the rules shall be placed before the Houses of Legislature, but failure to place the rules before the Houses of Legislature does not affect the validity of the rules merely because they have not been placed before the Houses of the Legislature."

Halsbury's Laws of England, (3rd Edn., Vol. 36, pages 486-7) also says:

"Many statutes conferring legislative powers provide that instruments made in exercise thereof shall be laid before Parliament (or, in some cases, the House of Commons alone) after being made, but do not subject them to any further procedure."

Before 1948, the effect of such a provision was in every case a matter of construction. It might be provided that an instrument was not to come into operation until the expiry of a specified period after laying; but no more was normally required than that it be laid, or laid forthwith or as soon as may be, or laid within a specified period, and in these latter cases the provision would, unless the contrary intention clearly appeared, be held directory rather than mandatory, failure to lay the instrument at all, or within the time specified, in no way affecting its validity."

22. The sub-section (6) of Section 3 of the Act requires only "Every order made by the Central Government or by any officer or authority of the Central Government" to be laid before the Parliament, even though Section 5 of the Act expressly contemplates the State Governments and even officers subordinate to State Governments to make Orders under delegation by the Central Government. It is pertinent to note that as early as 1964 the Indian Law Institute has, in its publication "Administrative Process under the Essential Commodities Act", (vide page 89 therein) pointed out that it is a patent lacuna in the Act that only an Order made by the Central Government, or officer or authority under it, need be scrutinised by the Parliament; but not an Order made by a State Government or by an officer or authority under it, and yet the Act has not so far been amended by the Parliament. The indication is obvious that the obligation is not laid on the State Government to lay Orders made by it before the Parliament.

23. Mr. Easwara Iyer challenged Section 3 of the Act as unconstitutional because it contains no legislated guidance as to the scope and ambit of the Government's powers to make Orders under it, and particularly Section 3 (2) (f) which did not prescribe the maximum limit of stock to attract a liability to sell. The following observation of the Supreme Court — though expressed in a different context — appear to me pertinent, when read *mutatis mutandis* here:

"Quick decision and swift and effective action must be of the essence of those powers and the exercise of it must, therefore, be left to the subjective satisfaction of the Government charged with the duty of maintaining law and order. To make the exercise of these powers justiciable and subject to the judicial scrutiny will defeat the very purpose of the enactment. No assumption ought to be made that the State Government or the authority will abuse its power. ... Further, even if the officer may conceivably abuse the power, what will be struck down is not the statute but the

abuse of power." (Virendra v. The State of Punjab, AIR 1957 SC 896 at p. 901). Considering the object of the Levy Order, which is to secure "equitable distribution and availability at fair prices" of foodgrains for all at a time of countrywide food shortage, the determination of quantity to be procured from or to be allowed to be retained by a producer must necessarily be left to the State Government who is the best appraiser of the pressure of the time, the urgency of the situation and the maintenance of public morale. Even a monopoly procurement may be justified if circumstances require such a course. I am not persuaded to hold that the defects attributed by counsel to Section 3 of the Act are substantial.

24. Mr. Velayudhan Nair wanted the expression 'holding' to be interpreted, as the Supreme Court has done in *K. K. Handique v. Member, Board of Agricultural Income-tax, Assam*, AIR 1966 SC 1191 to "include a two-fold idea of the actual possession of a thing and also of being invested with a legal title" and therefore to construe the expression in Section 3(2) (f) of the Act a "person holding in stock", to refer only to a person who has both possession and title to the paddy at hand, and to impose that limitation into the definition of a cultivator in the Levy Order. The Supreme Court has not said categorically that the expression 'holding' connotes possession and title, and has added to their observation cited by counsel, "Sometimes it is used only to mean actual possession". It cannot then be said on the authority of the Supreme Court that the word 'holds' includes invariably possession and title of the thing held. What it means in a particular context must necessarily depend upon the context itself. In a legislation designed to meet urgent public need for foodgrains, the title to property in the paddy, which is a matter of individual concern between the rival claimants thereto, cannot enter seriously for consideration. Procurement for price paid involves little deprivation of property: it works only a conversion of the commodity into its equivalent in cash. In the circumstances of the Levy Order an investigation on ultimate title is neither relevant nor practical.

25. Mr. Cheriyan Manjooran urged that there is a real distinction between producers and cultivators, that the Essential Commodities Act aims to catch only the former and not the latter and that the Levy Order in dealing with 'cultivators' has travelled beyond the Act. Section 3 (2) (f) of the Act does not use the expression 'producer'. Section 3 (3C) which uses that expression is unrelated to paddy or rice with which only the Levy Order is concerned. In the con-

text of the Levy Order it is also difficult to say that the cultivator of paddy is not one of the class of producers of foodgrains.

It was next contended by him that Section 3 (2) (f) of the Act that deals with 'stock' of foodgrains, can refer only to a stage of storage after providing for one's requirements and therefore cannot empower the promulgation of the instant Levy Order that directs procurement as soon as paddy is harvested and before the requirements of the producer are ascertained and allowed for, and that therefore the Levy Order is ultra vires of Section 3 (2) (f) of the Act and void. I am unable to accept this contention. To me, the expression 'stock' in Section 3 (2) (f) appears to mean a collection or store. When a crop of paddy is harvested, threshed and the harvesting workers' charges are paid, what the cultivator takes thereafter in his 'stock' of paddy within the meaning of Section 3 (2) (f) of the Act, and the Order made in relation thereto is therefore well within its purview. There is nothing in that sub-section to indicate that the stock means only a stock for sale.

26. Mr. Velayudhan Nair also contended that the Levy Order has gone beyond the parent Act, because Section 3 (2) (f) of the Essential Commodities Act contemplates compulsory purchase only from a "person holding in stock" and that a person can be said to hold a stock only if he has a store of goods beyond his requirements; but the Levy Order compels sale of paddy by every person who has cultivated more than two acres of land without any enquiry as to his requirements. It is difficult to appreciate counsel's assumption that the Act, in contemplating measures "for maintaining or increasing supplies of any essential commodity or for securing their equitable distribution and availability at fair prices", contemplates purchase of foodgrains only from persons who hold stock above all their requirements. A law designed to meet famine conditions cannot afford to be so liberal. Its provisions must be capable of drastic application to meet all situations. The expression "any person holding in stock any essential commodity" must, in the context, comprehend all persons having possession of any appreciable quantity of the commodity. In the nature and purpose of the Act it cannot be said that the Levy Order that directs sale of a relative excess of the production of a large scale cultivator, has outstepped the Act. I am in respectful agreement with the observation of Raman Nayar, J., made on behalf of Govindan Nair, J., also, in N. J. Thomas v. State of Kerala, 1966 Ker LT 931, that the expression 'holding in stock' does not necessarily postulate "holding in quanti-

ties in excess of one's own requirements". The contention advanced on the assumption that it does so has to be rejected.

27. Counsel stressed that the scale of levy notified under Clause 3 of the Levy Order pays no regard to the actual production of a cultivator and is therefore arbitrary and violative of the rule of equal protection in Article 14 of the Constitution. The scale of levy classifies the paddy lands in the several taluks of the State into three classes according to their average yield and, after exempting 2 acres cultivated by each cultivator, prescribes a scale of levy in 3 progressively rising slabs of next 3 acres, next 5 acres and larger areas. The scale of levy notified on July 1, 1966, has been modified from time to time — seven times before 1968 — which must have been on the basis of experience gained on its actual working. Even if this is classification according to taluks and the area cultivated by each cultivator is found hard for any individual farmer to comply, the Order provides by its Clause 6 for an objection by the cultivator, enquiry and decision thereon by a Taluk Supply Officer and an appeal, if needed, from his decision to the District Supply Officer and an overall access to the Government, the Commissioner or Director of Civil Supplies. Considering the enormousness of the range of operation of the Levy Order and the speed with which it has to be worked, ample justice has to be held met by the above provisions. As pointed out by the learned Judge the constitution of official staff to survey and inspect all paddy fields in the State to assess their actual yield would involve "an administrative machinery so stupendous and costly that the very object of the Order would be frustrated." It has to be kept in mind that Courts are not to sit tight on every governmental action. As observed by Holmes, J., in *Bain Peanut Co. of Texas v. Pinson*, (1930) 282 US 499 at p. 501 we have to remember that the machinery of government would not work if it were not allowed a little play in its joints. A judicial review of governmental action should not involve excessive timidity that would encourage arbitrariness in administration nor temerity that would paralyse the administration.

Counsel's reliance on *State of Andhra Pradesh v. Nalla Raja Reddy*, AIR 1967 SC 1468 and on *K. T. Moopil Nayar v. State of Kerala*, AIR 1961 SC 552 which related to land revenue, is, in my opinion, out of place because of the wide difference in the nature of the subject-matters involved and in the purpose of the laws concerned. The scheme of the Levy Order taken along with its complement, the Declaration Order in so far as the

latter affects cultivators, is to procure with the least hardship to the producers a fair proportion of the paddy produced in the State as soon as the harvest is over, and thereafter, if conditions of the time so require, to empower the Government, Commissioner, District Collector or District Supply Officer to get a declaration of the stock held by the producer expected to have in possession or control excessive paddy, and procure the entire excess over the just requirements of himself and his dependents, on immediate payment of price in both cases.

28. Mr. M. T. Palkaday contended that the classification of cultivators for purposes of levy on the basis of the area of land cultivated and not on the volume of foodgrains produced is irrational, and illustrated it by pointing out that a cultivator who produced only 50 quintals of paddy from 10 acres and a cultivator who produced 100 quintals from a like area by improved method of cultivation are to deliver the same quantity of paddy under the present Order. The basis of classification under the Order is not area alone but area and general productivity. For regulation by a general law only the general yield of a locality can be taken as the standard. For assessing general yield a taluk is taken as the unit by the Levy Order. It is too much to assume that the yield from lands similarly situated would vary so widely as counsel puts it. The assumption can only be that lands in a locality would normally yield fairly the same yield. Individual cultivators whose land did not produce as much as was expected can make their representations and get relief under Clause 6 of the Order. Clause 3-C also affords opportunity to every cultivator to inform the Village Officer 7 days before harvest, the extent of lands cultivated by him and the date of the harvest and the estimated yield thereof, and that affords the basis of further proceedings under the Levy Order. The contention that the levy is unrelated to the actual yield of the land does not then bear much merit.

29. Mr. Suryanarayana Iyer contended that the scale for levy prescribed by notification under the Levy Order is discriminatory in that it does not treat all cultivators in the same way and procure from them the same measure of paddy per acre of their cultivation. Article 14 of the Constitution does not prohibit reasonable classification and in my view the classification made under the Levy Orders is not unreasonable. All cultivators are given exemption from levy for the first 2 acres of cultivated land and all have to measure the same measure of paddy for every acre cultivated beyond 2 acres, the same measure though at a higher rate per every acre beyond 5 acres, and

the same measure though at a still higher rate per acre above 10 acres. That the rates rise as the slabs rise cannot spell any unreasonable discrimination within the meaning of Article 14 of the Constitution. The merit of equal protection of the laws does not lie in giving the same treatment to every member of the society, for all are not of the same condition; but in giving to those in want according to their needs and taking from those in plenty according to their stocks. I am in respectful agreement with the observations of Shearer, J., in *Mohammad Anzar Hussain v. State of Bihar*, AIR 1952 Pat 220 at p. 226:

"It cannot fairly, or indeed at all, be said that the object of the Ministry in making this Order was to benefit one sub-class of producers at the expense of any other sub-class. There is, clearly, nothing objectionable in the levy being a progressive one, that is in any comparatively large producer being required to deliver to the State a proportionately greater quantity of his grain than a smaller producer."

The contention fails.

30. Mr. Palkaday contended that Clause 13 of the Levy Order which empowers the Government to exempt any class of persons from levy is an unbridled power capable of enormous mischief and therefore arbitrary.

In *Harishankar Bagla v. State of Madhya Pradesh*, AIR 1954 SC 465 the Supreme Court observed:

"Mr. Umrigar further argued that the Textile Commissioner had been given unregulated and arbitrary discretion to refuse or to grant a permit The policy underlying the Order is to regulate the transport of cotton textile in a manner that will ensure an even distribution of the commodity in the country and make it available at a fair price to all. The grant or refusal of a permit is thus to be governed by this policy and the discretion given to the Textile Commissioner is to be exercised in such a way as to effectuate this policy. The conferment of such a discretion cannot be called invalid and if there is an abuse of the power there is ample power in the Courts to undo the mischief."

Further, as pointed out by the Supreme Court in AIR 1957 SC 896:

"The fact that power is to be exercised by the State Government itself is some safeguard against the abuse of this power."

31. The power to exempt from the operation of the Order any class of cultivators is given to the Government only and that has been specified, in the clause itself, to be exercised only "in the public interest" "having regard to the conditions prevailing in any area". Meeting

a similar contention the Supreme Court has held in *Inder Singh v. State of Rajasthan*, AIR 1957 SC 510 para 14 thus:-

"A more substantial contention is the one based on Section 15, which authorises the Government to exempt any person or class of persons from the operation of the Act. It is argued that that section does not lay down the principles on which exemption could be granted, and that the decision of the matter is left to the unfettered and uncanalised discretion of the Government, and is therefore repugnant to Article 14. It is true that that section does not itself indicate the grounds on which exemption could be granted, but the preamble to the Ordinance sets out with sufficient clearness the policy of the Legislature; and as that governs Section 15 of the Ordinance, the decision of the Government thereunder cannot be said to be unguided."

This has been cited with approval and followed in *P. J. Irani v. State of Madras*, AIR 1961 SC 1731 para 13.

32. Counsel contended also that the power to reduce levy on objections by cultivators under Clause 6 (2) of the Order is left unguided to the discretion of the Taluk Supply Officers and is therefore likely to be made an instrument of unhealthy patronage by certain officers. The Court cannot presume that the administration of a particular law would be done "with an evil eye and unequal hand." The jurisdiction to decide is conferred on a responsible officer, and the subjection of his decision to the supervision (under Clause 11) of the Government and the Commissioner and Director of Civil Supplies is a sufficient safeguard against abuses by individual officers. On the principle of the decision in *Bagla's case*, AIR 1954 SC 465, the contention has only to be overruled.

33. The result is that none of the grounds of attack on the validity of the Levy Order appears substantial. The Order is declared constitutional and valid.

II. The Kerala Paddy and Rice (Declaration & Requisitioning of Stocks) Order.

34. Mr. Krishna Iyer challenged Cl. 4 of the Declaration Order as arbitrary in that it allows officers even of the status of a Panchayat Executive Officer to order a stock-holder to sell a specified quantity of paddy to a nominee of the Government without any enquiry as to the volume of the stock in his possession and his requirements for the maintenance of himself and his family. It has to be remembered that this Declaration Order has been made under Section 3 (2) (f) of the Essential Commodities Act, along with the Levy Order, Rice (Purchase by Levy) Order and the Rationing Order, as

part of a scheme designed to secure "equitable distribution and availability at fair prices" of foodgrains to ease the food shortage in the country. Every stock-holder — not being a cultivator who has sold the levy paddy and not been specially required by the Government, Commissioner (or Director) of Civil Supplies, District Collector or District Supply Officer to declare — has to declare the quantity of paddy and rice in his possession or control to the Tahsildar or the Taluk Supply Officer. The Taluk Supply Officer has a record, under the Rationing Order, of the number of members in every house, taken from the head of the family. It cannot therefore be said that the officers concerned have no data for determining the stock and the number of members in the stock-holder's family to assess their requirements of the foodgrain. As the information on the above matters is given by the stock-holder himself, no enquiry is normally needed to fix the quantity of paddy to be requisitioned from him, unless the officer suspects suppression of facts in which case he has to make an enquiry in the matter — the learned Advocate General assures it is invariably done — and take a decision. If in any particular case, the stock-holder is not satisfied of his decision, an appeal is provided for under Clause 6; and the Government and the Commissioner (which term includes the Director also) of Civil Supplies have powers to revise any order of any officer. The complaint of arbitrariness therefore does not appear to be serious.

35. Counsel then contended that the 4th proviso to Clause 4 of the Declaration Order which allows only one month's ration to some stock-holders while six months' ration is allowed to others by the preceding provisos is unreasonably discriminatory. Section 3 (2) (f) empowers the Government to require by order "any person holding in stock any essential commodity to sell the whole or a specified part of the stock" to the Government or its nominee for 'securing equitable distribution and availability at fair prices' for all. Though the power extends to the whole of the stock of paddy and rice in the possession or control of the stock-holder, the State Government has, in the impugned Order, made a concession to him to retain a part of it and has for that purpose classified the stock-holders according to their relation with the stock and their co-operation with the Government in the administration of the Order. If the stock is of paddy produced in the stock-holder's lands and he has co-operated with the Government by filing his declaration as required by the Order, he is allowed concession for the full period between two consecutive cultivations on his land

— the rate of such allowance being greater if he is the producer himself, and lesser if he is only a receiver of rent in paddy. If the stock is not of paddy of the stock-holder's land or if the stock-holder has suppressed his stock, the concession allowed to him is only for a period of one month at the rate allowed to rent-receivers. Article 14 of the Constitution guarantees equality before the law and equal protection of the laws. But that does not exclude a reasonable classification of persons, objects or transactions, for attaining certain objectives. If a classification is based on some real and substantial distinction, bearing a just and reasonable relation to the objects sought to be achieved, it is valid. (See *Hari Krishna v. Union of India*, AIR 1966 SC 619). It cannot be said that the classification made in Clause 4 of the impugned Order does not have a real relation to the object of the Order. The contention fails.

36. According to Mr. Krishna Iyer the very provision allowing concessions at different rates to producers, rent-receivers and non-producers among the stock-holders, all of which are at a rate much above that given to other citizens and even to persons engaged in essential services like the Defence, is unreasonably discriminatory. This argument also fails to carry conviction. It is well known that India is short of foodgrains and has now to import large quantities from other countries to meet the requirements of her population. An incentive to cultivators of foodgrains to enhance production in the country cannot be said to be an unreasonable discrimination in the circumstances. Pertinent here is the observation of Shearer, J., in AIR 1952 Pat 220:

"In other countries in which the State has found it necessary to requisition part of the crops raised by substantial cultivators it has sometimes happened that so much has been taken that the cultivators have been discouraged from growing as much as they could in subsequent agricultural year."

I am not therefore prepared to hold that a larger concession shown to persons concerned in the production of paddy is unrelated to the objects of the Order, one of which is "for maintaining the supplies of rice and paddy."

37. Counsel then challenged the "allowance of 1.5 quintals of paddy for every acre of land cultivated by him (the cultivator) with paddy" as arbitrary and unrelated to its purpose, viz., meeting the cultivation expenses. Harvest charges, the learned Advocate General states — and I agree with him — do not come in the picture, as they are invariably given at the threshing ground and therefore do not form part of the stock in the possession of the producer. Mr. Velayu-

dhan Nair also contended that the fixation of the same rate for the whole State, irrespective of the actual need in the locality, is arbitrary. His contention is that in certain areas, where paddy itself has to be measured as wages to workers, the requirement will be more, and in areas where labour is cheap and wages are paid in cash, it would be far less than what is allowed by the Order.

Except the vague allegations at the hearing, no data have been placed before this Court to find any arbitrariness in this matter. No data are given by counsel to show that 1.5 quintals of paddy per acre would not suffice for the seed and other requirements like food to agricultural labourers at work which have to be met with the grain. Nor am I convinced that there is large difference in labour conditions between one part of the State and another. I do not therefore find any prejudice to the producers caused by the fixation of an allowance of 1.5 quintals per acre of cultivated area.

38. Counsel contended that the fixation of compensation for the rice and paddy requisitioned under the Order at the controlled price, which is defined in the Order itself as the maximum price fixed under the Maximum Prices Orders, is a negation of the stock-holder's right to get a "just equivalent" for the grains taken from him. It is one thing to say that the Maximum Prices Orders need periodical revision, and another thing to say that payment of the maximum price fixed by law is not a just equivalent for a thing procured by the Government. In the light of the fact that on sales by private treaty the stock-holder is not entitled to a larger price, I cannot say that the provision to pay the maximum price is anyway unjust in the matter of payment of compensation within the meaning of Article 31 (2) of the Constitution. As observed by Shearer, J., in AIR 1952 Pat 220:

"It has to be remembered that the paddy which a producer is required to deliver is not confiscated. The producer is paid for it, and the difference between what he receives from the State and what he would have obtained if he had sold it at the controlled wholesale price is not very great. No doubt, it would be more convenient for him to sell it in the open market, and not to have to deal with minor officials. But too much ought not to be allowed to be made of such a grievance, and none at all of the grievance that he might, quite possibly, be able to obtain from some speculator more than the controlled wholesale price."

I am in respectful agreement with these observations.

39. It is then pointed out by counsel that Clause 3 (1) of the Order obliges a

stock-holder to declare his stock, but there is no corresponding provision to oblige any officer to take the excess paddy in that stock; nor is any time fixed for making a demand in case the officer proposes to take such excess. It is urged that as private sales by stock-holders are not prohibited except when a demand under the Order has been made, the absence of a provision for an expeditious demand empowers officers to keep mum in the case of certain persons and to be vigilant in the case of others, and thereby to discriminate largely, tacitly allowing some to sell their stock in open market for prices far above the controlled price and at the same time compelling others to sell their stock to the State at controlled rates, and that such an arbitrary discretion is inconsistent with the equality of protection of law envisaged by Article 14 of the Constitution. I am afraid that the apprehension expressed by counsel is far-fetched. The preamble and various provisions of the Order indicate clearly the intent and purpose of the law and they afford sufficient guidance to the action of the officers administering the law. It is hardly legitimate to presume that the administration of law entrusted with the executive officers will be exercised 'with an evil eye and an unequal hand'. There is ample power conceded by our Constitution to the Courts to correct the vagaries of any erring individual officer. I see no force in the contention.

40. As the Kerala Paddy and Rice (Declaration and Requisitioning of Stocks) Order, 1966, is not shown to have offended any provision in the Constitution, the attack on its constitutional validity has to fail. The Order is declared valid.

III. The Kerala Paddy (Maximum Prices) Order, 1965 and the Kerala Rice (Maximum Prices) Order, 1965.

41. Mr. Krishna Iyer impugned the Maximum Prices Orders as arbitrary legislations as the prices therein have been fixed in 1965 without a provision for revision from time to time and pointed out that the Orders made under conditions prevailing in 1965 have not been revised so far, even though the cost of production has gone up on account of increase in labour charges and enhancement in price of manure. It is true that the price of paddy must be such as to leave a reasonable margin of profit to the producers above their cost of production. But no data have been placed before us to show that under the present conditions in the State the maximum prices fixed by the Maximum Prices Orders, 1965, do not leave a fair margin of profit over the cost of production. In the judgment under appeal Gopalan Nambiyar, J., has observed:

"Nothing was made out to show that the Maximum Prices Orders 1965 are unconstitutional or invalid."

I am in respectful agreement with that observation. Mr. Krishna Iyer cited the tables of living indexes given in 1965 L. L. J. and 1967 L. L. J. to show that the living indexes in all parts of the State have risen above 100 points in the interval 1965 to 1967 and consequently the labour charges have shot up considerably. But the extent of its impact on cost of production of paddy is not exhibited to us. As such we have no material to declare the maximum prices now in vogue to be unreal and arbitrary. The expression "the maximum price specified by the Government for the time being under the Kerala Paddy/Rice (Maximum Prices) Orders 1965" indicates categorically that the intention behind the Maximum Prices Orders is to revise the price from time to time as conditions may require. The learned Advocate General assures that the propriety of the maximum prices fixed by the Maximum Prices Orders is now being checked by the Government and it will be done from year to year hereafter. The assurance is recorded and in the light of that I do not feel it necessary to canvass further on the legality or propriety of the Maximum Prices Orders here.

42. In the result, I allow the Appeal (W. A. No. 30 of 1968) by the State, and dismiss the other appeals.

Before parting with the case, I would, in view of the statements made at the bar that several officers have misunderstood and misapplied the definition of a cultivator in the Levy Order and that has caused the filing of a multitude of writ petitions in this Court, tell the Government that it would ensure proper administration of the Order if its officers are instructed on the real import of that definition in the light of this Judgment.

I make no order as to costs here.

43. KRISHNAMOORTHY IYER, J.:—I agree with my learned brother Madhavan Nair, J.

44. The learned Single Judge has held that the definition of the term "cultivator" in the Kerala Rice and Paddy (Procurement by Levy) Order, 1966, (hereinafter referred to as the Levy Order) is vague and does not lay down even the broad principles for a satisfactory administration of the provisions of the Levy Order and is productive of arbitrariness and is therefore violative of Article 14 of the Constitution and the last portion of Clause 7 of the Levy Order in so far as it places a ceiling on the market value of the price to be paid for the paddy acquired offends Article 31 (2) of the Constitution. The learned Judge took the view that since the definition of the term "cul-

thvator" is so intimately connected with all the other provisions the Levy Order is liable to be struck down. The learned Judge also held that Clause 4 of the Kerala Paddy and Rice (Declaration and Requisitioning of Stocks) Order, 1966, (hereinafter referred to as the Requisitioning Order) to the extent it directs sale to the Government at the "controlled price" offends Article 31 (2) of the Constitution. But the challenge of the Kerala Paddy (Maximum Prices) Order, 1965, and the Kerala Rice (Maximum Prices) Order, 1965, was overruled by him. The Levy Order, the Requisitioning Order and the Maximum Prices Orders have been issued by the Kerala Government in exercise of the powers conferred by the Essential Commodities Act, 1955, (Central Act X of 1955) read with certain Orders issued by the Government of India. The Essential Commodities Act, 1955 (hereinafter referred to as the Act) is intended to provide, in the interests of the general public, for the control of the production, supply and distribution of, and trade and commerce, in Essential Commodities. Section 3 (1) thereof empowers the Central Government if it is of opinion that it is necessary or expedient so to do for maintaining or increasing supplies of any Essential Commodity or for securing their equitable distribution and availability at fair prices, or for securing any essential commodity for the Defence of India or the efficient conduct of military operations to pass orders providing for regulating or prohibiting the production, supply and distribution of essential commodities and trade and commerce therein. Section 3 (2) of the Act specifies the several matters in respect of which orders under Section 3 (1) of the Act can be made. Section 5 of the Act enables the Central Government by notified order to delegate the power to make orders under Section 3 of the Act in favour of a State Government and other persons. It is in pursuance to such delegation that the Kerala Government has passed the Levy Order and the Requisitioning Order which came into force on 1-7-1966 and the Maximum Prices Orders which came into force on 3-9-1965.

45. The Levy and the Requisitioning Orders have been passed by the State Government in exercise of the powers conferred by Section 3 (1) and (2) of the Act, read with the Order of the Government of India No. G. S. R. 906 dated 9th June, 1966, while the Maximum Prices Orders have been passed under Section 3 (1) and (2) (c) of the Act read with the Notification No. 203 (General) (14)743/64/Pv.11 dated the 13th October, 1964 of the Government of India, Ministry of Food and Agriculture (Department of Food). Sections 3(1) and 3(2)(c)

and (f) which are relevant are reproduced below:

"3. Power to control production, supply, distribution etc. of essential commodities.

(1) If the Central Government is of opinion that it is necessary or expedient so to do for maintaining or increasing supplies of any essential commodity or for securing their equitable distribution and availability at fair prices, or for securing any essential commodity for the Defence of India or the efficient conduct of military operations it may, by order, provide for regulating or prohibiting the production, supply and distribution thereof and trade and commerce therein.

(2) Without prejudice to the generality of the powers conferred by sub-section (1), and order made thereunder may provide—

(a)

(b)

(c) for controlling the price at which any essential commodity may be bought or sold;

(d)

(e)

(f) for requiring any person holding in stock any essential commodity to sell the whole or a specified part of the stock to the Central Government or a State Government or to an officer or agent of such Government or to such other person or class of persons and in such circumstances as may be specified in the order;

(g)

(h)

(i)

(j)

Neither before the learned Judge nor before us the Constitutional validity of either the Act as a whole or Sections 3 and 5 thereof separately was challenged. The attack was confined only to the Levy Order, the Requisitioning Order and the Maximum Prices Orders on the ground that they are violative of Articles 14, 19 (1) (f) and (g) and 31 (2) of the Constitution.

46. In Narendra Kumar's case, AIR 1960 SC 430 their Lordships of the Supreme Court pointed out that:

"when Section 3 confers power to provide for regulation or prohibition of the production, supply and distribution of any essential commodity it gives such power to make any regulation or prohibition in so far as such regulation and prohibition do not violate any fundamental rights granted by the Constitution of India."

It is therefore clear that if any of the Orders offend Articles 14 or 19 (1) (f) and (g) or 31 (2) of the Constitution they cannot be sustained and it is necessary to consider the constitutional validity of the orders.

47. The first question to be considered is whether the Levy Order infringes

Article 14 of the Constitution because of the definition of the term "cultivator" therein. Clause 2 (b) of the Levy Order defining "cultivator" reads:

"'Cultivator' means a person who actually cultivates any land with paddy;" I am in complete agreement with the views expressed by my learned brother Madhavan Nair, J., on the interpretation to be given to the definition clause. But I wish to add further that if the definition of the term "cultivator" in the definition clause in the Levy Order is susceptible of the interpretation given to it by the learned Single Judge, the term used in Clauses 3-C and 4 to 8 of the Levy Order has to be understood in a restricted manner and not in the light of the definition clause. It is no doubt true that when in a statute words are defined, normally the said meaning should be attributed to those words occurring in the several provisions of the Act. But all statutory definitions have to be read subject to the qualification expressed in the definition clauses which create them. In *V. F. & G. Insurance Co. Ltd. v. M/s. Fraser & Ross*, AIR 1960 SC 971 their Lordships of the Supreme Court observed:

"It is well settled that all statutory definitions or abbreviations must be read subject to the qualification variously expressed in the definition clauses which created them and it may be that even where the definition is exhaustive inasmuch as the word defined is said to mean a certain thing, it is possible for the word to have a somewhat different meaning in different sections of the Act depending upon the subject or the context. That is why all definitions in statutes generally begin with the qualifying words similar to the words used in the present case, namely, unless there is anything repugnant in the subject or context."

An interpretation clause cannot therefore be used to interpret any of the Sections in the Act if there is anything in the Section itself which will be repugnant to the definition contained in the interpretation clause. Clause 2 of the Levy Order starts by saying: "In this order, unless the context otherwise requires". Clause 3 of the Levy Order directs that every cultivator shall sell to the Government paddy derived from lands cultivated by him in accordance with such scale as may be specified by the Government from time to time by notification in the Gazette; Clause 3-C directs that every cultivator holding more than two acres of land shall furnish information to the Village Officer of the Village in which the paddy lands are situated, in writing, regarding the harvest and shall harvest the crop only after obtaining the written permission of the Village Officer; Clause 4 provides for the

issue of notice to the cultivator by the officers mentioned therein specifying among other things the quantity of paddy to be sold by the cultivator; Clause 5 prescribes the mode of service of notice issued under Clause 4 on the cultivator; Clause 6 prescribes for the filing of objections by the cultivator, the mode of disposal thereof and for the filing of an appeal by any person aggrieved by the orders of the Taluk Supply Officer; Cl. 7 says that after the service of notice under Clause 4 no cultivator shall sell or remove paddy from his stock without conforming to the provisions of Clause 4; and Clause 3 provides for the issue of a receipt for the purchase of paddy by the Government to the cultivator. It is not possible to construe the term "cultivator" occurring in the above clauses as meaning even a person who carries on the mere tilling work or other analogous cultivation operations without any control over the standing crops or without any power to deal with the paddy harvested from the land. The context in which the term "cultivator" is used in these clauses shows that the cultivator is the person who has got the right to conduct the harvest and who has the right of disposal of the paddy harvested from the land. The term in the context cannot comprehend a person who merely puts his own muscular effort to the soil. It is not necessary that for a person to be a cultivator he should plough the field, irrigate it, harvest the crop and thresh it. It is sufficient if the land is cultivated under his supervision, he bears the risk of cultivation and gives directions regarding the disposal of the crops. As to whether a particular person is a cultivator having a right to conduct the harvest and dispose of the paddy is a matter to be decided with reference to the facts of each case and in my view even if there is any ambiguity in the interpretation clause as to the meaning of the term "cultivator" no such ambiguity exists in regard to the meaning that has to be attributed to the term "cultivator" in clauses 3, 3C and 4 to 8 of the Levy Order. Clause 3 of the Levy Order compels the cultivator to sell paddy derived from lands cultivated by him in accordance with the scales specified by the Government. According to the Schedule fixed by the Notification dated 3-8-1966 it is seen that persons who have cultivated paddy in an area up to and including 2 acres in the aggregate are exempted from selling any paddy to the State. Similarly clause 3C provides for a cultivator holding more than two acres of land to furnish the information regarding the harvest. It is therefore impossible to conceive that the term "cultivator" used in these provisions relates even to a tiller having no sort of control over the paddy to be sold to the

Government. Though the term "holding" in clause 3C of the Levy Order may not be sufficient to indicate the necessity of any proprietary interest in the land it is a pointer to show that the sale is contemplated by a person in whom the right to sell is vested. This view is confirmed by the provision of Section 3 (2) (f) of the Act which provides for requiring any person holding in stock any essential commodity to sell the whole or a specified part of the stock. It is not possible to conceive that the legislature has empowered the delegate to make laws for the acquisition of the paddy from those people who have absolutely no right to them to the detriment of the people having right over the same. The subordinate legislation evidenced by the Levy Order and the Requisition Order has normally to be interpreted only in consonance with the power delegated and these orders therefore cannot be expected to authorise the sale of the paddy by persons who are in mere custody but have no right of sale over the same. I am therefore in agreement with the view taken by my learned brother Madhavan Nair, J., that the finding of the learned Single Judge that the Levy Order offends Article 14 of the Constitution cannot stand.

48. I shall now pass on to consider the second question whether the latter part of Clause 7 of the Levy Order offends Article 31 (2) of the Constitution. Since in the course of the discussion it is necessary to refer to Section 3 (3) and 3 (3B) of the Act, I shall reproduce the same here:

"3 (3). Where any person sells any essential commodity in compliance with an order made with reference to Clause (f) of sub-section (2), there shall be paid to him the price therefor as hereinafter provided:—

(a) where the price can, consistently with the controlled price, if any, fixed under this section, be agreed upon, the agreed price;

(b) where no such agreement can be reached, the price calculated with reference to the controlled price, if any;

(c) where neither Clause (a) nor Clause (b) applies, the price calculated at the market rate prevailing in the locality at the date of sale.

(3B) Where any portion is required by an order made with reference to Clause (f) of sub-section (2) to sell any grade or variety of foodgrains, edible oilseeds or edible oils to the Central Government or a State Government or to an officer or agent of such Government and either no notification in respect of such foodgrains, edible oilseeds or edible oils has been issued under sub-section (3A) or any such notification having been issued

has ceased to remain in force by efflux of time, then notwithstanding anything contained in sub-section (3), there shall be paid to that person such price for the foodgrains, edible oilseeds or edible oils as may be specified in that order having regard to—

(i) the controlled price, if any fixed under this section or by or under any other law for the time being in force for such grade or variety of foodgrains, edible oilseeds or edible oils; and

(ii) the price for such grade or variety of foodgrains, edible oilseeds or edible oils prevailing or likely to prevail during the post-harvest period in the area to which that order applies.

Explanation.—For the purpose of this sub-section, "post-harvest period" in relation to any area means a period of four months beginning from the last day of the fortnight during which harvesting operations normally commence."

49. Section 3 (2) (f) of the Act enables the Central Government or its delegate to require any person holding in stock any essential commodity to sell the whole or a specified part of the stock to the Central Government or a State Government or to an Officer or agent of such Government or to such other person or class of persons and in such circumstances as may be specified in the order. When any person is required to sell any essential commodity in compliance with an order made with reference to Section 3 (2) (f) of the Act, Section 3 (3) of the Act provides that there shall be paid to him the price therefor as stated therein. Section 3 (3) of the Act is a general provision which will apply when a person holding any stock of essential commodity is required to sell by an order under Section 3 (2) (f) of the Act to any of the persons referred to therein. Section 3 (3A) of the Act enables the Central Government or its delegate in the circumstances mentioned in the provision to regulate the price at which the foodstuff shall be sold in any locality. This provision has been enacted to meet a specific situation namely the rise in prices and hoarding of foodstuff in any locality which have a tendency to bring about artificial scarcity and thereby prevent the free flow of foodstuff at reasonable prices. Section 3 (3A) is applicable only in the case of foodstuff and not to all essential commodities. Section 3 (3A) of the Act need not detain us further as it was agreed at the bar that it is not relevant for the purpose on hand.

50. Section 3 (3B) of the Act which was inserted by the Amending Act 25 of 1966 and which came into effect from 3-9-1966 deals with foodgrains, edible oilseeds or edible oils only. There was

cil. The Government then reviewed the order dated 4th January 1968 rescinding it. The order passed by the State Government on review said:

"Whereas Shri Sheikh Habib and two others have filed an application dated 8th January 1968 requesting the State Government for the review of the orders passed by the State Government under section 328 of the Madhya Pradesh Municipalities Act, 1961 (No. 37 of 1961), (hereinafter referred to as the said Act) and published under this Department Notification No. 14-A-XVIII-Urban-II 68 dated the 4th January, 1968 for the dissolution of the Municipal Council, Rewa:

And whereas, it is found that the enquiry conducted by the Enquiry was not properly conducted inasmuch as (i) The report of enquiry is based on records and documents made available by the Municipal Council which have not been exhibited and proved by witnesses; (ii) witnesses whose evidence was material were not summoned and examined for accounting for the allegations;

Now, therefore, in exercise of the power conferred by section 332 of the said Act, the State Government hereby:

(i) reverses the dissolution of Rewa, Municipal Council ordered on the 4th January, 1968;

(ii) restores the status quo prevailing on 3rd January, 1968, and

(iii) remands back the case for enquiry according to law and procedure.

2. As none appeared in the dock before the enquiry officer for accounting for and proving the allegations, it cannot be determined at this stage of review as to who are the parties interested in support of order of dissolution and as such the question of giving notices to such parties for appearance and being heard does not arise."

4. Before stating the contentions advanced on behalf of the petitioner, it is necessary to refer to the material provisions of sections 328 and 332 of the Act. Section 328 (1) is in the following terms:

"328. Power to dissolve or supersede Council.—

(1) If at any time upon representation made or otherwise it appears to the State Government that—

(a) the Council is not competent to perform, or persistently makes default in the performance of the duties imposed on it by or under this Act or any other law for the time being in force, or exceeds or abuses its powers or fails to carry out any order passed by the State Government under this Act;

(b) the President of the Council or any of its committees is not competent to perform, or persistently makes default in the performance of the duties

imposed on him or it by or under this Act or any other law for the time being in force, or exceeds or abuses his or its powers or fails to carry out any order passed by the State Government under this Act and the Council has failed or neglected to take action against the president or the committee; the State Government may, by an order stating the reasons therefor published in the Gazette, dissolve such Council and may order a fresh election to take place."

By sub-section (4) of section 328, it is provided that no order under sub-section (1) or sub-section (2) or sub-section (3) shall be passed until a reasonable opportunity has been given to the Council to furnish an explanation. Sub-section (6) of section 328 runs thus:

"(6) If the Council is dissolved or superseded as provided in the preceding sub-sections, the following consequences shall ensue:

(a) all the Councillors of the Council shall, as from the date of the order, vacate their offices as Councillors;

(b) all powers and duties of the Council under this Act may, until the Council is reconstituted, be exercised and performed by such person or a Committee of persons as the State Government may appoint in that behalf;

(c) all properties vested in the Council shall, until the Council is reconstituted vest in the State Government;

(d) when more than one person are appointed under clause (b) any one of them, duly authorised in this behalf by a resolution passed by them, may sue or institute or defend any action-at-law by or against the Council.

Section 332 deals with "power of review". The material portion of that provision is as follows:

"332. Power of review.—(1) The State Government may, either on its own motion or on the application of any party interested, review any order passed by itself, and the Commissioner, the Collector, the prescribed authority or any other officer authorised under this Act may, similarly, review any order passed by himself and pass such order in reference thereto as it or he thinks fit:

Provided that—

(i) no order shall be varied or reversed unless notice has been given to the parties interested to appear and be heard in support of such order.

5. Shri Dharmadhikaree, learned counsel for the petitioner, submitted that as on the making of an order under section 328 (1) dissolving the Council, the Council itself became extinct and the consequences mentioned in sub-section (6) of section 328 followed, so there could be no question at all of an order of the State Government dissolving the Coun-

cil being set aside or reviewed, so as to revive the dead Council. He proceeded to say that the order of the Government dissolving a Council was an administrative or an executive order and the power of review conferred on the State Government under S. 332 was only with regard to review of quasi-judicial orders. In the alternative, he urged that assuming that an order dissolving a Council could be reviewed under section 332, it could be varied or reversed after hearing the parties interested and only in the like manner and subject to the conditions in which an order superseding a Council could be made under section 328. Learned Counsel suggested that the "party interested" to whom notice should have been given as prescribed by the first clause of the proviso to section 332 (1) was "the constituency itself", that is to say, all the citizens residing in Rewa Municipality; and that in any case notices should have been given to all the Councillors including the petitioner on whose complaint the Council was dissolved. Learned Counsel attacked the order dated 23rd March 1968 of the Government restoring the Council also on the ground that the said order was based on extraneous grounds in that it referred to the report of an enquiry made when no enquiry was at all held and none was contemplated by section 328.

6. In our judgment, all these contentions are without any substance. It will be seen from the language of section 332 (1) that the power of review conferred on the State Government by the provision is not in any way qualified or limited or controlled by anything that is contained in section 332 or in any other provision of the Act. There is nothing in section 332 to show that under that provision only quasi-judicial orders can be reviewed and not an administrative or an executive order. Indeed, as is evident from Sec. 21 of the General Clauses Act, an executive or an administrative order can be amended, varied or rescinded in the same manner and subject to the like sanctions and conditions in which the order is made. An order of the Governor of the State Government after it has been duly authenticated under article 166 (2) of the Constitution and communicated to the party or authority concerned whose legal rights are affected by it cannot no doubt be reviewed or modified in the absence of a legal provision in that behalf. *Bachhittar Singh v. State of Punjab*, AIR 1963 SC 395. The legal provision for review of such an order is contained in section 332 of the Act. The contention, therefore, that the order dissolving the Municipal Council being an administrative order could not be reviewed under section 332 cannot be accepted.

7. The contention that in its very nature an order dissolving a Municipal Council cannot be rescinded because of the consequences specified in sub-section (6) of section 328 that ensue on the making of an order of dissolution also lacks substance. It is no doubt true that when a Council is dissolved, all the Councillors of the Council vacate their offices as from the date of the order of dissolution and the administration of the Council is taken over by a person or a committee of persons appointed by the State Government. But these are not consequences which make the restoration of the Council an impossibility. It cannot be denied that an order of the State Government under section 328 superseding or dissolving a Council can be quashed by this Court in proceedings under article 226 of the Constitution. If the order is quashed, then its effect is to restore the Council and the consequences mentioned in sub-section (6) of section 328 cease to be operative. The same result would have followed if the Act had provided for an appeal against an order under section 328 giving to the appellate authority the power to vary or modify or rescind the order made by the State Government under section 328. If the Council could be restored in the aforesaid proceedings, then it is difficult to appreciate why it could not be restored by the State Government itself in exercise of its power of review under section 332. To support his contention learned counsel for the petitioner placed reliance on *Akbarali Arif v. Govt. of Madhya Pradesh*, 1967 MPLJ 949. That decision does not in any way assist the petitioner. On the other hand, the observation in that case that statutory consequences of a decision of the Government cannot be arrested or discontinued so long as the decision itself stands, shows that when the order of the Government from which the statutory consequences flow is set aside, then the statutory consequences also cease.

8. In our opinion, the power of review conferred on the State Government under section 332 is wide enough to enable it to review an order passed under section 328. No doubt, as laid down in the first clause of the proviso to section 332 (1) no order can be varied or reversed "unless notice has been given to the parties interested to appear and be heard in support of such order". The expression "parties interested to appear and be heard in support of such order" clearly means those parties who are interested in the maintenance of the order sought to be reviewed. As is clear from the last paragraph of the impugned order, notice was not given to any "party interested". But there was no such party. It stands to reason to think

that the Councillors who were required to vacate their office as from the date of the order dissolving the Council were interested in seeing that the order of dissolution was set aside and the Council was restored. They were not parties interested in supporting the order which was reviewed under section 332. That all the Councillors of the Rewa Municipal Council were interested in the order of dissolution being set aside is clear from the fact that the Council had itself requested the Government to withdraw the notice to show cause why it should not be dissolved which was issued to it on 5th May 1967. The petitioner was also one of the Councillors who had voted for the resolution of the Council requesting the Government to withdraw the "show cause notice". The petitioner no doubt complained to the Government against "mal-administration" by the Council. But he never went to the length of saying that the council should be dissolved. That being so, the petitioner cannot claim that he was a "party interested" in supporting the order dated 4th January 1968 of the State Government dissolving the Council.

9. Learned counsel referred us to section 3 (18) and sections 4 and 5 of the Act defining "Municipality" and dealing with the constitution of municipalities to support his contention that all the residents residing in the area of the municipality were persons interested. He also pressed into service the observations of Morris J. in the Tipperary case, (1875) 3 O'M & H. 19 at p. 25 reproduced by the Supreme Court in K. Kamaraja Nadar v. Kunju Thavar, AIR 1958 SC 687 namely, that at p. 693 para 22 an election petition "is a proceeding in which the constituency itself is the principal party interested". It is difficult to appreciate how from the definition of "Municipality" or the classification of municipalities given in section 4 of the Act or the issue of a notification under section 5, the conclusion follows that all the citizens residing in a municipality are parties interested for the purpose of the first clause of the proviso to section 332 (1). Learned Counsel admitted that before the issue of notice it was not possible to know the citizens who would be interested in supporting dissolution and who would be in favour of the restoration of the Municipal Council. If that be so, then clearly notice to all citizens residing in the Municipal area cannot be given. The reason is that under the first clause of the proviso to section 332 (1) notice is required to be given to that party who is interested to appear and support the order sought to be reviewed. Learned counsel sought to get over this difficulty by saying that the expressions "the parties interested to

appear" and "be heard in support of such order" should be read disjunctively. In our opinion, there is no justification whatsoever for such a reading. The observation of Morris J. has no bearing in the present case. Where the lis is an 'election', then clearly in election proceedings the constituency itself is the principal party interested. But where the dispute is about the dissolution of a Council, then the principal party interested can be only the Councillors or the party who asked the Government to dissolve the Council. As we have pointed out earlier, in the present case the Councillors including the petitioner were interested in supporting the order of dissolution. Consequently, the order passed by the Government is not vitiated for want of notice to the Councillors including the petitioner.

10. The further argument of learned counsel that the impugned order is based on extraneous consideration is untenable. Section 328 no doubt does not contemplate or enjoin a regular formal enquiry into the allegations on which it is proposed to dissolve or supersede a Council. But such an enquiry is not barred by that provision. The enquiry mentioned in the impugned order has no reference to a formal regular enquiry into the charges on which the Council was dissolved. It simply means an enquiry conducted by an officer deputed by the Government to verify informally the charges made against the Municipal Council. On the basis of that enquiry the Government no doubt made an order dissolving the Municipal Council; but later on when it found that the charges had not been properly verified with reference to relevant records and documents, the Government passed the impugned order. Indeed, when it has been held by a Full Bench in Kareli Municipality v. State, AIR 1958 Madh Pra 323, that if the State Government supersedes or dissolves a Municipal Council without properly verifying the charges and the explanation of the Council thereto, the action of the Government cannot be said to be reasonable, it cannot be contended that the State Government rescinded the order of dissolution on extraneous factors when it realised that the charges had not been properly verified with reference to the relevant records and documents. It must be noted that under Section 332 the State Government's power to review does not depend upon the existence of any specific ground or grounds. It is open to the Government to review an order in the exercise of its power under S. 332 if it thinks that the order is not reasonable or proper or legal.

11. We must add that though the Government has the power to review and

order dissolving a Municipal Council and to restore the dissolved Municipal Council it is a power which should be exercised very sparingly and in extraordinary circumstances. We have not come across any case in which a dissolved Municipal Council was restored by the Government exercising its powers of review. It is clearly not conducive to efficient and stable municipal administration that a Council should be dissolved and then again restored only a few months after. The occasion for the exercise of review power for setting aside an order of dissolution will not arise if the order of dissolution is made not in a nonchalant manner but after a proper scrutiny of the charges against the Municipal Council and consideration of the explanation of the council thereto.

12. For the foregoing reasons, this petition is dismissed. The amount of the security deposit shall be refunded to the petitioner.

VGW/D.V.C.

Petition dismissed.

AIR 1969 MADHYA PRADESH 20
(V 56 C 7)

P. K. TARE AND SHIV DAYAL, JJ

Kodu, son of Panchhi Dhimar, Appellant v. Banmali, son of Mohan Kewat, Jabalpur, Respondent.

Criminal Appeal No. 530 of 1965, D/- 17-2-1968, from Judgment of Magistrate 1st Class, Katni, D/- 13-11-1964.

(A) Criminal P. C. (1898), Ss. 417, 204 (3) and 256—Accused pleading not guilty and desiring the presence of prosecution witnesses for further cross-examination—Magistrate ordering summons to be issued directing complainant to pay diet money — Dismissal of complaint under S. 204 (3) on failure of complainant to comply with direction — Appeal against order is competent as the dismissal of complaint after charge has been framed amounts to acquittal. (Para 3)

(B) Criminal P. C. (1898), S. 204 (3) — "Talbana" ordinarily means process fee—Magistrate dismissing complaint for failure to pay diet money in accordance with Court's direction to pay Talbana, interpreting the word to include diet money also — Order neither indicating any provision wherein that word has been used to include diet money or that it is the practice of that Court to so use it and that the parties were acquainted with that expression to include diet money as well — Held that the drastic action of the magistrate in 'dismissing' the complaint could not be justified or sustained — (Words and Phrases — "Talbana").

(Para 5)

(C) Criminal P. C. (1898), Ss. 544 and 256 — Recall of prosecution witnesses for further cross-examination — Payment of expenses of prosecution witnesses — Prosecution under S. 497, Penal Code — Offence being bailable and non-cognizable, having no direct nexus with public interest, question whether government should pay travelling allowances and subsistence allowance of witnesses summoned is under R. 558 (a) (ii) of Rules and Orders (Criminal) framed by the Madhya Pradesh High Court for the subordinate Courts to decide — Held that in the case the complainant should bear the expenses — Scope of R. 558 indicated—(1912) 8 Nag LR 65, Explained and Distinguished; 1962 MPLJ (Notes) 36 and 1933 Mad WN 1266 and AIR 1950 Nag 88 & 1947 Nag LJ (Notes) 7 and AIR 1950 Mad 283, Distinguished — High Court Rules and Orders (Criminal) (Madhya Pradesh), R. 558. (Para 11)

Cases Referred: Chronological Paras
(1961) Criminal Rev. No. 123 of 1961,
D/- 24-4-1961 = 1962 MPLJ
(Notes) 36, State v. Smt. Bilso 9
(1950) AIR 1950 Mad 283 (V 37) =
51 Cri LJ 738, Vendanta In re 10
(1950) AIR 1950 Nag 88 (V 37) =
ILR (1950) Nag 506 = 51 Cri
LJ 746, Vithi v. Tulsiram 10
(1949) AIR 1949 All 428 (V 36) =
50 Cri LJ 674, Saghir Uddin v.
Mt. Munni 6
(1947) 1947 Nag LJ (Notes) 7,
Crown v. Mst. Guni 9
(1933) 1933 Mad WN 1266, Amir-
thammal v. Ratnaswamy Padayachi 9
(1912) 8 Nag LR 65 = 13 Cri LJ 554,
Birdhichand v. Lakshmichand 9

L. S. Baghel, for Appellant; G. M. Kekre, for Respondent; M. V. Tamaskar, Deputy Govt. Advocate, for the State.

SHIV DAYAL, J.: This is an appeal against acquittal on special leave granted under section 417 (3), Criminal Procedure Code. The appellant filed a complaint under sections 497/498/109, Penal Code, against the respondent in the Court of the Magistrate First Class, Katni. It is alleged in the complaint that Mst. Itiya is the married wife of the complainant. Banmali, accused No. 1, has kept Mst. Itiya as his wife and he is committing adultery and is liable under section 497/498, Penal Code. Mst. Charkd, accused No. 2, is the mother of Mst. Itiya. She connived and abetted the offence under sections 497 and 498, Penal Code.

2. After recording prosecution evidence, the learned trial Magistrate, on 29th September 1964, framed a charge under section 497, Penal Code, against Banmali. The accused pleaded not guilty and desired that the prosecution witnesses be recalled for further cross-examination. The learned Magistrate direct-

ed that summons be issued on payment of "Talbana". The 9th November 1964 was fixed for further cross-examination. Mst. Charki was discharged. The complainant submitted that he was not bound to pay "Talbana". The learned Magistrate held that the word "Talbana" includes both process fee and diet money; that the complainant was bound to pay diet money; and that for non-compliance with his direction for payment of "Talbana", the complaint was liable to be dismissed. Accordingly, he "dismissed" the complaint under section 204 (3), Criminal Procedure Code. This appeal is from that order.

3. There can be no doubt that the learned Magistrate was clearly wrong in using the expression "dismissal of complaint". A charge had been framed. His order amounts to acquittal. This appeal is, therefore, competent.

4. So far as the process fee is concerned, the following provision, which is contained in Rule 546 of the Rules and Order (Criminal), framed by the High Court, is quite clear. Clause (3) of this Rule reads thus:

"No fee shall be chargeable for any process to compel the appearance of a witness recalled for cross-examination under the provisions of section 256 of the Code of Criminal Procedure".

Thus, the learned trial Magistrate was in error when, in his order dated 29th September 1964, he directed the complainant to pay process fee.

5. In his order, dismissing the complaint, the learned Magistrate observed that he used the word "Talbana" and that it includes both process fee and diet money. Here too, he is wrong. The word "Talbana", in its ordinary connotation, means process fee. The learned Magistrate now interprets the word "Talbana" as inclusive of diet money. May be that the learned Magistrate might be employing that expression in that sense but since he does not say in the order under appeal that that was the practice in that Court so that the counsel and the parties were acquainted with that expression as to include diet money as well, and since he does not refer to any provision where the word "Talbana" has been used as to include subsistence allowance, the drastic action he took in "dismissing" the complaint cannot be justified or sustained. He could not abruptly terminate the trial on that account. Therefore, the order under appeal must be set aside.

6. This brings us to the question whether the complainant is bound to pay subsistence allowance of prosecution witnesses when they are recalled under section 256, Criminal Procedure Code, at the instance of the accused. Section 544, Criminal Procedure Code, enacts thus:

"Subject to any rules made by the State Government, any criminal Court may, if it thinks fit, order payment, on the part of Government, of the reasonable expenses of any complainant or witness attending for the purpose of any enquiry, trial or other proceeding before such Court under this Code".

This section invests the Magistrate with a discretion regarding payment, on the part of Government, of the expenses not only of a witness but even of the complainant. Firstly, this discretion must be exercised according to the rules, if any, made by the State Government. Secondly, this discretion, as any other, must be exercised judiciously. It is plain enough that it is the right of the accused to have witnesses for the prosecution recalled and cross-examined after charge and it is not necessary for him to show a reasonable ground for exercising that right. It is obligatory on the Magistrate to recall the witnesses at the request of the accused. The Magistrate has no discretion to refuse to recall prosecution witnesses for cross-examination, even if the witnesses have been cross-examined before the charge was framed. (See *Saghir Uddin v. Mt. Munni*, AIR 1949 All 428.

It is equally clear that section 256, Criminal Procedure Code, does not cast the duty of recalling the witnesses on the complainant. It is the duty of the Magistrate to recall them. Therefore, the mere fact that the complainant did not take steps in that matter, does not absolve the Magistrate from his duty to recall the witnesses. It is also patent enough that section 256 of the Code, while giving an absolute right to the accused to recall prosecution witnesses, without assigning any cause for the same, does not make him liable to pay expenses of the prosecution witnesses.

7. Now, therefore, the question boils down to this. Whether the subsistence allowance of the prosecution witnesses, who are recalled at the desire of the accused for further cross-examination after charge (i.e., under section 256, Criminal Procedure Code) must be borne by the complainant or by the Government. Rule 558 of the aforesaid Rules and Orders provides as follows:

"558. Subject to the instructions hereinafter contained the criminal Courts are authorised to pay the expenses—

(a) of complainants and witnesses, whether for the prosecution or the defence—

(i) in cases prosecuted, instituted or carried on by, or under the orders of, or with the sanction of Government or any judge, magistrate or other public officer acting as such,

(ii) in cases in which the presiding officer considers such payment to be

directly in furtherance of the public interest, and

(iii) in all non-bailable cases;

(b) of witnesses summoned or recalled by the presiding officer of his own motion under section 540 of the Code of Criminal Procedure. . . ."

This Rule, which is contained in Chapter 23, under the heading "Expenses of Witnesses" has been made under S. 544, Criminal P. C. By virtue of this Rule: (1) In all challan cases Government has to pay expenses of the complainant and other witnesses, whether for prosecution or the defence. (2) When a witness is summoned or recalled by the Court of its own motion under section 540, Criminal Procedure Code, the Government has to pay his expenses. (3) In a non-bailable case, even if cognizance is taken on a complaint, the Government has to pay expenses of the complainant and witnesses whether for the prosecution or the defence. (4) Now remains a bailable case cognizance of which is taken on a private complaint. This rule does not specifically lay down who is to pay the expenses of witnesses. Such a case comes within the purview of clause (a) (ii) of this Rule, and the matter has been left in the discretion of the Presiding Officer. In exercising that discretion, he has to consider whether such payment would be "directly in furtherance of the public interest". The Rule has laid down the principle and criterion on which judicial discretion has to be exercised.

8. One of the well known theories of punishment is retributive theory. The State has taken upon itself to inflict appropriate punishment upon an offender instead of allowing the victim to take private vengeance in the form of tooth for tooth.

"The retributive theory is not, of course, the narrow theory of vengeance but rather the doctrine that the wrong done by the prisoner can be negated only by the infliction of the appropriate punishment".

(Baton on Jurisprudence).

Salmond says:

"Retributive punishment, in the only sense in which it is admissible in any rational system of administering justice, is that which serves for the satisfaction of that emotion of retributive indignation which in all healthy communities is stirred up by injustice. It gratifies the instinct of revenge or retaliation which exists not merely in the individual wronged, but also by way of sympathetic extension in the society at large. Although the system of private revenge has been suppressed, the emotions and instincts that lay at the root of it are still extant in human nature, and it is a dis-

tinct though subordinate function of criminal justice to afford them their legitimate satisfaction".

In that broad sense, the State is always concerned in getting an offender punished. But in this rule, limitation is to be found in the expression "directly in furtherance of public interest". Emphasis is on the word "directly". To see whether it will be directly in furtherance of public interest, it may be said that, while exercising its discretion under Rule 558 of the Rules and Orders (Criminal), the Court may take into account whether the charge, which has been framed, is for a cognizable offence or a non-cognizable one.

9. In *Birdhichand v. Lakhmichand*, (1912) 8 Nag LR 65, the applicants were prosecuted for defamation. The Magistrate directed them to pay diet money to the complainant's witnesses, who were required for cross-examination. They preferred a revision. It was held by the Judicial Commissioner's Court that the order was illegal and was, therefore, set aside. In the course of the discussion, the following observation was made:

"There is nothing in Chapter XXI of the Code which enables the Magistrate to demand even from a complainant the expenses to be incurred by his witnesses, though such a power is conferred by section 244 (3) where the case under trial is a summons case".

Section 244 of the Code provides for taking evidence in the trial of a summons case. In our opinion, the above remark was obiter. *Shri Baghel* then relies on *State v. Smt. Bilso*, Criminal Revn. No. 123 of 1961, D/- 24-4-1961 1962 MP LJ (Notes) 36. There, the question was whether the complainant could be required to pay process fee. In that decision, the question about payment of subsistence allowance and travelling expenses was not considered. Similar is the decision in *Amirthammal v. Ratnaswamy Padayachi*, 1933 Mad WN 1266 and *Crown v. Mst. Guni*, 1947 Nag LJ (Notes) 7.

10. *Shri Tamaskar*, learned Deputy Government Advocate, places reliance on *Vithi v. Tulsiram*, ILR (1950) Nag 506, (AIR 1950 Nag 88). In our opinion, that case is not in point. All that is held there is that the payment in respect of diet money and travelling expenses of witnesses falls under the head "other fees payable" mentioned in section 204 (3), Criminal Procedure Code, so that in a private prosecution, the complainant is under legal obligation to pay process fees before summonses are issued to his witnesses and in default, the complaint is liable to be dismissed under S. 204 (3). The other case relied on by *Shri Tamaskar* is *In re Vendanta*, AIR 1950 Mad 283. But there the question was whether the Government should be

required to pay subsistence allowance of defence witnesses. It was held that the power given to the criminal Court under section 544, Criminal Procedure Code, is discretionary. This case also is not in point.

11. The present case is one where the charge of adultery punishable under section 497, Penal Code, has been framed against the accused. That offence is bailable and non-cognizable. In our opinion the offence of adultery has no direct nexus with public interest (See section 199, Criminal Procedure Code). In the light of what has been said above, the question whether the Government should pay the travelling expenses and subsistence allowance of prosecution witnesses, who are to be summoned under section 256, Criminal Procedure Code, is within Rule 558 (a) (ii) of the Rules and Orders (Criminal), framed by the High Court for subordinate Courts. We are of the opinion that the complainant should bear the expenses of the witnesses to be recalled. Since the point was not before the trial Court in this light, ends of justice require that Shri Baghel's resquest to give the complainant a fresh opportunity to deposit the expenses should be allowed. We have already held that the learned Magistrate was in error in recording order of dismissal of the complaint.

12. The appeal is allowed. The order of the trial Magistrate, dismissing the complaint, is set aside. The case shall go back to the trial Court for recalling the prosecution witnesses for further cross-examination under section 256, Criminal Procedure Code, if the complainant deposits the expenses within one month from today, and then to proceed further with the trial.

MSK/D.V.C.

Appeal allowed.

AIR 1969 MADHYA PRADESH 23
(V 56 C 8)

SHIV DAYAL
AND R. J. BHAVE, JJ.

Bhagwati Bai, Petitioner v. Yadav Krishna Awadhiya and others, Respondents.

Misc. Petn. No. 2 of 1968, D/- 22-3-1968.

(A) Constitution of India, Art. 226 — Writ of habeas Corpus — When can be issued — Custody of minor child — Proper remedy — Guardian's claim to custody of child — Nature of right — Welfare of minor should be paramount consideration.

The writ of habeas corpus also extends its influence to restore the custody of a

minor child to his guardian when wrongfully deprived of it. But it is an extraordinary remedy and the writ is issued where, in the circumstances of the particular case, ordinary remedy provided by the law, is either not available or is ineffective or inadequate. For restoration of custody of a minor from a person, who according to the personal law, is not his legal or natural guardian, the ordinary remedy lies under the Hindu Minority and Guardianship Act or the Guardians and Wards Act, as the case may be, and it is only in exceptional cases that the rights of the parties to the custody of the minor will be determined on a petition for habeas corpus.

(Paras 7, 8)

(B) Criminal P. C. (1898), S. 491 — Custody of minor — Application for — Availability of alternative remedy is not a bar.

It cannot however be said that an application under section 491, Criminal P. C. by a guardian for custody of the minor, cannot lie just because there is the ordinary remedy provided by the law. The paramount consideration in every such case is the welfare of the minor. The best interest of the child is the primary consideration; the right of the guardian is secondary and it will not be enforced by issuance of the writ when it is in conflict with the former consideration. The underlying principle is that the guardian's claim to the custody of the child is not a right in the nature of property but, indeed, it is a right in the nature of trust for the benefit of the minor. Where there is imminent danger to the health or safety or morals of the minor, an interim order for production of the minor becomes necessary.

(Para 9)

Cases Referred : Chronological Paras
(1960) AIR 1960 SC 93 (V 47) =

(1960) 1 SCR 597 = 1960 Cri LJ

164. Gohar Begum v. Suggi Begum

(1957) AIR 1957 Andh Pra 704
(V 44) = 1956 Andh WR 939,

Basavalingam v. Swarajyalakshmi

S. C. Dutt, for Petitioner; P. H. Padhye, for Respondent No. 1.

SHIV DAYAL, J.: This is a petition under section 491, Criminal Procedure Code, and Article 226 of the Constitution for issue of a writ in the nature of habeas corpus. It is alleged by the petitioner that she was married to Yadav Krishna, respondent 1, on 7 March 1964 according to Hindu rites. They have two children; Shyam aged about 2-1/2 years and Ramoo about 5 months. The husband is a lecturer in the Government Higher Secondary School, Dongaragarh, District Durg. The parents of the petitioner reside at Jabalpur. Because of his ill-treatment

she came to Jabalpur for her first delivery. This was with the permission of her husband, but she wanted an assurance of good behaviour to be given to her, before she would return. The husband then instituted a suit for restitution of conjugal rights under section 9 of the Hindu Marriage Act, in the Court of the District Judge, Rajanandgaon. This was in March 1966. But, when he came to Jabalpur in June 1966, there was conciliation in the presence of respectable persons. She then agreed to go and stay with him, provided he withdrew the suit. That was done. She went back and started living and cohabiting with him at Dongargarh.

2. She further alleges that he again started ill-treating and beating her and also threatened to kill her. In the meanwhile, she again conceived and, to help her in her delivery, her mother was called from Jabalpur. Her father also went there to see her. On 25 October 1967, the younger child was delivered. On 3rd December 1967, the husband quarrelled with the petitioner and her parents and threw out the luggage of her parents and pushed her out of the house saying that he no more wanted her or any relations of her to live with him. She resisted but she was forcibly turned out. She wanted her children to accompany her but they were forcibly kept back by the husband.

3. In these circumstances, she alleges that the children are under illegal and unlawful detention of their father inasmuch as under the law she is entitled to their custody and that the welfare of the minor children lies in their staying with her.

4. Shrimati Kejabai (respondent 2) is the sister of Yadav Krishna; Sambaroo Ram (respondent 3) is his brother-in-law. Yadav Krishna has kept Ramoo, the younger child, with them and is under their care.

5. Yadav Krishna opposes this petition. In the return filed by him, he inter alia denies that he ever ill-treated the petitioner. He says that she being the only child of her parents, the latter want him to stay with them, but to this he does not agree. This seems to be the rift in the lute between him and the petitioner. He says that the children were left by the petitioner herself, and that they are being looked after very well. He denies that it will be in the interest of the children that they live with the petitioner. He says that Ramoo is not with respondent 2 or 3 but he has kept the Dutt (?) under the care of his paternal aunt at Raipur. Her name has not been disclosed.

6. When this petition came up for hearing, Shri Dutt for the petitioner and

Shri Padhye for Yadav Krishna made a sincere and prolonged endeavour for reconciliation. It is remarkable that neither side has anything to say against the moral character of the other. It is quite clear that they are not carrying on well with each other, but the cause of this seems to be petty domestic quarrels. Although the present proceeding is not under the Hindu Marriage Act, or the Hindu Minority and Guardianship Act, it appeared that if the parties came to an amicable settlement, it would be in the interests of both the children and this petition would become infructuous. But, ultimately, learned counsel stated that the parties could not come to terms amicably.

7. The writ of habeas corpus ad subficiendum, i.e., you have the body to submit or answer, is commonly known as the writ of habeas corpus. It is a prerogative process for securing the liberty of the subject by affording an effective means of immediate release from an illegal or improper detention. The writ also extends its influence to restore the custody of a minor to his guardian when wrongfully deprived of it. The detention of a minor by a person who is not entitled to his legal custody is treated, for the purpose of granting the writ, as equivalent to imprisonment of the minor. It is, therefore, not necessary to show that any force or restraint is being used against the minor by the respondent. In *Gohar Begum v. Suggi Begum*, 1960-1 SCR 597 (AIR 1960 SC 93) where the mother had, under the personal law, the legal right to the custody of her illegitimate minor child, the writ was issued.

8. But it must be remembered that this prerogative writ is an extraordinary remedy and the writ is issued where, in the circumstances of the particular case, ordinary remedy provided by the law, is either not available or is ineffective or inadequate. Otherwise, a writ will not be issued; it will be open to the person aggrieved to seek the ordinary remedy. Thus the power of the High Court in granting the writ is qualified and has to be used in the exercise of judicious and sound discretion. For restoration of custody of a minor from a person, who according to the personal law, is not his legal or natural guardian, the ordinary remedy, lies under the Hindu Minority and Guardianship Act or the Guardians and Wards Act, as the case may be, and it is only in exceptional cases that the rights of the parties to the custody of the minor will be determined on a petition for habeas corpus. (See *M. Basavalingam v. M. Swarajyalakshmi*, AIR 1957 Andh Pra 704).

9. It cannot be said that an application under section 491, Criminal Procedure Code by a guardian for custody of

the minor cannot lie just because there is the ordinary remedy provided by the law. The paramount consideration in every such case is the welfare of the minor. The best interest of the child is the primary consideration; the right of the guardian is secondary and it will not be enforced by issuance of the writ when it is in conflict with the former consideration. If that paramount consideration does not call for the writ to be issued, it will be refused and the applicant would be left to resort to the remedy provided under the ordinary law. The underlying principle is that the guardian's claim to the custody of the child is not a right in the nature of property but, indeed, it is a right in the nature of trust for the benefit of the minor. Where there is imminent danger to the health or safety or morals of the minor, an interim order for production of the minor becomes necessary.

10. We shall now apply these principles to the present case. The petitioner is the mother of both the minor children, Shyam and Ramoo. Both of them are under five years of age. Section 6 of the Hindu Minority and Guardianship Act, 1956, enacts that the natural guardian of a Hindu minor boy is the father and after him, the mother. Then there is a proviso which reads thus:

"... provided that the custody of a minor who has not completed the age of five years shall ordinarily be with the mother;"

The language of the proviso makes it abundantly clear that although the guardian is the father, the custody shall be with the mother until the minor completes the age of five years.

11. Shyam, the elder child, is with his father. He cannot be called a stranger; after all, Shyam is his son. There is absolutely nothing to show that there is imminent danger to the health or safety or morals of Shyam, while he is in the custody of Yadav Krishna. Likewise, there is nothing on the basis of which it can be said that it will not be in the interest of the minor to stay with his father. On the contrary, it appears to us that having regard to the welfare of this boy, it will be better that he stays with his father. This is the time that his education should begin. Yadav Krishna is a lecturer in a Government Higher Secondary School. He can look after the boy very well. Having regard to all these circumstances, issuance of habeas corpus must be refused in his case.

12. But the same situation does not obtain as regards Ramoo. He is a little babe of about five months. Considerations of his welfare require that he should be kept with the mother in preference to the father. It is true that the

petitioner is also a teacher in a School, but, during her absence for a few hours every day when she goes to the School, she voluntarily parted with the custody of Ramoo by entrusting him to his paternal aunt, who does not reside at Dongargarh; she resides at Raipur, which is said to be about 100 miles away from Dongargarh. Ramoo is thus not under the immediate care and custody of Yadav Krishna. There is not the slightest doubt that the care of this younger child will be much better if he is kept with his mother.

13. Let us still hope that the petitioner and her husband will amicably settle their quarrels.

14. Accordingly, we direct that the respondents shall forthwith place Ramoo under the care and custody of the petitioner. This petition is dismissed as regards Shyam. Shri Dutt and Shri Padhye agree that the child Ramoo shall be handed over by Yadav Krishna (respondent No. 1) to the petitioner in the presence of the District Magistrate, Raipur, or, in his absence, in the presence of the City Magistrate, Raipur, on 2 April 1968. We direct that a warrant shall be issued accordingly. The warrant shall be served on respondent no. 1 to produce Ramoo before the District Magistrate or the City Magistrate, as directed above. Shri Padhye and Shri Dutt will also intimate the respective parties forthwith. There shall be no order for costs of this proceeding.

HGP/D.V.C.

Order accordingly.

AIR 1969 MADHYA PRADESH 25
(V 56 C 9)

P. V. DIXIT, C. J.
AND R. J. BHAVE, J.

M/s. S. K. Kalani and Co., Indore, Petitioner v. Iron and Steel Controller, Calcutta and others, Respondents.

Misc. Petn. No. 150 of 1967, D/- 30-4-1968.

Iron and Steel (Control) Order, 1956—Joint Plant Committee not amenable to writ jurisdiction. (Govt. of India Notification dt. 29-2-1964 in Gazette of India Extraordinary dt. 1-3-1964) — (Constitution of India Art. 226—Joint Plant Committee — Iron and Steel Order (1956)—Writ does not lie.

The Joint Plant Committee constituted by the Government after withdrawal of control on certain categories of iron and steel goods hitherto covered by the Iron and Steel (Control) Order, 1956, wrote to the producers (Plants) not to despatch goods to the petitioner. The same was sought to be quashed by a writ under Art. 226 of the Constitution.

GL/JL/C953/68

Held that the Committee was not a statutory body formed under any enactment or regulation and was not therefore amenable to the writ jurisdiction of the High Court. The fact that the Controller was the ex-officio chairman of the Committee did not clothe it with any executive power. Moreover, the letter was no more than a mere advice to the plants who may or may not comply with it. (Para 10)

Cases Referred: Chronological Paras
(1931) AIR 1931 PC 248 (V 18) =
1931 AC 670, Eshuagbayi Elekov.
Officer Administering Govt. of
Nigeria 7

G. M. Chaphekar, for Petitioner;
K. K. Dube, Govt. Advocate, for Res-
pondent.

BHAVE, J.: By this petition under article 226 of the Constitution, the petitioner seeks a writ of mandamus directing the respondent No. 1, The Iron and Steel Controller, Calcutta, to withdraw the orders dated 14th October, 1966 and 5th December 1966 (Annexures C and D) under which the producers are directed to suspend despatches of the iron and steel materials against all the indents to controlled as well as decontrolled categories planned prior to 1st March 1964 in respect of the petitioner-firm which is 'a registered stock-holder' under the Iron and Steel (Control) Order, 1956. The petitioner also prays that the respondents 2 and 3, namely, the Planning Officer, Joint Plant Committee, Calcutta, and the Executive Secretary, Joint Plant Committee, Calcutta, be prohibited from giving effect to the aforesaid orders issued by the respondent No. 1 and be directed to plan the indents submitted by the Petitioner.

2. The petitioner-firm carries on business in iron and steel. When the Iron and Steel (Control of Production and Distribution) Order, 1941 was promulgated by the Central Government, the firm got itself registered as a 'registered stock-holder' under that Order with respect to its business carried on at Burwahs. The 1941-Order was superseded by another order, styled as 'The Iron and Steel (Control) Order, 1956' under which the registrations granted under the repealed Order were continued. The petitioner-firm had obtained registration as 'stock-holder' under the 1956-Order for its business carried on at Indore as well. The two registration certificates are Annexures A & B.

According to the procedure under the Iron and Steel (Control) Order, 1956, or its predecessor order, the Government of India used to allot State-wise quota of Iron and Steel and the States used to sub-divide that quota amongst the various stock-holders and used to issue the

quota certificates to the stock-holders in accordance with the quota allotted to the share of each registered stock-holder. On receipt of the quota certificate, each stock-holder used to place indents for his requirement with the Iron and Steel Controller, Calcutta, who used to plan the indents and issue directions to the producers to book and to despatch the goods according to the indents as planned by him.

3. The Government of India, on the recommendation of the Committee of Economists, decided to withdraw statutory control over certain categories of iron and steel. Accordingly, it issued a Notification, dated 29th February 1964, published in the gazette of India Extraordinary, dated 1st March, 1964, by which notification all the categories of iron and steel other than those specified in Schedule 1 of the Notification were decontrolled. The effect of this Notification was that all the dealers in iron and steel, irrespective of the fact whether they were 'stock-holders' or not, could directly deal with the producers and obtain their requirements from them and deal with the iron and steel so obtained in any manner they liked without any restriction as to price etc.

The decontrol of the said categories was likely to create difficulties in the matter of proper distribution of iron and steel goods between the different States and the prices were also likely to rise. It was, therefore, recommended by the Committee that the plants (producers) themselves should be entrusted with the work of ensuring proper distribution of the iron and steel goods and to maintain proper level of prices. With this view, the Government of India constituted a Joint Plant Committee consisting of (i) the Iron and Steel Controller, Calcutta, as its Chairman ex officio; (ii) a representative of each plant, and (iii) a representative of the Railway Ministry. This Committee was entrusted with the work of obtaining from the producers, indentors and authorised dealers such information and data as it may require in connection with the planning of the production, scrutiny of the indents and allocation to different plants.

In the case of decontrolled categories, the Joint Plant Committee was given the authority to fix the ex-works price. The producers were given freedom to recognise anyone as a trader in iron and steel of decontrolled categories after satisfying themselves of his credentials. On such recognition, the traders were to be treated as authorised dealers. Such authorised dealers could also be appointed by the Joint Plant Committee. The Committee was expected to plan the indents of the authorised dealers recognised by the producers or by the Joint

Plant Committee itself. The formation of the Joint Plant Committee was notified by the Government of India on the same day the control over certain categories was withdrawn.

4. The case of the petitioner-firm is that the Joint Plant Committee so constituted continued to plan the indents submitted by the petitioner-firm up to 1966. But its Indent No. FH/66-67/17 dated 7-12-1966 was returned by the second respondent under his Memorandum dated 13th December, 1966 (Annexure F) on the ground that, according to the policy of the Joint Plant Committee, no planning of controlled or decontrolled categories is done in favour of any party against whom the Iron and Steel Controller, Calcutta, may have imposed embargo on suspension of despatches of any of category of perfect or defective material irrespective of the materials involved and the reasons for such embargo or suspension.

It was stated in that memo that as the Iron and Steel Controller, Calcutta, had imposed suspension on despatches to the petitioner, the Committee was unable to plan the indent. The direction of the Iron and Steel Controller, Calcutta, referred to in the above memo, is to the following effect:

"You are hereby advised to suspend despatches of Iron and Steel materials against all pending indents for controlled categories as well as decontrolled categories planned prior to 1-3-1964 in respect of Registered stock-holdership of M/s S. R. Kalani and Co., 1, Ganesh Ganj, (Pilia Khali), Indore City at Burwaha (Dist. Nimar) under Registration No. MB-38 for a period of three years." (Annexure C)

This direction was with respect to the petitioner's business of Burwaha. A similar direction was issued under the Memorandum dated 5th December 1966 (Annexure D) with respect to the petitioner's business at Indore.

5. The petitioner, under its Letter dated 10th December 1966 (Annexure E) requested the Iron and Steel Controller, Calcutta, to indicate reasons for the action taken by him; but no reply was received by the petitioner. Similarly, the petitioner sent a representation dated 19th December 1966 (Annexure G) to the third respondent pointing out therein that the suspension on despatches was applicable to only those indents which were planned upto 1-3-1964, the Controller's directive had no prospective effect, and that there was no justification for the Committee to refuse to plan the indents of the decontrolled categories submitted by the petitioner subsequent to that date. The petitioner was, however, informed that the decision already taken was final

and till such time as the suspension order was not withdrawn by the Iron and Steel Controller, Calcutta, nothing could be done with respect to the petitioner.

6. The petitioner's contention is that the directions issued by the respondent No. 1 under Annexures C and D were issued without giving the petitioner any opportunity of being heard and without bringing to the notice of the petitioner as to on account of which default on its part the directions were issued. It was urged that this resulted in violation of the principles of natural justice and the directions issued by the Iron and Steel Controller, Calcutta, are liable to be quashed. It was further submitted that the Joint Plant Committee was constituted by the Central Government and thus it was a statutory body and was also bound by the same principles. The refusal of the Controller to afford any opportunity to the petitioner to explain its position and the refusal of the respondents 2 and 3 to plan its indents without disclosing any valid reasons has resulted in arbitrarily excluding the petitioner from the Iron and Steel business. It was urged that the petitioner has no remedy against the arbitrary action of the respondents apart from the remedy under Article 226 of the Constitution.

7. Shri Chaphekar, learned counsel for the petitioner, urged that the executive can only act in pursuance of the powers given to it by law. No member of the executive can interfere with the liberty or property of the subject except on the condition that he can support the legality of his action before a court of justice. In support, he relied on the decision of the Privy Council in *Eshugbayi Eleko v. Officer Administering Government of Nigeria*, AIR 1931 PC 248. He, therefore, urged that the respondents must justify before this court as to under which provision of law the action was taken against the petitioner.

8. In the return filed on behalf of the respondent No. 1, it is stated that Annexures C and D do not contain any order of the respondent No. 1. Under those memos all the producers have been merely advised to suspend despatches of iron and steel materials to the petitioner for a period of three years. It is conceded that the advice given was not in exercise of any powers conferred on the respondent No. 1 under the Iron and Steel (Control) Order; the advice was given by the respondent No. 1 merely in his administrative capacity, and it is open to the producers to accept or reject the advice. It was, however, urged that certain malpractices of the petitioner came to light and the Central Government was satisfied that the petitioner's conduct warranted an action against him.

The advice was, therefore, issued under the 'Standardised Black-listing Code'. As the reasons that impelled the Central Government were kept secret and confidential on grounds of public policy, they could not be disclosed to the petitioner. It was, therefore, urged that no writ could be issued as against the respondent No. 1.

9. On behalf of the respondents 2 and 3, it has been urged that after certain categories of iron and steel were decontrolled, the producers as well as the dealers have been left free to deal with those items in any manner they liked; the Joint Plant Committee is a self-created organisation of the producers; and that it is not a statutory body. The decision of the Joint Plant Committee not to deal with persons who have been found guilty of malpractices or about whom there is a suspicion to the same effect is in the national interest; the Joint Plant Committee cannot be forced to deal with an undesirable person; and that it not being a statutory committee, no writ can be issued against it.

10. From the language of Annexures C and D it is clear that they do not contain any order issued by the Iron and Steel Controller, Calcutta; it is merely an advice tendered to the producers. The respondent No. 1 has conceded as much. The Joint Plant Committee is, therefore, not bound to accept the advice and can deal with the petitioner if it so desires. As Annexures C and D do not contain any binding orders of the Controller, the same cannot be quashed; nor can the Controller be directed to withdraw the same. After the notification decontrolling certain categories was issued, the petitioner ceased to be a 'stock-holder' vis-a-vis these categories; it becomes just a dealer in those items. The producers may deal with it or may insist that it should come through the Joint Plant Committee. The Joint Plant Committee may also disregard the advice of the Controller and may deal with the petitioner. The fact that the Controller is also an ex-officio Chairman of the Joint Plant Committee does not make any difference so far as the legal position is concerned. We are of the view that the Joint Plant Committee is not a 'statutory committee' appointed under any enactment or regulation. The Committee was formed by the Central Government in its administrative capacity and is, as a matter of fact, a self-imposed organisation of the producers to ensure proper distribution of their products at proper price. The mere fact that the Controller is the ex-officio Chairman of the Committee does not clothe it with any executive authority. We are, therefore, of the view that no writ can be issued against the Joint Plant Committee or its officers also.

11. For the aforesaid reasons, we do not wish to enter into the controversy as to whether the petitioner was guilty of malpractices or whether there was any justification for the respondent no. 1 to issue the advice or for the Committee to accept the same. The proper remedy of the petitioner is to approach the authorities and satisfy them about its proper and clean dealings. The petitioner is not entitled to any relief from this court under Article 226 of the Constitution.

12. The petition, therefore, fails and is dismissed. In the circumstances of the case, we make no order as to costs. The amount of the security deposit shall be refunded to the petitioner.

TVN/D.V.C.

Petition dismissed.

'AIR 1969 MADHYA PRADESH 28
(V 56 C 10)

P. V. DIXIT, C. J.
AND G. P. SINGH, J.

The Collector, Seoni, Appellant v. Dadoo Yogendra Nath Singh, and others, Respondents.

First Appeal No. 88 of 1967, D/- 4-5-1968, from decree of Addl. Dist. J. Seoni, D/- 2-5-1967.

(A) Land Acquisition Act (1894), Ss. 11 and 12 — Award under — Claim for enhanced compensation — Onus to prove inadequacy of award is on claimant.

The party claiming enhanced compensation is in the position of a plaintiff and he must produce evidence to show that the award of the Collector is inadequate. He can no doubt discharge the initial burden by producing evidence showing prima facie that the award is inadequate. But in the absence of any such evidence the award will stand. AIR 1933 Bom 361 and AIR 1964 Madh Pra 196, Rel. on.

(Para 13)

(B) Land Acquisition Act (1894), S. 54 — Appeal under — Filing of appeal by Collector not in State's name but in his own as appellant — Appeal is not incompetent. AIR 1964 Madh Pra 196, Rel. on.

(Para 3)

(C) Land Acquisition Act (1894), Ss. 9, 13, 25 (1) — Claim for compensation in pursuance of notice under S. 9 — Award in excess of claim is wrong.

A claim made on a notice under section 9 for getting compensation cannot be equated to an offer which leads to the formation of a contract. Section 25 (1) is plain and contains a statutory injunction to the Court not to award compensation in excess of what is claimed in pursuance to a notice under S. 9. An award made in excess of the amount

claimed is wrong. AIR 1943 Mad 337, Dis-
ting. (Para 6)

(D) Land Acquisition Act (1894), S. 23
—Agricultural land, acquisition of —
Claim for valuation as building site —
Absence of evidence to prove such pot-
entiality of land — Valuation as build-
ing site cannot be made. AIR 1967 SC
465, Foll. (Para 12)

Cases Referred: Chronological Paras
(1967) AIR 1967 SC 465 (V 54)=
(1967) 1 SCR 489, Raghuban
Narayan v. Govt. of Uttar Pra-
desh

(1965) Civil Appeal Nos. 313 to 315
of 1963, D/- 30-8-1965 (SC).
Jijabhoy v. District Collector,
Thana

(1964) AIR 1964 Madh Pra 196
(V 51)=1964 MPLJ 220, Collector,
Raigarh v. Chaturbhuj

(1943) AIR 1943 Mad 337 (V 30)=
1943-1 Mad LJ 278, In re, Zamin-
dar of Ettayapuram

(1933) AIR 1933 Bom 361 (V 20)=
35 Bom LR 763, Asst. Develop-
ment Officer v. Thyaballi

K. P. Munshi, Govt. Advocate, for Ap-
pellant; Y. S. Dharmadhikari, for Res-
pondents.

SINGH, J.: This appeal under S. 54 of
the Land Acquisition Act, 1894 is by the
Collector, Seoni and is directed against
an award made by the Additional Dis-
trict Judge, Seoni on 2nd May, 1967 on
a reference under S. 18 of the Act.

2. An area of 7.35 acres of land be-
longing to the respondents out of Khasra
No. 47/1 situate in village Nangelipeth,
District Seoni was acquired by the State
Government in 1963 for implementation
of Seoni Water Supply Scheme. The noti-
fication under section 4 of the Act was
published in the Government Gazette on
4th November, 1963. Notices under sec-
tion 9 of the Act were issued to the res-
pondents on 28th December, 1963 in
reply to which they filed their claim for
compensation on 25th February, 1964.
The respondents stated that though the
price of the land was much more, they
were willing to accept compensation at
the rate of Rs. 1,500/- per acre. The
land Acquisition Officer made his award
on 17th August, 1964. On the material
produced before him he held that value
of the land acquired was Rs. 450/- per
acre. He, therefore, awarded a sum of
Rs. 3,804/- (including 15 percent for com-
pulsory nature of acquisition) as compen-
sation for the land as also interest at 4 per
cent from the date of taking over of posses-
sion, i.e. 19th September, 1964 until pay-
ment. The respondents then applied for
a reference under section 18 of the Act.
The Additional District Judge, Seoni who
heard and decided the reference came to
the conclusion that the market value of

the land should be fixed at Rs. 11,000/-
per acre. On this finding a sum of Rupees
80,850 together with 6% interest was
awarded by the Additional District Judge
to the respondents as compensation.

3. Before we proceed to examine the
contentions advanced on behalf of the
appellant we must first dispose of a pre-
liminary objection regarding the tenabi-
lity of appeal. The objection is that the
Collector has no right of appeal and
therefore the appeal should have been
filed by the State. There is no substance
in this objection as it is concluded
against the respondents by a Division
Bench ruling of this Court in Collector,
Raigarh v. Chaturbhuj, 1964 MPLJ 220
at p. 222: (AIR 1964 Madh Pra 196 at
p. 199) where it was observed:

"On behalf of the respondents, Shri
R. K. Verma has raised a preliminary
objection that the appeals should have
been filed in the name of the State
Government and as they have been
preferred by the Collector, Raigarh, they
should be dismissed. It is true that the
State Government is the real party ag-
grieved and the appeals should have
been filed in the name of the State Gov-
ernment through the Collector as their
agent. However, the defect does not ap-
pear to us to be fatal. The Collector has
a right to act for the Government under
the specific provisions of the Act. For
instance, it is the duty of the Collector
to make an award and after he has done
so, it is he who takes possession of the
land under section 16. The duty of pay-
ing the compensation is laid on the Col-
lector under section 31. Section 28
requires the Collector to pay interest on
the amount awarded by the Court in
excess of his award. In fact, all these
amounts have to be paid by the State
Government; but under the special pro-
visions of the Act it is the Collector who
has to perform that duty. Now, if the
Collector wants to be relieved of a part
of the statutory liability created by the
award of the Court, he should in our
opinion, be entitled to prefer an appeal
against the award. We do not think that
it is necessary to file the appeal formal-
ly in the name of the State Government."

4. The first contention raised for the
appellant is that the Court below had no
jurisdiction to award to the respondents
more than Rs. 1,500/- per acre for they
claimed compensation only at this rate
in their reply to notices issued under sec-
tion 9 of the Act.

5. After the respondents were served
with notices under section 9 of the Act,
they filed their claim in which they
stated as under:

"1. That the non-applicants do not op-
pose the acquisition proceedings because
the land in question is being acquired for

on essential public purpose, namely, water-works.

2. As regards price, the non-applicants have already made it clear that although the price of the land looking to the situation and the locality is and can be much more, however, the non-applicants are willing to accept at the rate of Rs. 1,500/- per acre.

3. It is submitted that the area 7.53 acres out of Khasra No. 47/1 may be acquired on payment of the price of the land at the rate of Rs. 1,500/- per acre, as the lands adjoining this land and situated in a lesser advantageous position are sold at this rate. As a matter of fact the non-applicants have already received offers of the land in question at the rate of 0.25 N. P. per square foot, but the non-applicants are refusing those offers in view of the fact that the land in question is being acquired for a public purpose."

Whatever may have been the reason, the respondents restricted their claim of compensation to Rs. 1,500/- per acre and it was not open for the Court to award to them more than what they claimed. A clear statutory provision to that effect is contained in section 25 (1) of the Act which reads as follows:

"When the applicant has made a claim to compensation pursuant to any notice given under section 9, the amount awarded to him by the Court shall not exceed the amount so claimed or be less than the amount awarded by the Collector under S. 11."

The Court below has not made any reference to section 25 (1) and has got over the difficulty by placing reliance on *In re Zamindar of Ettayapuram*, AIR 1943 Mad 337. In that case, it was held that compensation may be allowed at a rate higher than what is claimed in an application for reference under S. 18, but it cannot exceed the limit imposed by section 25 (1) and, therefore, cannot be in excess of what is claimed in reply to notice under section 9. This case thus does not at all support the view taken by the Court below.

6. It has further been said in the judgment under appeal and has also been argued before us for the respondents that their willingness to accept compensation at the rate of Rs. 1,500/- per acre was in the nature of an offer and as it was not accepted by the Collector who awarded compensation at the rate of Rs. 450/- per acre, the respondents were not bound by their initial offer. There is no substance in this argument. A claim made on a notice under section 9 for getting compensation cannot be equated to an offer which leads to the formation of a contract. Section 25 (1) is plain and contains a statutory injunction to the Court not to award compensation in excess of what

is claimed in pursuance of a notice under section 9. The unambiguous language of this section cannot be defeated by an argument based on an analogy of offer and acceptance. It will be seen that the injunction here is for the Court and certainly in no sense can it be said that a claim made in reply to notice under section 9 is an offer made to the Court. Whatever may have been the reason to claim compensation at the rate of Rupees 1,500/- per acre, the Court is bound to take it as the maximum limit which cannot be exceeded.

7. We, therefore, accept the contention that the Court below was clearly wrong in making an award in favour of the respondents which was far in excess of the amount claimed by them before the Collector.

8. Next it is urged that the finding that the market rate of land at the time of notification under section 4 was Rupees 11,000/- per acre is without any evidence and that the respondents have failed to prove that the compensation awarded by the Collector was not proper.

9. It must be recalled that the notification under section 4 of the Act for acquisition of the land was published on 4th November, 1963. This date is therefore the relevant date with reference to which the market value of the land has to be determined. The respondents in the Court below have produced in evidence two sale deeds Exs. N.A.1 and C.D.1. The first sale deed is of 23rd April, 1966 and the second one is of 27th July, 1966. These sale deeds which were executed nearly two and half years after the notification under S. 4 cannot be taken as relevant for valuing the land in these proceedings. As regards the appellant, a sale deed executed on 2nd May, 1963 (Ex. A-1) has been filed and proved. This sale deed relates to 7.55 acres of land which was sold for a sum of Rs. 3,500/-. This land is at a distance of two furlongs from the acquired land. This sale was also relied upon by the Collector in fixing the compensation at the rate of Rs. 450/- per acre. In the absence of any other satisfactory evidence, Ex. A-1 can certainly be taken to be the best available evidence for determining the compensation.

10. It may here be mentioned that P. W. 1 Gokulprasad who is the purchaser of the sale deed Ex. A-1, during his cross-examination, stated that he purchased some land of the respondents two years back, that is, some time in 1965 at the rate of -/8/- annas per square foot. In fact, this statement formed the basis of the finding of the Court below that the market value of the land acquired should be fixed at Rs. 11,000/- per acre. There is no document in support of

this alleged sale which according to the statement of the witness is as yet incomplete as he has not paid the full purchase price. The statement of the witness as regards this sale is wholly unconvincing. Moreover, the alleged sale being of 1965 cannot be legitimately used for determining the market value of the land acquired in 1963.

11. It was contended on behalf of the respondents that the acquired land had a potential value for building purposes and therefore it should be valued as a building site. It is admitted that the land was agricultural land and had not been diverted for building purposes. The land seems to be on the outskirts of Seoni town but that in itself does not show that the land had a potential value for building purposes. It was for the respondents to lead evidence to show that at the relevant time there was a tendency of the town to develop in that direction and that prior to the acquisition new buildings had been constructed in the neighbourhood. Having gone through the record, we do not find any clear evidence to that effect and, therefore, we do not accept the contention of the learned counsel that the land should be valued as a building site. In *Raghubans Narayan v. Government of Uttar Pradesh*, AIR 1967 SC 465 their Lordships quoted the following passage from one of their earlier decisions, viz., *Jijabhoy v. District Collector, Thana, Civil Appeals Nos. 313 to 315 of 1963, D/- 30-8-1965 (SC)* which is pertinent in this connection:

"The question therefore turns upon the facts of each case. In the context of building potentiality many questions will have to be asked and answered: whether there is pressure on the land for building activity, whether the acquired land is suitable for building purposes, whether the extension of the said activity is towards the land acquired, what is the pace of the progress and how far the said activity has extended and within what time, whether buildings have been put up on lands purchased for building purposes, what is the distance between the built-in-land and the land acquired and similar other questions will have to be answered. It is the overall picture drawn on the said relevant circumstances that affords the solution."

In *Raghubans Narayan's case*, AIR 1967 SC 465, there was evidence to the effect that there was a school building near the acquired land that the land abutted on the road and that some houses had been built on the opposite side of the road. It was held that this did not constitute evidence of building potentiality. It was pointed out that there should be evidence on record "of building activity of a substantial nature being carried on in the neighbourhood of the acquired land

at about the time when the notification was issued." As we have already stated there is no such evidence in the case and therefore it cannot be said that valuation should be made on the basis of the potentiality of the land as building site.

12. It may also be mentioned that in their application under section 18, the respondents mentioned that the lands in the neighbourhood had been sold at the rate of Rs. 1,250/- and 1,350/- per acre. The situation of these lands which are in the neighbourhood of the land acquired is shown in a map which the respondents filed along with the application. Afterwards, they gave particulars that these sales took place in July and September, 1963. The respondents, however, did not produce any evidence in respect of these sales presumably under the expectation that they would get more compensation by producing evidence of sales that took place in 1966. The 1963 sales that were pleaded by the respondents were denied by the appellant and in the absence of any evidence the respondents cannot now be allowed to fall back on those sales. But that no doubt goes to show that even on the admission of respondents contained in application under Section 18, the market value of Rupees 11,000/- per acre determined by the learned Additional District Judge was fantastic and palpably wrong.

13. Having considered the evidence as a whole to which we have already referred, in our opinion, on the material on record, the respondents have failed to substantiate that the award made by the Collector was not proper. In *Asst. Development Officer v. Tyaballi*, AIR 1933 Bom 361, it was laid down that the party claiming enhanced compensation was in the position of a plaintiff and he must produce evidence to show that the award of the Collector was inadequate. He can no doubt discharge the initial burden by producing evidence showing prima facie that the award is inadequate. But in the absence of any such evidence the award will stand. This statement of the law was cited with approval by a Division Bench of this Court in 1964 MPLJ 220: (AIR 1964 Madh Pra 196). As already stated the respondents who were challenging the award did not produce any relevant material before the Court showing that the amount awarded by the Collector was inadequate. In our opinion, therefore, the award must stand.

14. The appeal is allowed. The award made by the learned Additional District Judge, Seoni is set aside and it is ordered that the Collector's award shall stand. The respondents will pay the costs of both the Courts to the appellant.
BNP/D.V.C. Appeal allowed.

AIR 1969 MADHYA PRADESH 32

(V 56 C 11)

P. K. TARE, J.

Smt. Sugga Bai and others, Appellants
v. Smt. Hiralal and others, Respondents.

Second Appeal No. 533 of 1962 D/-
14-8-1966 from Appellate decree of 2nd
Addl. Dist. J., Jabalpur D/- 22-9-1962.

(A) Hindu Minority and Guardianship
Act (1956), S. 8 — Joint interest of minor
in family property — Manager disposing
it of for benefit of minor or family need
— S. 8 does not apply to such transac-
tion. (Para 6)

(B) Houses and Rents — M. P. Ac-
commodation Control Act (23 of 1955), sec-
tion 11—C. P. & Berar Letting of Houses
and Rent Control Order (1949), Cl. 13 —
Suit for eviction filed in 1958 when Con-
trol Order (1949), was in force — During
pendency of suit Act 23 of 1955 came to
be applied to Jabalpur region in 1959 —
Suit filed without permission of Rent
Controller held maintainable — Land-
lord at the most would be liable for pro-
secution under Cl. 13 of the Control
Order. (Para 7)

(C) Houses and Rents — M. P. Ac-
commodation Control Act (23 of 1955),
Section 4 (f) — T. P. Act (1882), sec-
tion 111(g) — Determination of lease —
Second clause of S. 111 (g) T. P. Act in
conflict with S. 4 (f) — S. 4 (f) stands
and second clause of S. 111 (g) stands
abrogated after 1-1-1959. (Para 8)

(D) T. P. Act (1882), S. 111 (g) — Ten-
ant denying title of landlord — Permis-
sible limits — If denial is in permissible
limits, estoppel cannot be applied to ten-
ant — Penalty of forfeiture when ap-
plies: (1913) ILR 35 All 145 and AIR 1953
All 797, Not followed — (Evidence Act
(1872), S. 116).

A tenant cannot be permitted to deny
the title of the original lessor. Similarly,
he cannot be permitted to deny the deri-
vative title of a reversioner if he has
attorned to him. However, if he has not
attorned to him or if he has not paid any
rent to him, he can certainly deny the
derivative title of a reversioner. To this
extent, a tenant can deny the title within
these permissible limits. Similarly, he can
also contend as against the original
lessor that he has ceased to be his land-
lord because of some subsequent trans-
fer. These are the permissible limits
where the estoppel will not be applied
as against the tenant. There can be no
doubt that if a tenant denies the title
of his landlord outside the permissible
limits, he should forfeit his tenancy, as
he cannot be permitted to deny his land-
lord's title unless he has delivered back
possession to the landlord openly. But
a tenant who denies the title of the

assignee or the reversioner within the
permissible limits should not be made to
suffer the penalty of forfeiture: AIR 1937
PC 251 and AIR 1926 Cal 1205, Rel. on;
(1913) ILR 35 All 145 and AIR 1953 All
797, Not followed. (Paras 10, 11)

Cases Referred: Chronological Paras

(1961) AIR 1961 Madh Pra 49
(V 48)=1960 MPLJ 1002 (FB),

Shyamal v. Umacharan 7

(1953) AIR 1953 All 797 (V 40),

Ramdas v. Shree Ram 14

(1937) AIR 1937 PC 251 (V 24)=

ILR (1938) 1 Cal 1, Krishna Pro-

sad v. Baraboni Coal Concern

Ltd. 9, 11, 14

(1926) AIR 1926 Cal 1205 (V 13)=

96 Ind Cas 1056, Abdulla v.

Mohammad Muslim 11, 14

(1913) ILR 35 All 145 = 11 All LJ

115, Prag Narain v. Kadir Bakhsh 12

(1861) 142 ER 664 = 10 CBNS 788,

Jones v. Mills 14

(1841) 173 ER 1047 = 2 Car and P

773, Doe v. Long 14

A. R. Choubey and G. P. Choubey, for

Appellants; J. N. Sinha, for Respondents

Nos. 1, 2 and 3.

JUDGMENT: This is an appeal by the
plaintiff-landlords, against the decree
dated 22-9-1962, passed by the IInd Addi-
tional District Judge, Jabalpur, in Civil
Appeal No. 69-A of 1960, re-numbered
as Civil Appeal No. 73-A of 1961, affirm-
ing the decree dated 18-10-1960, passed
by the Ist Civil Judge IInd Class, Jabal-
pur, in Civil Suit No. 28-A of 1960.

2. The appellants purchased the suit
house from Shyam Krishna and others.
Out of the vendors one Amitabh was a
minor. The family of the vendors is in-
disputably governed by the Dayabhaga
School of Hindu Law. The sale deed
Ex. P/13 was executed on 30-5-1958,
wherein although the minor's father was
a party to the sale, the minor was re-
presented through his next friend the
mother. After the appellants purchased
the house, they served a notice of attorn-
ment dated 20-6-1958 (Ex. P/1) on Hira-
lal, the predecessor of the present res-
pondents, who was a tenant of the ven-
dors. A similar notice of the same date
Ex. P/3 was served by the vendors as
well. But in reply to that notice, the
tenants as per the communication dated
24-6-1958 (Ex. P/7), asserted that as one
of the vendors was a minor, the ven-
dors should prove their title and he
refused to recognise the vendees as his
landlords. Consequent on that, the ap-
pellants exercised their option for for-
feiture of the tenancy and gave a notice,
dated 8-8-1958 (Ex. P/2), forfeiting the
tenancy. In that notice the tenant was
required to vacate within 24 hours of the
receipt of notice. Therefore, the present
suit for eviction and for damages for

AIR 1969 MADRAS 33 (V 56 C 8)

KRISHNASWAMY REDDY, J.

Chelpark Company Ltd., Petitioner v. The Commissioner of Police, Madras and others, Respondents.

Writ Petn. No. 2825 of 1967 and CrI. M. P. No. 2250 of 1967, D/- 3-11-1967.

Criminal P. C. (1898), Sec. 561-A — Penal Code (1860), S. 441 — Striking workmen remaining in factory premises after working hours — Whether act of striking workmen amounts to criminal trespass under S. 441 — Power of High Court to direct executive to take appropriate action.

By virtue of relationship as employer and employees, the employees have got a right to enter the factory premises at the commencement of working hours and stay and work during working hours and leave at the closing of working hours. Either before or after the working hours, they have no right to occupy the property of the employer. As the employees are entitled to work during working hours, they can refuse to work only during working hours, while they stay and strike. After the closing hours, the employer has to close the factory and make arrangements for the protection of the property. The act of the striking workmen in remaining after the working hours will amount to seizure and holding of the building, preventing the use of the premises by the employer in a lawful manner. Therefore, remaining of the workmen in the factory premises after the working hours is unlawful and will amount to trespass. (Para 16)

Where the striking workmen not only refused to receive the order of injunction restraining them from collecting in factory premises, after working hours, served on them knowing that the said order was sought to be served, but remained in the premises after working hours preventing the petitioner from closing the premises for protecting and safeguarding his property, obstructing the female employees from leaving the premises, indulging in insulting the members of the staff of the petitioner and intimidating the members of the staff of the non-striking workmen including lady members by using provocative language likely to lead to a breach of the peace:

Held that taking into consideration the circumstances of this case, the striking workmen remaining after working hours, intended to annoy, insult, intimidate and commit offences, of course, to achieve their ultimate object of bringing pressure on the employer to concede their demands. Every act done by them was intended, bringing them within the mischief of Section 441, I. P. C. These

striking workmen had committed criminal trespass by unlawfully remaining in the factory premises after working hours. So far as remaining on the factory premises after working hours was concerned, it did not make any difference, whether the stay was by the dismissed workmen or by the workmen in service. AIR 1960 SC 161 (176), Disting.; (1939) 306 US 240, Ref.; Writ Petn. No. 1021 of 1967 (Mys), Rel. on. (Paras 18, 21)

The High Court in exercising its extraordinary powers under Section 561-A Cr. P. C. will take into consideration the gravity of the injustice brought to its notice and the non-availability of an effective remedy otherwise. This power will be used sparingly in deserving cases. The High Court can direct the executive where cognizable offences are committed or where there is threat to property and person, to take appropriate action to secure the ends of justice. (Para 30)

When a Magistrate can order investigation under Section 156 (3), Criminal P. C. it cannot be said that High Court has no power to order investigation and direct the police to do its duty. AIR 1945 PC 18, Explained. (Para 33)

The pendency of the suit could not be a bar for taking action by the police if cognizable offences were disclosed or a breach of the peace was likely to occur. In this case, the order of injunction was passed against the striking workmen from collecting within the factory premises after working hours. The police should have given effect to the order of injunction by dispersing the striking workmen against whom the said order was passed. It was, therefore, not necessary for the police to consider whether any alternative remedy was available to the employer or any dispute was pending before any Court. In this case if the employer and the willing workmen had resisted the striking workmen remaining after working hours in the factory, it would have resulted in a breach of the peace. This was a fit case where the police could take action under Section 127 (1) Cr. P. C. They could arrest the striking workmen as cognizable offences were disclosed and investigate and file charge-sheets, if there was a prima facie case. (Paras 38, 39)

Cases Referred: Chronological Paras

- (1967) Writ Petn. No. 1021 of 1967
 =(1967) 1 Mys LJ 686, Mysore
 Machinery Manufacturers Ltd. v.
 State of Mysore 21, 37
 (1963) AIR 1963 SC 447 (V 50)=
 1963 (1) Cri LJ 341, State of West
 Bengal v. S. N. Basak 34
 (1960) AIR 1960 SC 160 (V 47)=
 (1960) 1 SCR 806, Punjab National
 Bank Ltd. v. A. I. P. N. B. E. Fed-
 eration 14, 19

(1945) AIR 1945 PC 18 (V 32)=
46 Cri LJ 413. Emperor v. Nazir
Ahmad 28, 30, 33, 34
(1939) 306 US 240=83 Law Ed 627,
National Labour Relations Board
v. Vansteel Metallurgical Corpo-
ration 20

V. Rajagopalachari for King and Partridge, for Petitioner in Cri. Misc. Petn. No. 2250 of 1967; S. Mohan Kumaramangalam for Paul Pandian and G. U. Srinivasalu for Respondents; The Public Prosecutor for the State; V. K. Thiruvengkatachari for King and Partridge, for Petitioner in W. P. No. 2825 of 1967; The Govt. Pleader S. Mohan Kumaramangalam, Paul Pandian and G. U. Srinivasalu, for Respondents.

ORDER.—The facts and the reliefs prayed for in both these petitions being substantially the same, they are dealt with together. The Criminal Miscellaneous Petition has been filed under Section 561-A, Cr. P. C. against the respondents the Commissioner of Police, Madras, and the Assistant Commissioner of Police (Law and Order) Southern Range, Madras, praying for a direction to the respondents to do their duty and evict the labourers (27 persons) from the factory premises of the petitioner at the close of working hours. The Writ Petition has been filed to issue a writ of mandamus or other appropriate directions to the respondents, praying for the same relief as in Criminal Miscellaneous Petition. It is stated that the Writ Petition has been filed by way of abundant caution in case it was felt that the Criminal Miscellaneous Petition could not afford an adequate remedy. The petitioner filed affidavits in support of both the petitions. The second respondent filed counter-affidavits. The persons who were sought to be removed from the factory premises were impleaded as parties to both the petitions on their applications and they filed their affidavits.

2. The facts and the circumstances under which these two petitions have been filed are briefly as follows:—

3. The petitioner is a Limited Company carrying on business of the manufacture of fountain pen ink, having its registered office at No. 37-L, Mount Road, Madras-32 of which T. V. Advani is the Managing Director, who filed affidavits in support of the petitions. In the Office of the petitioner 21 Clerks and others are employed. Adjacent to the office is the petitioner's factory in which 31 workmen are employed.

4. On the 18th September, 1967, twenty-seven persons mentioned in the affidavit assembled inside the factory and refused to carry out their duties at the instigation of the Union representing the said twenty-seven persons and commenced what is called "stay-in-strike".

5. There is only one shift in the petitioner's factory which is from 8 A. M. to 5-30 P. M. on week days and 8 A. M. to 1 P. M. on Saturdays. Just before the closing hours of the factory on the 18th September, 1967, the striking workmen were requested by the petitioner's representatives to leave the factory premises as they had no authority to remain in the factory after working hours and this request was made as the petitioner wanted to lock up the factory premises after working hours, in which valuable stock-in-trade, machinery etc. had been kept. As the said twenty-seven persons refused to vacate the factory premises, the petitioner posted its watchman to safeguard the property of the Company. It is stated that eighteen of the workmen were willing to continue to work; but they were prevented by the striking workmen from carrying out their duties by obstructing them by surrounding the machinery. The striking twenty-seven persons on 19th September, 1967 obstructed a lorry laden with packing cases consigned to the petitioner from entering the factory and the lorry had to return, with the packing cases. On the 21st September 1967, seven female employees were prevented from leaving the factory and were "gheraoed" for nearly 2½ hours. On the 22nd September, 1967, some of the striking workmen surrounded the petitioner's Accountant Mr. R. D. Chellappa and abused him in an attempt to intimidate him.

6. The petitioner made complaint to the Inspector of Police, 'J' Division, Saidapet, Madras-15 in respect of the incidents which took place on the 18th, 19th, 21st and 22nd September, 1967.

7. As no effective action was taken by the police, the petitioner filed a suit O. S. No. 3800 of 1967 before the 1st Assistant City Civil Judge, Madras, for an injunction (a) restraining the striking workmen from obstructing the petitioner's lawful discharge of duties and preventing its loyal workers from carrying on their duties; (b) restraining the said persons from interfering with the petitioner's business, and (c) for a direction to the said twenty-seven persons to leave the petitioner's factory premises after the working hours. Pending suit, on the application filed by the petitioner, the Court granted an interim injunction restraining the striking workmen from collecting themselves in the premises, after the working hours. On 22-9-1967, at about 5-15 p.m. the bailiff of the City Civil Court went to the petitioner's factory premises and in the presence of the Police Constables sought to serve the order of interim injunction on the striking workmen. As they refused to receive the order the bailiff affixed a copy of notice on the notice board of the factory. The striking workmen, even after the

order of interim injunction was brought to their notice, refused to leave the factory premises after the working hours. Thereupon, the Managing Director of the Petitioner-Company contacted the first respondent and requested him to give assistance to the petitioner in evicting the striking workmen from the factory premises. The first respondent referred the petitioner to the second respondent and the second respondent had declined to assist the petitioner. In respect of several incidents that occurred in the factory, the petitioner has been sending complaint to the Inspector of Police, J-1, Police Station, Saidapet, for necessary action vide letters dated 23rd, 25th and 27th September, 1967.

8. The complaint sent to Inspector of Police on the 27th September, 1967 discloses in detail, several incidents that occurred in the factory premises. The petitioner had requested the Inspector of Police to take appropriate action against the striking workmen who intruded on his property by scaling compound walls. It is submitted by the petitioner that the striking workmen are guilty of offences of criminal trespass (Section 441, Indian Penal Code), criminal intimidation (Section 503, Indian Penal Code) and preventing service of summons (Section 173, Indian Penal Code). It is further submitted that it is the duty of the Police when cognizable offences are brought to their notice, as was done by the petitioner in this case, to take action under the provisions of the Criminal Procedure Code. It is also the duty of the police to evict the striking workmen after working hours from the factory premises as they have committed cognizable offences. As they have failed in their duty, the petitioner prayed that in the absence of satisfactory explanation by the respondents, a direction may be issued to the respondents directing them to do their duty and evict the striking workmen from the factory premises at the close of the working hours.

9. In the counter-affidavit filed by the second respondent, it is stated in respect of the striking workmen remaining in the factory premises after working hours, it was purely a labour problem governed by the Industrial Disputes Act. In respect of the service of order of interim injunction, the second respondent stated that the striking twenty-seven workmen refused to receive the order of Court from the bailiff and a copy of the order was affixed on the notice board of the factory. It is also stated that the second respondent posted two police constables to do bandobust along with the armed reserve-men at the factory premises to prevent any breach of peace which was likely to occur. He gave directions to

the Inspector of Police, Saidapet Police Station, to keep close watch over the movements and activities of the striking workmen. The second respondent further stated that he was visiting the factory periodically and found that the workmen had not resorted to any violence or acts of intimidation. According to the second respondent, the striking workmen had not committed any cognizable offence to warrant the interference by them. They had not committed the offence of criminal trespass and there is no duty cast upon the respondents to evict the striking workmen from the factory premises after the working hours. It is also contended that as the matter has been taken to a Civil Court and as it is sub judice the police cannot take any action.

10. On behalf of the striking workmen affidavit was filed by one S. Sethuram, the Secretary of the Chelpark Employees' Union and one of the striking workmen. It may not be necessary to mention the details of the affidavit excepting to note that it is admitted that the striking workmen have been staying in the factory premises even after the working hours. It is also denied in the affidavit that the striking workmen refused to receive the copy of the interim injunction order sought to be served on them. It is further stated that the stay-in-strike is legal.

11. The undisputed facts are these: (1) The striking workmen remained in the factory premises after the working hours; (2) the order of injunction by the City Civil Court restraining them from collecting inside the factory premises after working hours was served on the workmen by affixture of the copy of the order on the notice board of the factory premises; though in the affidavit filed on behalf of the workmen it is stated that it was not served on them, in the counter-affidavit filed by the second respondent, it is admitted that the service on the workmen was made by affixture; and (3) the petitioner has filed complaints in respect of the incidents which occurred in the factory premises, vide letters dated 23rd, 25th and 27th September, 1967.

12. The substantial contention raised by the respondents is that the acts alleged against the striking workmen and their remaining in the premises of the factory after the working hours do not disclose a cognizable offence and there was no breach of any statutory duty cast upon the respondents, so as to entitle the petitioner to a writ of mandamus or a direction under Section 561-A, Criminal Procedure Code.

13. It becomes, therefore, necessary to consider whether the striking work-

men remaining in the factory after the working hours, will amount to criminal trespass and if so, what the duties of the respondents are, to take action in such a case. This question will very much depend upon the fact whether the striking workmen could legally and legitimately remain in the factory premises after the working hours. Even if their remaining in the factory premises after the working hours is unlawful, to bring it within the mischief of Section 441, Indian Penal Code it has to be further considered whether the workmen remained unlawfully in the factory premises with any of the intents mentioned in Section 441, Indian Penal Code.

14. It is contended on behalf of the respondent and the workmen that the object of the striking workmen in staying in the factory premises was only to bring pressure on the petitioner to concede the demands and that their stay in the factory premises with that object even after working hours cannot be unlawful and it is further contended that even assuming that such stay by the workmen after the working hours is unlawful, it cannot be said that they have committed the offence of criminal trespass inasmuch as the intention of the workmen was not to annoy, insult or intimidate or commit any offence but to bring pressure on the management to concede the demands as aforesaid. In support of their contention, reliance has been placed on a passage in paragraph 47 of the judgment of the Supreme Court in Punjab National Bank v. A. I. P. N. B. E. Federation, AIR 1960 SC 160 which reads as follows:—

"Does the conduct of the strikers as found by the Appellate Tribunal constitute criminal trespass under Section 441 of the Indian Penal Code? That is the next point which calls for decision. It is argued that the conduct of the employees amounts to criminal trespass which is an offence and as such those who committed criminal trespass would not be entitled to reinstatement. According to the Bank the employees committed criminal trespass inasmuch as they either entered unlawfully or having lawfully entered continued to remain there unlawfully with intent thereby to insult or annoy their superior officers. It would be noticed that there are two essential ingredients which must be established before criminal trespass can be proved against the employees. Even if we assume that the employees' entry in the premises was unlawful or that their continuance in the premises became unlawful, it is difficult to appreciate the argument that the said entry was made with intent to insult or annoy the superior officers. The sole intention of the strikers obviously was to put pressure on the Bank

to concede their demands. Even if the strikers might have known that the strike may annoy or insult the Bank's Officers it is difficult to hold that such knowledge would necessarily lead to the inference of the requisite intention. In every case where the impugned entry causes annoyance or insult it cannot be said to be actuated by the intention to cause the said result. The distinction between knowledge and intention is quite clear, and that distinction must be borne in mind in deciding whether or not in the present case the strikers were actuated by the requisite intention. The said intention has always to be gathered from the circumstances of the case and it may be that the necessary or inevitable consequence of the impugned act may be one relevant circumstance. But it is impossible to accede to the argument that the likely consequence of the act and its possible knowledge must necessarily import a corresponding intention."

15. This passage makes it clear that the requisite intention to bring it within the mischief of Section 441, Indian Penal Code has always to be gathered from the circumstances of the case and that the necessary or inevitable consequence of the impugned act may be a relevant circumstance to infer intention. The Supreme Court in relation to the facts held that the intention of the striking workers was not to annoy or insult or intimidate but to put pressure on the employer to concede their demands. The facts of that case are distinguishable from the present case. That was a case of pen-down strike. The employees entered the office and were occupying their seats; but were refusing to work during office hours. The strike was wholly confined to the regular working hours. The strike was peaceful and non-violent and the employees had done nothing more than occupying their seats during office hours. The strikers never obstructed or prevented the co-workmen from doing their work; nor had they insulted the employers or intimidated them. The only act alleged in that case against the striking workmen was that they refused to vacate their seats when they were asked to do so by the superior officers, during working hours. But in the present case, the striking workmen after having entered the factory premises refused to leave at the close of working hours and remained in the factory premises during day and night. They refused to receive the order of injunction sought to be served on them. It is alleged that the striking workmen have been threatening their co-workers and preventing them from carrying out their duties by obstructing them and by surrounding the machinery. It is also alleged that the striking workmen obstructed a lorry laden

with packing cases consigned to the petitioner from entering the factory and they prevented female employees from leaving the factory and that some of the striking workmen surrounded the petitioner's accountant and abused him in an attempt to intimidate him. These facts are borne out by letters written by the petitioner to the Inspector of Police, Saidapet. I am inclined to accept that the incidents mentioned above had occurred in the factory as the Inspector of Police to whom letters were addressed had not controverted the allegations made in the petitioner's affidavit. It can, therefore, be seen that the striking workmen in the present case not only remained after working hours but also they were not peaceful and non-violent.

16. The petitioner does not dispute that the stay-in-strike commenced by the workmen is legal; but it is contended that the workmen have no right to stay in the factory premises after the closing hours and their continuance in the factory premises after the closing hours is unlawful. The entry by the workmen into the factory premises during working hours is lawful. Their stay in the factory premises till the closing of the working hours is also lawful. But I am of the view that the striking workmen have no right to remain in the factory premises after working hours and their remaining in the premises after having entered lawfully, is unlawful and it will amount to trespass. It is not in dispute that the factory premises belonged to the petitioner. It is the property of the petitioner. The working hours of the factory are between 8 A.M. to 5-30 P.M. on week days and 8 A.M. to 1 P.M. on Saturdays. By virtue of relationship as employer and employees, the employees have got a right to enter the factory premises at the commencement of working hours and stay and work during working hours and leave at the closing of working hours. Either before or after the working hours, they have no right to occupy the property of the employer. The employees can stay and strike only during the working hours, when they can stay and work. As the employees are entitled to work during working hours, they can refuse to work only during working hours, while they stay and strike. After the closing hours, the employer has to close the factory and make arrangements for the protection of the property. The employer is entitled to possession and protection of his property. The act of the striking workmen in remaining after the working hours will amount to seizure and holding of the building, preventing the use of the premises by the employer in a lawful manner. The employer is practically deprived of his property when the work-

men remained on the factory premises after working hours. Therefore, the workmen remaining in the factory premises after the working hours is unlawful and will amount to trespass.

17. The next point to be considered is whether the act of remaining after the working hours in the factory premises by the striking workmen will amount to criminal trespass. 'Criminal trespass', is defined in Section 441, Indian Penal Code, which reads thus:

"Whoever enters into or upon property in the possession of another with intent to commit an offence or to intimidate, insult or annoy any person in possession of such property, or, having lawfully entered into or upon such property, unlawfully remains there with intent thereby to intimidate, insult or annoy any such person, or with intent to commit an offence, is said to commit 'criminal trespass'."

18. I have found that the entry by the striking workmen into the factory premises at the commencement of the working hours was lawful; but their remaining after the working hours in the factory was unlawful and will amount to 'trespass'. To bring it within the mischief of this definition, it is necessary to prove that the striking workmen having remained unlawfully in the factory premises, had the intention to commit an offence or to intimidate, insult or annoy the petitioner. It is contended on behalf of the workmen, as noted already, that they had no intention to commit any offence or to annoy, insult or intimidate the petitioner; but their object in staying even after the working hours in the factory was only to press the petitioner to concede their demands. I am unable to agree with this contention. It is true that the ultimate object of the striking workmen is to make the petitioner yield to their wishes. But the means adopted to achieve their object must also be lawful. The striking workmen not only refused to receive the order of injunction restraining them from collecting in factory premises, after working hours, served on them knowing that the said order was sought to be served; but remained in the premises after working hours preventing the petitioner from closing the premises for protecting and safeguarding his property, obstructing the female employees from leaving the premises, indulging in insulting the members of the staff of the petitioner and intimidating the members of the staff of the non-striking workmen including lady members by using provocative language likely to lead to a breach of the peace. These acts were intentionally done by them for the demand of their ulterior end. Some of the acts committed by

them would amount to offences under Sections 341, 503 and 504, Indian Penal Code. It is no doubt true that if an act is done knowing that a particular result is likely to follow in consequence of such act, it cannot be said that such consequences were intended, unless the facts of a particular case warrant such an inference. The intention is subjective. It cannot be proved; but can only be inferred from the facts and circumstances of the case. Taking into consideration the circumstances of this case, I have no doubt in my mind that the striking workmen remaining after working hours, intended to annoy, insult, intimidate and commit offences, of course, to achieve their ultimate object of bringing pressure on the petitioner to concede their demands. Every act done by them was intended, bringing them within the mischief of Section 441, Indian Penal Code. These striking workmen had committed criminal trespass by unlawfully remaining in the factory premises after working hours.

19. The learned Counsel for the striking workmen relied upon the following observation made by the Supreme Court in AIR 1960 SC 160 at p. 176:

"Even if we assume that the employees' entry in the premises was unlawful or that their continuance in the premises became unlawful, it is difficult to appreciate the argument that the said entry was made with intent to insult or annoy the superior officers."

This observation, as stated already, was made in the context and circumstances of that case. In paragraph 54 of the judgment in that case, we find an indication that the strikers were peaceful and non-violent and had done nothing more than occupying their seats during office hours.

20. In this context, it is worthy to note the following passages in the judgment of the Supreme Court of United States in National Labour Relations Board v. Fansteel Metallurgical Corporation, (1939) 306 US 240 where the employees had resorted to violence and coercion while striking work:

"The employees had the right to strike but they had no licence to commit acts of violence or to seize their employer's plant. We may put on one side the contested questions as to the circumstances and the extent of injury to the plant and its contents in the efforts of the men to resist eviction. The seizure and holding of the buildings was itself a wrong apart from any acts of sabotage. But in its legal aspect the ousting of the owner from lawful possession is not essentially different from an assault upon the officers of an employing company or the seizure and conversion of its goods or the de-

spolting of its property or other unlawful acts in order to force compliance with demands. To justify such conduct because of the existence of labour dispute or of an unfair labour practice would be to put a premium on resort to force instead of legal remedies and to subvert the principles of law and order which lie at the foundations of society". Proceeding further, Hughes, C. J., who delivered judgment of the majority observed:

"This was not the exercise of 'the right to strike' to which the Act referred. It was not a mere quitting of work and statement of grievance in the exercise of pressure recognised as lawful. It was an illegal seizure of the buildings in order to prevent their use by the employer in a lawful manner and thus by acts of force and violence to compel the employer to submit. When the employees resorted to that sort of compulsion they took a position outside the protection of the statute."

21. These two passages were quoted with approval in a recent Mysore case in W. P. No. 1021 of 1967 (Mys). The Division Bench in that case while considering a petition filed for the issue of Writ of Mandamus to the Chief Secretary and the Commissioner of Police, Bangalore, held that the striking workmen committed the offence of criminal trespass by staying in the factory premises day and night. The workmen in that case were dismissed by the management and after dismissal, they resorted to 'stay-in-strike' and squatted on the factory premises during and after working hours day and night. The learned Counsel for the workmen contended that in the Mysore case, the relationship between the employer and the employees ceased by the termination of service by order of dismissal and that their remaining on the property would amount to trespass; but in the present case, the relationship between the employer and the employees did not cease and that their remaining on the factory premises even during working hours will not amount to trespass. Of course, it is true that in the Mysore case, the workmen were dismissed. It has been held in that case that the dismissed workmen had committed trespass even while they entered into the premises because their services were terminated. In the present case, as already noted, the entry by the workmen is lawful. But their remaining after working hours, when they have no right to stay, will amount to trespass. So far as remaining on the factory premises after working hours is concerned, it does not make any difference, whether the stay is by the dismissed workmen or by the workmen in service. In W. P. No. 1021 of 1967 (Mys.), the Division Bench of the

Mysore High Court has observed as follows:

"We are not concerned in this case with the question as to whether the termination of their employment was legal or illegal. What we are concerned with is the conduct of the dismissed workmen in persisting to remain on the property even after the order of dismissal and 'during day and night'. This conduct, in our opinion, as already observed, is not only wholly unjustified but is also illegal bringing the action of such of them as are persisting in such conduct within the four corners of the law".

The emphasis (here in ' ') that is laid down in this passage is the workmen remaining on the property during day and night. With respect, I agree with these observations.

22. In view of the contention raised by the second respondent that there was no breach of any statutory duty cast on the respondents for the issue of direction as prayed for by the petitioner, it is necessary to refer to the relevant provisions of law to ascertain the scope of the obligations and duties of Police Officers.

23. Besides the powers provided under the Criminal Procedure Code, which would be adverted to presently, the powers and duties of a Police Officer are enumerated in the Madras City Police Act, 1888 (hereinafter called 'the Act'). Section 23 of the Police Act says:

"Every Police Officer shall, for the purpose of this Act, be considered to be always on duty. He shall not engage, without the written permission of the Commissioner in any duty other than his duties under this Act. It shall be his duty to use his best endeavour and ability to prevent offences and public nuisance; to preserve the peace; apprehend disorderly and suspicious characters; to detect and bring offenders to justice; to take charge of all unclaimed property; to seize and impound stray cattle; to collect and communicate intelligence affecting the public peace, and promptly to obey and execute all orders and warrants lawfully issued to him and it shall be lawful for every Police Officer, for any of the purposes mentioned in this section, without a warrant to enter and inspect any drinking shop, gaming-house or other place of resort of loose or disorderly characters."

Under Section 41 of the Act, the Commissioner or, subject to his orders, any Police Officer above the rank of head constable, may prohibit any assembly for the preservation of the public peace or public safety. Section 51-A of the Act gives power to the Commissioner of Police to direct removal of certain classes of persons who are about to be engaged in the commission of any offence involv-

ing force or violence or punishable under Chapters XII, XVI or XVII of the Indian Penal Code or in the abetment of any such offence.

24. Section 154, Criminal Procedure Code provides that every information relating to the commission of a cognizable offence must be reduced to writing by the officer-in-charge of the Police Station and signed by the person giving it; Section 156, Criminal Procedure Code empowers such Police Officer to investigate any cognizable case without the order of a Magistrate; and under Section 157, Criminal Procedure Code if an Officer-in-charge of a Police Station has reason to suspect the commission of a cognizable offence, he shall forthwith send a report of the same to a Magistrate empowered to take cognizance of such offence upon a police report, and shall proceed in person, or shall depute one of his subordinate officers to investigate the facts and circumstances of the case. Under Chapter IX of the Criminal Procedure Code, a Police Officer is empowered to disperse unlawful assembly. Section 127 (1), Criminal Procedure Code reads as follows:-

"Any Magistrate or Officer-in-charge of a Police Station may command any unlawful assembly, or any assembly of five or more persons likely to cause a disturbance of the public peace, to disperse; and it shall thereupon be the duty of the members of such assembly to disperse accordingly."

25. From the foregoing provisions, it is clear that the Police Officers have obligations and duties to perform, such as dispersing unlawful assembly, preserving peace, detecting and bringing offenders to justice, removing persons under certain circumstances and investigating cognizable offences and similar other things.

26. It has now to be considered whether this Court has got powers under Section 561-A, Criminal Procedure Code to direct the respondents to evict the striking workmen and to do their duty enjoined on them.

27. Section 561-A, Criminal Procedure Code reads thus:

"Nothing in this Code shall be deemed to limit or affect the inherent power of the High Court to make such orders as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice".

28. This section emphasizes that the High Court has the widest jurisdiction to pass orders to secure the ends of justice as it is the superior Court of jurisdiction. This section does not give new powers; but preserves the inherent powers of the High Court. In *Emperor v. Nazir Ahmad*, AIR 1945 PC 18, the

Privy Council considering the object and scope of Section 561-A, Criminal Procedure Code observed as follows:—

"It is not correct to say that Section 561-A has given increased powers to the Court which it did not possess before that section was enacted. The section gives no new powers, it only provides that those which the Court already inherently possesses shall be preserved and is inserted, lest it should be considered that the only powers possessed by the Court are those expressly conferred by the Criminal Procedure Code and that no inherent power had survived the passing of the Criminal Procedure Code".

29. The High Court is not only a Court of Law but a Superior Court of Justice. If the High Court feels that in a particular case, the ends of justice require that an order should be made in an application, although the application is not contemplated by the Code, it will entertain the application and make the necessary orders to secure the ends of justice.

30. The High Court in exercising its extraordinary powers under Sec. 561-A Criminal Procedure Code will take into consideration the gravity of the injustice brought to its notice and the non-availability of an effective remedy otherwise. This power will be used sparingly in deserving cases. I am of opinion that the High Court can direct the executive where cognizable offences are committed or where there is threat to property and person, to take appropriate action to secure the ends of justice. It has been contended by the learned Counsel for the workmen that the powers under Section 561-A, Criminal Procedure Code cannot be invoked to give direction to the Police Officer even in respect of investigation and appropriate action in cognizable offences as it will amount to interference with the duties of the Police. Reliance has been placed on the following passage in AIR 1945 PC 18:

"In their Lordships' opinion, however, the more serious aspect of the case is to be found in the resultant interference by the Court with the duties of the police. Just as it is essential that every one accused of a crime should have free access to a Court of justice so that he may be duly acquitted if found not guilty of the offence with which he is charged, so it is of the utmost importance that the judiciary should not interfere with the police in matters which are within their province and into which the law imposes upon them the duty of enquiry. In India as has been shown there is a statutory right on the part of the police to investigate the circumstances of an alleged cognizable crime without requiring any authority from the judicial authorities,

and it would, as their Lordships think, be an unfortunate result if it should be held possible to interfere with those statutory rights by an exercise of the inherent jurisdiction of the Court. The functions of the judiciary and the police are complementary not overlapping and the combination of individual liberty with a due observance of law and order is only to be obtained by leaving each to exercise its own function, always, of course, *subject to the right of the Court to intervene in an appropriate case.*"

31. What the Privy Council was concerned in that case was whether the proceedings taken in pursuance of the first information report could be quashed under Section 561-A, Criminal Procedure Code. It was contended that the first information report did not disclose a cognizable offence and the Police Officer had taken up investigation without the order of the Magistrate and that such investigation was illegal and that on that account, the proceedings of investigation should be quashed. This decision makes it clear that the Courts cannot interfere with the investigation by the police; nor can they direct them to proceed in a particular manner in investigation. Nor can the regularity or the legality of the proceedings in the course of investigation be questioned by the Courts.

32. Section 156 (2), Criminal Procedure Code says:

"No proceeding of a Police Officer in any such case shall at any stage be called in question on the ground that the case was one which such officer was not empowered under this section to investigate."

33. But, however, if the police refused to take up investigation in a cognizable offence, which is a statutory obligation imposed on them, the Court can certainly direct the police to perform its statutory duty to secure the ends of justice. Even in a cognizable offence, if the police do not take up investigation, a Magistrate under Section 156 (3), Criminal Procedure Code may order investigation. When a Magistrate can order investigation, can it be said that this Court has no power to order investigation and direct the police to do its duty. The decision of the Privy Council reported in AIR 1945 PC 18 cannot be taken as laying down the principle that the Court cannot direct the police to investigate any cognizable offence. But what it says is, the Court cannot interfere with the actual performance of the duties of the police.

34. The Supreme Court in State of West Bengal v. S. N. Basak, AIR 1963 SC 447, following the principle laid down in AIR 1945 PC 18 held that the investigation of the cognizable offence cannot be interfered with when no charge has been

laid. That was also a case where a petition was filed under Sections 439 and 561-A, Criminal Procedure Code to quash the police investigation on the ground that it was done without jurisdiction.

35. I am, therefore, of the view that to secure the ends of justice, the High Court in its inherent powers under Section 561-A, Criminal Procedure Code can direct the Police Officer to do his duty where he has failed to do. It is of course true that if an effective alternative remedy is available, the powers under Section 561-A, Criminal Procedure Code cannot be resorted to and such powers being extraordinary powers, shall be exercised only in exceptional cases where grave injustice is brought to the notice of the Court.

36. It is contended that in this case, alternative remedies are available to the petitioner and that if a cognizable offence is disclosed, the petitioner can move the Magistrate for redress and that the discretionary power of this Court under Section 561-A, Criminal Procedure Code or for issuing a Writ of Mandamus against the respondents could not be invoked. No doubt it is true that the petitioner can move the Magistrate; but I do not think the remedy sought for in these petitions can be achieved expeditiously. The law gives the petitioner a right to approach an Executive Officer like the police to give him protection and take appropriate action in cognizable offences. The Police Officers alone, when they are satisfied that cognizable offences are being committed, can take expeditious action contemplated by law. The effective remedy which is prayed for in this case is for the removal of the striking workmen after working hours from the factory premises. The Magistrate cannot give a relief for a remedy of this nature; but he may have to direct the police to make enquiry and submit a report and he has to see, any order passed by him, executed through the machinery of the police.

37. The Division Bench of the Mysore High Court in W. P. No. 1021 of 1967 (Mys.) in negating a similar contention raised in that case, observed as follows:-

"It was lastly contended by the learned Government Pleader that the petitioner should have approached the Magistrate for redress and that as he had not availed himself of that alternative remedy open to him under the law, this Court should not use its discretionary power of issuing a Writ of Mandamus against the respondents. We do not think that the failure of the petitioner to approach the Magistrate in a particular case either debars him from approaching this Court or debars us from exercising our discretionary power of issuing a writ.

The most expeditious remedy contemplated by law and the right of protection given by law is that of approaching an executive officer like the police; the various provisions of the Code of Criminal Procedure and the Mysore Police Act do indicate bifurcation between the powers and duties of the police and those of Magistrate. The nature of the remedy sought for by the aggrieved party is also a decisive factor. The most expeditious action contemplated by law is an approach to the police who when they are satisfied that cognizable offences are being committed, can take immediately preventive measures as also punitive measures. In the present case, what has been sought for is a preventive measure, preferably for removal of the dismissed workmen from the premises of the factory. Even if a Magistrate were approached by the petitioner, the Magistrate would have to direct the police to make an enquiry and submit a report as to what is required to be done. In other words, the Magistrate himself has got to see that his order is executed through the machinery of the police. That is why in cognizable offences the law requires the police to take action without waiting for the orders of the Magistrate."

With these observations, I respectfully agree.

38. It is also contended by the respondents that the petitioner should have resorted to the provisions under the Industrial Disputes Act as there is a dispute between the petitioner and the workmen. It appears, under Section 10 (1) of the Industrial Disputes Act, the Government alone, if it is of opinion that any Industrial Dispute exists or is apprehended, may by order in writing refer the dispute to a Labour Court for adjudication. The discretion to refer the dispute is left to the Government. The Government cannot be compelled to refer the dispute. Under Section 10 (3) of the Industrial Disputes Act, the Government may prohibit the continuance of any strike or lock-out where an Industrial Dispute has been referred to the Labour Court, Tribunal or National Tribunal. These provisions make it clear that this remedy is not open to the petitioner though he could apprise the Government of the existence of the dispute. It is further contended that the matter is sub judice as the petitioner has gone to a Civil Court and the matter is pending before it. The pendency of the suit cannot be a bar for taking action by the police if cognizable offences are disclosed or a breach of the peace is likely to occur. In this case, the order of injunction was passed against the striking workmen from collecting within the factory premises after working hours. The police should have given effect to the order of injunc-

tion by dispersing the striking workmen against whom the said order was passed. It is, therefore, not necessary for the police to consider whether any alternative remedy is available to the petitioner or any dispute is pending before any Court. They are only concerned to see whether the incidents complained of disclosed a cognizable offence or at least there are reasonable grounds to believe that such cognizable offences were committed or likely to be committed. If the police had come to the conclusion that the striking workmen had committed a cognizable offence, it was their statutory duty to take appropriate action.

39. It appears that in this case the respondents have been under the impression that the striking workmen remaining in the factory premises after working hours does not disclose a cognizable offence. If they had known that a cognizable offence was committed, they would have certainly taken necessary action. As I have now found that the striking workmen had committed the offence of criminal trespass and they formed themselves into an unlawful assembly by remaining after working hours in the factory premises, the respondents would take necessary appropriate action. The respondents have got various measures in giving relief to the petitioner. They can direct the striking workmen squatting within the factory premises after working hours to disperse and remove them from the premises of the factory. As already stated, under Section 127, Criminal Procedure Code the officer-in-charge of a Police Station may command any unlawful assembly likely to cause disturbance of the public peace, to disperse. In this case, if the petitioner and the willing workmen had resisted the striking workmen remaining after working hours in the factory, it would have resulted in a breach of the peace. This is a fit case where the respondents can take action under Section 127 (1), Criminal Procedure Code. They may arrest the striking workmen as cognizable offences are disclosed and investigate and file charge-sheets, if there is a prima facie case. It is a matter for the police in this case to decide what they should do and what course they should adopt in order to give an effective relief to the petitioner.

40. It is no doubt true that the capital and labour should contribute equally for its development and progress and the rights and interest of both the employer and employees should be protected. But, if they transgress the bounds of law and create an atmosphere likely to affect law and order, which are the foundations of the civilised society, the police should not lag behind to do its statutory duty of taking appropriate action contemplated

by law. Otherwise, there will be chaos and confusion in the country affecting the normal avocations of people. The powers and duties of the police are directed, not to the interest of the police, but to the protection and welfare of the public.

41. As I have found in this case that the striking workmen remaining after working hours in the factory premises committed the offence of criminal trespass and formed themselves into an unlawful assembly, the respondents are directed, to disperse and remove such of those persons who remain in the said premises after working hours, if necessary with the assistance of their subordinates, and take such appropriate action as they may think fit in the circumstances of the case. CrI. M. P. No. 2250 of 1967 is allowed.

42. On the view I am thinking in the Criminal Miscellaneous Petition, I do not think it necessary to issue a Writ in the nature of Mandamus to the respondents directing them to do their statutory duty as I am sure that the respondents, being responsible officers, would certainly take necessary effective steps on the lines mentioned in the judgment. With these observations, W. P. No. 2825 of 1967 is dismissed.

43. No costs.

RSK/D.V.C.

Order accordingly.

AIR 1969 MADRAS 42 (V 56 C 9)

RAMAMURTI, J.

S. Krishnaswamy and others, Applicants v. South India Film Chamber of Commerce and others, Respondents.

Applns. Nos. 1215 to 1218, 1227 and 1228 of 1967, D/- 3-7-1967 in C. S. No. 99 of 1967.

(A) Civil P. C. (1908), O. 39, Rr. 1 and 2 — Interim injunction — Grant of — Declaratory suit against society — Principles stated. (Paras 13, 14, 19)

(B) Specific Relief Act (1963), Ss. 34 and 37 — Elections to Executive Committee of Society — Party acquiescing in elections cannot be allowed to challenge validity of election.

It is established law that if a party who has acquiesced in the election to which he objects or he is raising an objection which might have been put forward against himself on a previous election or in the same election in which he participated, the Court in the exercise of its discretion will refuse to award him any relief. It would not make any difference whether the relief is sought by means of a writ of quo warranto or by way of a declaratory suit seeking a dec-

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laration that the elections were invalid and praying for an ad interim injunction therein. AIR 1953 Nag 81 and (1866) LR 1 QB 433 and AIR 1954 Mad 563 and AIR 1914 Cal 152 and AIR 1920 Mad 573, Rel. on; AIR 1946 Cal 206, Dist.

(Paras 25 and 26)

Cases Referred: Chronological Paras

(1959) AIR 1959 All 598 (V 46), Shridhar Misra v. Jaichandra	14
(1956) AIR 1956 Assam 82 (V 43), J. K. Choudhury v. Hem Chandra	22
(1954) AIR 1954 Mad 563 (V 41)= 1954-1 Mad LJ 102, A. R. V. Achar v. Madras State	25
(1953) AIR 1953 Nag 81 (V 40)= ILR (1953) Nag 267, Miss Cama v. Banwarilal	25
(1951) AIR 1951 Mad 831 (2) (V 38) =ILR (1949) Mad 808, Nagappa v. Madras Race Club	14
(1946) AIR 1946 Bom 516 (V 33)= 48 Bom LR 341, Satyavart Sidhan- talankar v. Arya Samaj, Bombay	14
(1946) AIR 1946 Cal 206 (V 33)= ILR (1944) 2 Cal 464, S. K. Sawday v. N. Singha Roy	26
(1920) AIR 1920 Mad 573 (V 7)= 39 Mad LJ 319, Lakshminarasimha Somayagiyar v. Ramalingam Pillai	26
(1914) AIR 1914 Cal 152 (V 1)= ILR 41 Cal 384, Bhupendra Nath Basu v. Ranjit Singh	26
(1866) LR 1 QB 433=35 LJQB 145, R. v. Lofthouse	25
(1800) 1 East 38=102 ER 15, Rex v. Clarke	25

V. P. Raman, for Applicants; V. Thyagarajan, for Respondents.

ORDER:—Applicant in Applications Nos. 1215 to 1217 of 1967 is the plaintiff in the suit, C. S. No. 99 of 1967. Application No. 1217 of 1967 was filed for the appointment of a Commissioner for seizure of some documents and records of the 1st defendant Society and the Advocate Commissioner appointed by this Court has submitted his report after carrying out the warrant of commission. There is nothing further to be done in that matter.

2. Application No. 1215 of 1967 is for an interim injunction restraining respondents 1, 4 and 5 from holding a meeting on 21-6-1967 for co-opting a President, a Vice-President and five other members of the committee pending disposal of the suit. Application No. 1216 of 1967 is for an interim injunction restraining the first defendant Society from allowing the office-bearers elected at the general body meeting on 11-6-1967 from holding their offices. In both the applications the order of interim injunction was passed by this Court on 21-6-1967 and the respondents aggrieved by the said order have applied for vacating the interim orders passed by

this Court by means of Applications Nos. 1227 and 1228 of 1967 respectively.

3. The facts which led up to the present suit and the applications aforesaid may briefly be stated. The first defendant which is a Registered Society under the Societies Registration Act is the South Indian Film Chamber of Commerce. It was founded in 1939, its main objects being encouragement and development of the film industry and the solution of problems connected with it. The Chamber is governed by its Memorandum of Association and Rules (hereinafter referred to as the Rules) with regard to all its activities including the election or nomination of its office-bearers. The principal office-bearers of Society (hereinafter referred to as the Chamber) are the President, two Vice-Presidents, two Honorary Secretaries, one Treasurer and twenty-two committee members. These office-bearers are elected every year at a general body meeting convened for that purpose.

With a view to properly and adequately safeguard the interests of members having varied and different interests in the film industry, the members of the Chamber have been classified under the following groups: Studio Owners, Producers, Distributors, Exhibitors and Associates and out of the twenty-two committee members, two members are nominated while the twenty members of the Executive Committee are given representation as shown hereunder:

Studio group	3
Producers' group	7
Distributors' group	3
Exhibitors' group	7

There are about 1600 members on the rolls of the Chamber. This year the general body meeting, after due publication and notice (as required by the rules) was convened on Sunday the 11th of June, 1967, in the premises of the Chamber at 10 A. M. and 676 members attended and participated at the meeting. Sri Nagi Reddy who had been the President of the Chamber for the past several years was elected as the President this year too, he having secured 344 votes as against his rival candidate one Subbaraman who secured 321 votes, but Shi Nagi Reddy resigned from his office. Of the two Vice-Presidents unanimously elected Sri A. L. Srinivasan also resigned, with the result that there is at the moment only one Vice-President for the Chamber Mr. Sunderlal Mehta who is the second defendant in the suit. The third defendant was unanimously elected as the Treasurer.

With regard to the office of Secretaries, there were four candidates and defendants 4 and 5 were elected as Secretaries they having secured 359 and 356 votes

respectively as against the other two contesting candidates, the plaintiff who secured 292 votes and D. Ramanujam who secured 303 votes. Defendants 6 to 12 are seven members elected from the producers' group out of the 11 members who contested in the election. Defendants 13 to 15 are the members representing the Studio group who were elected unanimously. Defendants 16 to 21 are members representing the Exhibitors' group who were elected unopposed.

4. The plaintiff claims to be the General Manager of Padmini Pictures, Film producers and is also an associate member of the first defendant Chamber. He not only participated and contested the election, but also acted as a teller. Immediately after the election of the office-bearers, on the same day Mr. Nagi Reddy, the President announced the result; all the office-bearers elected were inducted in their respective offices there being no kind of protest or objection at the time of the announcement. The newly elected office-bearers were functioning as such from the 11th of June, 1967, and the present suit was instituted by the plaintiff (who contested for the Secretary's post and lost) for a declaration that the election of defendants 4 to 12 for the year 1967-68 to the offices of Secretaries and the members of the committee was illegal and ultra vires and also for a perpetual injunction restraining all the office holders of the Chamber, defendants 2 to 21 holding any office in the first defendant Chamber pursuant to the election held on 11-6-1967.

5. In paragraph 9 of the plaint, the plaintiff has set forth his various grounds of complaint and objections with regard to the alleged irregularities and illegalities and violations of the rules of the Society vitiating the election of the office-bearers aforesaid. In the Schedules A to E appended to the plaint, the plaintiff has specified the categories of instances concerning the illegality of the voting. Pending disposal of the suit, the plaintiff has asked for the interim injunction as stated above.

6. The contesting defendants 3 and 4 have set forth their objections in their counter-affidavit and as it was represented by learned Counsel on their behalf that they were handicapped in adequately and properly putting forth their objections by the order of seizure of the documents and records of the Chamber passed by this Court, permission was granted to defendants 3 and 4 to file a supplemental affidavit with liberty to the plaintiff to file a further reply affidavit and both sides have filed such affidavits accordingly. I gave liberty to counsel on both sides to make their submissions with respect to the averments and pleas raised in all these affidavits.

7. Rules 34 and 38 contain the provision for the office-bearers, the machinery for their elections and provision for filling up vacancies. The first complaint of the plaintiff is that the election of 7 members of the Executive Committee representing the Producers' group is invalid on the ground that the 40 members specified in Schedule A to the plaint have been wrongly enrolled and wrongly allowed to participate in the election. The objection is that these 40 members who have participated in the election and exercised their votes did not satisfy the conditions of the definition of Producer member under Rule 4 as they are not persons 'actually engaged' in producing pictures or closely connected with the industry of film.

In paragraphs 6 and 7 of the supplemental reply affidavit filed on behalf of the plaintiff, the various aspects of this complaint have been elaborated. According to the plaintiff, a person can claim to be a producer member and be enrolled as such only if there is proof at the time of his enrolment that the several vital steps preliminary to the production of a picture had been reached and accomplished and the particular member is at the point of being given a permit for raw films and that the tests for determining whether a person can be enrolled as a producer must be objective tests with reference to the tangible progress he had made in the matter of production of a picture.

8. The next complaint of the plaintiff is a violation of Rule No. 8 regarding voting by authorised representatives of members, numbering as many as 212. According to the plaintiff, if a member desires to exercise his right of voting under Rule 36 (3) (b) under his authorised representative, the member concerned should submit the authorisation to the Chamber immediately after he becomes a member of the Chamber. According to the plaintiff, the authorisation forms signed by members were received and registered at the office of the first defendant between 6th and 9th of June, 1967, long after (in many cases years after) they had become members of the Chamber. Further, according to the plaintiff, virtually, the enrolment of a person as a member of the Chamber should form part and parcel of his authorisation to someone to represent him in terms of Rule 8.

The other complaint of the plaintiff is that changes in the authorisation should have been made 48 hours before the date of any meeting; in this case before the evening of 8th of June, and that changes in authorisation received on the 9th, though they may be only up to 9-30 A.M. on the 9th, were invalid. According to the plaintiff, Rule 8 would not permit

the Chamber to receive change of authorisations after 5-30 P.M. on 8-6-1967 and that 90 such authorisations were received subsequent to such period. The third objection with regard to Rule No. 8 on which considerable stress was laid was that the authorised representative must be the principal officer employed in the film business of the authorising member and that in the instant case several third parties unconnected with the business activities of the member have been authorised in violation of Rule No. 8 and have been permitted to vote, in Schedule C appended to the plaint, the plaintiff has mentioned 41 instances in which such violation had taken place. On this aspect, the substance of the plaintiff's complaint is that it is only persons who are intimately connected with and employed in the film business of the authorising member who will have intimate knowledge of the day to day problems of the film industry in general and the particular aspect of film industry, of the authorising member the Studio, Producer, Distributor or Exhibitor as the case may be and that only such authorised persons can usefully participate in the meetings of the Chamber and persons who are mere strangers to the film industry cannot serve any purpose at such meetings.

According to learned Counsel, to permit any authorised representative even if he be, an utter stranger to the film industry, knowing nothing about it, to participate in the deliberations and the resolutions carried out by a mere brutal majority of such strangers would frustrate and defeat the object of the Chamber and the purpose for which the members were classified under several groups and the purpose for which Rule 8 provides that the authorised representative shall be the principal employee of the film business of the authorising member. Learned Counsel, Sri V. P. Raman stressed the significance of the words "shall be the principal officer employed in the film business of the authorising member".

9. The next complaint of the plaintiff is that persons who were in arrears for more than 3 months and were liable to be removed from the membership were allowed to vote after receipt of the arrears due from them at the last moment on the day of the election. The plaintiff also has complained that some authorisations were wrongfully rejected from seven members as set out in Schedule B to the plaint and that there was some false impersonation at the elections; two instances were given in Schedule D appended to the plaint. The plaintiff also had raised the objection that the ballot papers containing the names of the contesting candidates were all in English and several members did not know English at all. The above are in substance

the main grounds on which the validity and legality of the elections of the office-bearers are questioned by the plaintiff in the suit.

10. The main ground on which the interim injunction is asked for, restraining these office-bearers from functioning is that the constitution of the Chamber is such that their meetings should be conducted and deliberations and decisions taken therein, should be with a view to serve, safeguard and protect the interests of all the members in general and the interests of the several categories of the members as Studios, Producers, Distributors, Exhibitors and Associates and that when election of the office-bearers concerning a particular group is under serious challenge, any decision taken by the Chamber or its executive committee would cause considerable prejudice to the members of the Chamber and in particular the members of the specific groups as Studios, Producers, Distributors, Exhibitors and Associates, if ultimately this Court were to hold that the elections complained of by the plaintiff are invalid and illegal. The full and complete representative character of the executive committee and its members is seriously impaired when the election of the office-bearers is under challenge and questioned. According to the plaintiff, these office-bearers should not be allowed to function and at the same time, the other office-bearers also should not function as the committee without proper representation of a particular group or category of members cannot claim to be fully representative in character. In other words, learned Counsel for the plaintiff urges that the executive committee cannot and should not function either with or without the members and office-bearers, whose election is under challenge.

Sri V. P. Raman urged that the plaintiff has made out a strong *prima facie* case, he having raised points and objections which are of a substantial nature calling for careful scrutiny and investigation during the trial and that the injury which he complains of is of an overwhelming nature and that the status quo which according to learned Counsel is the state of affairs prior to the election of the office-bearers, should be maintained. Learned Counsel also made several suggestions for restricting the scope of the order of injunction so that the day to day routine affairs of the Chamber can be carried on, the injunction being restricted to serious and vital matters concerning disbursements of heavy amounts and policy decisions in serious matters dealing with the film industry.

11. In the counter-affidavit of defendants 4 and 5, they have set forth how the interim injunction would paralyse

and seriously interfere with the day to day administration and functions of the Chamber and how the balance of convenience is all in favour of the defendants and against the plaintiff. In the two affidavits filed on behalf of the defendants 4 and 5 they have elaborated, no doubt, illustratively, how the interim injunction asked for would seriously hamper and practically bring about chaos and confusion and utter standstill of the working of the Chamber. In the annexure attached to the supplemental counter-affidavit of defendants 4 and 5, instances of important activities of the Chamber and the Committee which would be interfered with if there should be an interim injunction, are set out. In the supplemental reply affidavit filed on behalf of the plaintiff, the plaintiff has pointed out that the interim injunction would not cause any such prejudice as alleged by the contesting defendants and that the balance of convenience is in favour of the plaintiff.

12. Even at the threshold it is necessary to advert to one crucial aspect which was stressed in the two counter affidavits filed on behalf of the defendants 3 and 4 as well as stressed in the course of the arguments of Sri V. Thyagarajan learned Counsel for the respondents. Even assuming (without conceding so, in any manner whatsoever) that there had been any violation, infringement or non-compliance of any of the provisions of the Rules, this practice has been in vogue for several years and the office-bearers who were elected in accordance with such uniform practice, have been functioning all these years, without any challenge or question, that this practice in the course of these long years is itself an indication that the Rules which are after all framed for the internal management and for safeguarding and protecting the interests of the members have been understood in that sense, i.e., whether obligatory, mandatory or directory, that the plaintiff who has been in the executive committee on prior occasions had full knowledge and was fully alive to these alleged violations and infringements of the rules, that above all, with full knowledge of these alleged violations and infringements of the Rules he participated in the elections, contested for a seat, took a chance of his being elected on the basis of the votes of these alleged disqualified voters, that he never raised any objection at any stage with respect to any of the matters now complained by him and that under those circumstances, the plaintiff should not be entitled to ask for the discretionary relief of a declaration about the validity of the election, much less would he be entitled to the discretionary relief of an interim injunction pending disposal of the suit.

Repeated stress was laid by learned counsel Sri Thyagarajan for the defendants upon this highly objectionable conduct of the plaintiff not coming to Court with clean hands, himself having been a party to everything that took place at the meeting as sufficient by itself to disentitle the plaintiff to the indulgence of an interim injunction. He also drew my attention to the several paragraphs in the two counter affidavits filed on behalf of the defendants 3 and 4 in which the facts stated as disqualifying several voters as members of the Chamber were denied, mainly with regard to the Producer members and Authorised representatives of the members. He urged that the suit and the injunction applications are bereft of any substance or bona fides and are filed by the plaintiff in a vindictive spirit and in a sense of frustration arising out of his defeat in the very election and that the plaintiff's complaint of the threatened injury or mischief which he desires to avert during the pendency of the suit by means of an interim injunction are all unreal and imaginary.

13. The principles which govern the grant or refusal of an interim injunction in aid of the plaintiff's right are all well-settled and they depend upon a variety of circumstances. In the nature of things, it is impossible to lay down, any set, rigid or general rule on the subject by which the discretion of the Court ought in all cases be regulated. As the plaintiff, by the interim injunction undoubtedly seeks to interfere with the rights of the opponent before the plaintiff's right is finally established, the injunction is not granted as a matter of course and it is necessary for the plaintiff to make out a strong prima facie case in support of the right that he asserts. It is true, that at the interlocutory stage, the Court should not embark upon a detailed investigation on the relative merits of the contentions of the parties and it is enough if the plaintiff raises questions of a substantial character calling for decisions after an examination of the facts and the law arising in the case. The Court can consider the nature and the merits of the rival contentions at the interlocutory stage only as bearing upon the limited question as to whether or not the plaintiff has made out a strong prima facie case. The Court should avoid expressing any opinion on the merits which would partake the character of a decision of the main issues in the case. The plaintiff should next make out that the Court's interference is necessary to protect him from an injury or mischief which is imminent and it is at the same time irreparable. He should make out that the injury is so serious, irreparable and imminent that an immediate order of Court is necessary even before his rights

are established at the trial. Inseparably connected with this, is the burden, which lies upon the plaintiff to make out, that the comparative mischief or inconvenience which would ensue from withholding the injunction would be far greater from what would ensue from the injunction being granted. Lastly, which again is a very important consideration, is that in considering whether an interim injunction should be granted, the Court must have due regard to the conduct and dealings of the parties, before the application is made to the Court, by the plaintiff to preserve and protect his rights, since the jurisdiction to interfere, being purely equitable, is governed by the equitable principles (Vide 21, Halsbury's Laws of England, paragraphs 766 and 767).

14. On the question of the balance of convenience and the threatened mischief or injury irreparable or otherwise, regard must be had to the nature of the suit and the particular right asserted like suits against Government, Public Corporations, Municipal Corporations, Statutory bodies, Social clubs and its members, Societies registered under the Societies Registration Act and its members distinguished from litigation between private individuals. In the case of clubs and Societies registered under the Societies Registration Act, the general principles governing the right of suit of an individual share holder or a member of the Company would apply and ordinarily the Court will not interfere with the internal management of the Society at the instance of one or some only of the members of the Society subject to well recognised exceptions (1) where the impugned act is ultra vires of the Society, (2) the act complained of constitutes fraud or (3) whether the impugned action is illegal. The Rules are made by the Society itself for the convenience of its members for regulating their own conduct as members and for regulating the affairs of the Society as an entity. A breach of any Rule made by the Society would not give rise to a cause of action for any member to rush to Court, it must be a case of manifest illegality or where the act of omission or commission is something which goes to the root of the matter. All the members would be bound by the decision taken by the general body though there may be some violation of some Rules provided it is something which could well be condoned and ignored by the general body (Vide Shridhar Misra v. Jaichandra, AIR 1959 All 598; Satyavart Sidhantalankar v. Arya Samaj, Bombay, AIR 1946 Bom 516 and Nagappa v. Madras Race Club, ILR (1949) Mad 808 at pp. 821 to 823=(AIR 1951 Mad 831 (2) at pp. 835-836).

15. Before I proceed further, it is necessary to set out in full the contents

of the two printed notices which were published on the 20th of May, 1967, about the general body meeting of the 11th of June, 1967, at 6-30 P.M. In the first notice, the particulars of the seats as representing particular group are given. Nominations for the several office-bearers are required to be sent before 5-30 P.M. on the 30th of May. The scrutiny of the nominations was announced to take place at 5-45 P.M. on the 30th itself in the premises of the Chamber. The polling was announced to take place on the 11th of June, between 10 A.M. to 1 P.M. and 2 P.M. to 5 P.M. Particular attention of the members is drawn to Rule No. 8 regarding voting by authorised members with particular reference to the form in which the authorisation of a member has to be declared as the principal officer employed in the film business of the member. This notice winds up by saying that members intending to send their representatives may send in fresh authorisations for the general body meeting on the 11th of June, so as to reach the Chamber, 48 hours before the commencement of the meeting. In the other notice, the agenda is notified, one of which is the election of office-bearers for 1967-68. It is in this notice attention of the members is particularly drawn to certain rules bearing upon the right of the members to vote; Rule No. 5 the subscription and Rules Nos. 8 (1) and 36 voting by authorised representatives, Rule No. 35 that members whose subscriptions at the time should have been in arrears shall not be entitled to vote.

16. It is common ground that these two notices were widely circulated to all the members. Learned Counsel Sri Thyagarajan Iyer placed considerable stress upon the contents of these two notices on several aspects of the points in controversy. Even though the members had ample time to raise every objection at the time of the scrutiny of the nomination papers, no member raised any objection with regard to any of these members who the plaintiff now complains were not entitled to vote at the election. It is quite legitimate to presume that all the members knew and understood what exactly are the qualifications which a member belonging to the producers' group should possess and what is exactly meant by the words "who is actually engaged in producing a picture at the time of his application", whether this qualification should be a continuing qualification even after he became a member, and what exactly are the activities in the production of the picture which the producer should have accomplished before his application for membership.

Learned Counsel for the respondents urged that if during the long continuous course of years, members were enrolled and were allowed to continue it could and should have been only because the members of the executive committee were of the opinion that they were still entitled to be on the rolls as producer members and that in interpreting the words "actually engaged in producing the picture" the meaning to be given is the one which the members themselves attached to these words as manifested by their conduct all these years. If members ought not to continue in the producers' group on the rolls of the Chamber and if therefore they do not serve any useful or effective purpose towards promoting the objects of the Chamber and if still, they exercised votes and therefore controlled the activities of the Chamber, it is for the members to object at the time of the scrutiny. So long as they are members on the rolls and so long as no objection was raised either earlier or at the time of the scrutiny of the nominations and their names still continue, these members cannot be denied their right to participate in the election. He also urged that members are on the rolls for a long time and at this distance of time, all of a sudden, the legality of their voting cannot be objected after the voting has been over.

17. In the first notice there is the intimation that members who desire to send their authorisations for the forthcoming meeting may send before 48 hours before the date of the meeting. Here too the same argument was advanced by Sri Thyagarajan Iyer to the effect that all the members, for all these years, have uniformly understood Rule No. 8 as permitting authorisation at any time up to a limit of 48 hours before the meeting and that no member had understood Rule No. 8 in the sense that unless the nomination of the authorised representative was made forthwith as part and parcel of an application for the membership, authorised representatives cannot be nominated subsequently. He also urged that it would be absurd and anomalous to compel a member to nominate his authorised representative when he has no confidence in any other person and desires to attend the meeting himself all throughout. Further the necessity for an authorised representative need not be for ever. Inevitably there will be change of authorised representatives and there will be years in which there will be no authorised representative at all. To construe Rule No. 8 that there should be only one authorised representative, and that too, nominated immediately, after the admission to membership, would defeat the purpose of Rule No. 8 and practically render it futile and useless. Whether the provision in

Rule No. 8 is mandatory or directory or whether any delay thereto could be condoned are all matters, for the general body and if by a continuous course of conduct the members have worked out and applied this rule in this particular manner and if what happened this year is in consonance with the usual practice, the plaintiff who did not raise any objection, cannot question the legality of the election.

With regard to the argument about 48 hours, the same line of argument was adopted by learned Counsel. He urged that, in the context, 48 hours, would only mean till 10 A.M. on the 9th. The very fact that no particular member objected when nominations of authorised representatives were received till 9-30 A.M. shows that the members understood the rule only in this manner. Learned Counsel also urged that great significance should be attached to the fact that at the time of the scrutiny of the nomination papers, objections were raised and some nomination papers were also rejected. When that was the situation, it has to be necessarily inferred that at the time of the scrutiny of the nomination papers of other members they were all in order and therefore no objection was raised.

18. On the question as to who can properly claim as the "principal officer employed in the film business" and whether factually that authorised representative possessed that qualification are all matters which should have been considered by the members and if they felt that persons without qualification were allowed to vote, the aggrieved members should have raised objection at the time of the scrutiny of the nomination papers. In this context it should be borne in mind that members are generally recommended by one member of the executive committee supported by another member and members are enrolled only after the executive committee carefully scrutinises all the details, the qualifications of the member or the associate member as the case may be and the plaintiff himself was in the executive committee, the previous years and he had full access to all the records.

19. Sri V. P. Raman attempted to meet this argument by urging that whether a particular member was actually engaged in the production of a picture, whether an authorised representative was the principal officer employed in the film business of the member concerned, are all factual matters which can be investigated only at the trial after evidence and arguments and that at the stage of the interlocutory application, they are not quite germane and that it is sufficient, if his client, the plaintiff had raised substantial questions of fact and law

even turning upon the proper interpretation of the rules, and that he need not establish at this stage that he is sure to succeed at the trial.

I am unable to accept this argument put in this abstract form as it would result in the position that a plaintiff has merely to allege and deny facts and on that ground ask for an interim injunction. As observed earlier, all the aspects cumulatively should be taken into account in determining whether an interim injunction should be issued. I see considerable substance in the argument of Sri Thyagaraja Iyer that "if the contention of the other side were to be accepted, any disgruntled member bent upon mischief would be encouraged to rush to Court attacking factually the qualification of all the members on the rolls of the company or Society impeaching their elections taking refuge under the doctrine that he has raised substantial questions of fact which should not be gone into now but only at the trial and therefore a case has been made out for an interim injunction." It is here the other contention that the plaintiff should make out a strong *prima facie* case comes into operation. Even in the supplemental affidavit, the plaintiff does not categorically deny that this has been the practice in the previous years. On the other hand the stand taken by the plaintiff is that this practice cannot be given effect to, for, it is opposed to the rules of the Chamber.

20. There is one important aspect which should be referred to at this stage. The suit is filed by the plaintiff in his individual capacity as a member of the Chamber for declaring the election of Honorary Secretaries, defendants 4 and 5 and executive committee members representing producers' group, defendants 6 to 12 as illegal. He can succeed in the suit only by establishing that the producer members set out in Schedule A to the plaint, the authorised representatives set out in Schedule C to the plaint and the 212 authorised members whose authorisations were received late (not immediately after the enrolment of the members concerned) were not entitled to vote at the meeting. The suit is not analogous to an election petition to set aside the election under any statute, Municipal Acts or the Representation of the People Act where in a proceeding by a defeated candidate, the right of a voter or voters can be considered in the light of their qualifications, disqualifications subject of course to the finality attached to the names of those members being on the rolls at the time of the election. They are all cases in which the voters concerned get the right to vote by being residents of a particular place.

Here in the instant case, the right to vote is one of the privileges of a member

of the Chamber and it is a matter for serious consideration whether in the suit as framed, the question of the continuance of these members as producer members, as authorised representatives etc. can be considered without they being parties to this proceeding. There is no point in this Court adjudicating upon the question whether the members in Schedule A to the plaint are actually engaged in the production of pictures and whether the members set out in Schedule C are not the principal officers of the film business of the concerned authorising members. Any decision in this suit will be of no avail and they will still continue to be on the rolls of the Chamber unless an objection is raised in their presence and their answers are heard. It is necessary to remember that this right to vote, whether a right or a privilege, emerges from an inseparably connected status as a member of the Chamber. It would result in anomalous and absurd consequences if the Court were to uphold the plaintiff's objections, that these numerous members will not be members for the purpose of voting so far as this election is concerned, while vis-a-vis the Chamber they will undoubtedly and certainly continue to be members of the Chamber entitled to all the privileges like distribution of raw films and various other materials in the production of a picture etc., etc., and participation in the various other deliberations of the Chamber. The rights of all the members are governed by the rules of the Chamber.

It is elementary law that so long as a member continues to be on the rolls and has not been removed after hearing his objections, he will in law be entitled to all the privileges of the member and will also be liable to all his obligations. I cannot visualise a proceeding in which the question whether or not a person already on the rolls of the Society still continues to be member as such could be agitated and decided without the member or members concerned being parties to that proceeding. In my opinion, there is vital distinction between an election petition under a statute where one of the questions may be whether a voter or voters had a right to vote or was disqualified in voting without that question having any repercussion upon his other rights. For instance in an election dispute, the defeated candidate may establish that 500 voters were purchased by corruption and their votes should not be taken into account, but that analogy will not apply to the instant case in which the right to vote springs from his status as a member.

21. The position becomes a *fortiori* against the plaintiff applicant and in favour of the defendants-respondents, with regard to the large number of au-

thorised representatives when the matter is looked at from the point of view of the members who have sent in the authorisation under Rule No. 8. At the election or at the deliberations of the meetings, the members concerned send in their representatives presumably to put forward and press their point of view, in the matter of the election of a particular candidate or candidates or upon particular aspects concerning the film industry in which they are vitally interested. If objections were raised at the proper time and the authorisations were rejected, the members concerned would have themselves participated in the meeting and cast their votes or expressed their points of view.

Now, at this stage to eliminate the voting or the views expressed by such large number of persons as many as 200 voters, would work gross injustice as by acceptance of the authorisations, the members concerned were all led to believe that their points of view would be heard at the meeting and their franchise exercised through their representatives. When all the members including the plaintiff have accepted and therefore represented to the authorising members that their representatives can vote at the meeting, the plaintiff nor even the Society as an entity, cannot thereafter refuse to take their votes into consideration. It would be opposed to all principles of natural justice if the Court were to hold that the votes exercised by all these 200 representatives are invalid without the authorising members being given an opportunity to defend their authorisations.

All these aspects clearly emphasise that the decision in the instant case will have to proceed only on the basis of the finality of the roll of the members of the Chamber as it existed on the date of the election and the plaintiff cannot question the accuracy of the roll. That perhaps, is the reason why in the statutes regarding elections to Municipalities, local bodies etc., there is a statutory provision for the amendment of the electoral roll and a right to seek redress in a Court of law either in the initial or the subsequent stages of the election dispute. I am making these observations not as expressing my final opinion, but as merely indicating my view that the plaintiff has not made out a strong *prima facie* case and the right that he asserts in the suit "as framed" is highly doubtful.

22. The next aspect that has to be considered is the question of balance of convenience and the irreparable mischief or damage which the plaintiff would sustain in case the interim injunction is refused. As prefaced in my preliminary observations, this involves two aspects,

(a) whether the mischief or injury is irreparable and so serious and (b) whether the plaintiff's complaint of the threatened injury is real or merely illusory and imaginary. In the first place, it has to be borne in mind that it is established law that at the instance of one member Courts are highly reluctant to interfere; at any rate, would not lightly interfere with the functioning of a corporate body or a Society. It is not a dispute between two private individuals. A large number of voters had arrived from various places at considerable expense and inconvenience and participated at the meeting and the interim injunction would result in a total suspension of the business and activities of the Chamber. The Chamber has to carry on its affairs and activities and very great inconvenience and mischief would be caused to the Chamber by the issue of an injunction restraining the office bearers from functioning as such.

The annexure to the supplemental counter affidavit of the defendants shows the various important matters which will have to be attended by the executive committee. It is familiar knowledge that at the present moment serious and vital problems and difficulties are confronting the film industry and the executive committee has to attend to those matters. The committee has to nominate members for serving on the Central Wage Board for Film Industry which is a vital concern to the industry. The executive committee has to take a decision as to the representation of the best South Indian film at the Film Festivals. The Chamber has to represent through its representative in the meeting of the Film Federation of India which is to be convened at Calcutta and the Vice President and Secretaries have to function in the Raw Film Committee. A perusal of this annexure shows the great magnitude of the problems which confront the film industry and the urgency for these matters being attended to. The position is so obvious and lies on the surface that it does not require much of an elaboration to hold that the balance of convenience is all in favour of the defendants and the damage or the prejudice that will be sustained by the defendants by the issue of an interim injunction would be irreparable and cannot by any means be compensated in damages and neither the plaintiff nor the Court could do anything which could repair the damage or afford adequate restitution or compensation.

As against this, let me examine what the balance of convenience in favour of the plaintiff is. Except the existence of party faction which may be presumed because of the contest in the elections in the group of representatives of the producers' group, the plaintiff does not allege

any malice or illwill or ulterior motive on the part of the defendants either as a group or individually. Mr. Raman's argument is that when every deliberation, decision and activity and action taken by the Chamber should be in a representative character by the members of the executive committee, all acting together as one unit, such a thing is not secured when the election of honorary secretaries and the committee members under the producers' group are under challenge and that any decision taken by a committee composed of such members itself would be irreparable damage and mischief done to the Chamber if ultimately it should be held the election of those office bearers is invalid.

I am unable to accept this argument. This argument does not give adequate consideration to the important fact that the election of all the office bearers is not attacked in the suit and the attack is confined only to the election of Secretaries and the seven members of the executive committee. Learned Counsel urges that when party faction has crept into the activities of the Chamber, the plaintiff could legitimately apprehend that in that spirit of party faction, the executive committee would take decisions of drastic consequences involving dissipation of the finances of the Chamber and also do things that will be prejudicial to the particular group, i.e., the producers' group.

This complaint appears to be purely imaginary and illusory. Out of the 22 members constituting the executive committee, the members whose elections are challenged are only 9, the rest of the office bearers were elected unopposed or unanimously which means the plaintiff and the members of his group have full confidence in the rest of those office bearers who are so elected unanimously. It cannot be readily imagined and assumed that these responsible office bearers like the Vice-President, Treasurer etc., would support any move or decision which would be detrimental to the interests of the Chamber. It cannot be seriously suggested that the rest of the members of the executive committee would act as mere puppets and would allow themselves to be easily led by defendants 4 to 12 even assuming that defendants 4 to 12 would make suggestions and put forward moves not in the interests of the Chamber but merely to spite the plaintiff and the members of his group. Why should we presume that when the construction of the building is in progress and when bills are paid from time to time after taking a certificate of the architect, monies would be disbursed in a reckless manner with a view to dissipate the resources of the Chamber purely out of spite?

Again, it is absurd to imagine that in the several matters set out in the annexure to the supplemental counter affidavit, the members of the executive committee would not represent the proper and correct point of view of the Chamber in general but would take a partisan view, being led by defendants 4 to 12. One can understand the plaintiff having some kind of statable grievance at least, if in the action he questions the legality of the election of all the office bearers. The rest of the members of the executive committee are respectable persons and they have been elected unopposed and unanimously.

As mentioned above, so far as the rest of the office bearers are concerned, the plaintiff has not made any specific complaint of a personal nature. The argument was more in the nature of a legal argument in the abstract, that the executive committee consisting of all the members should not be allowed to function as one unit when the election of some of the members of that executive committee is under challenge. It is obvious that the question of balance of convenience has to be decided only with reference to actual realities of the factual position, and not by a mere doctrinaire approach in the abstract.

In this connection, I may refer to the decision in *J. K. Choudhury v. Hem Chandra*, AIR 1956 Assam 82 in which the facts and the main situation were somewhat similar as in the instant case. There the plaintiff brought a suit against the governing body of a college consisting of 16 members claiming a declaration that five co-opted members in the governing body were not validly co-opted and that the governing body was not validly constituted; the plaintiff also prayed for an injunction restraining those members from working as members in the governing body, of that institution. It was held, the governing body had to discharge several important functions and those functions would be stultified if it was not allowed to function and that the balance of convenience was entirely in favour of the institution demanding that the governing body should continue to function.

There too, the same argument was advanced that all these members who were alleged to have been wrongfully co-opted by being in the executive committee at its deliberations would effectively contribute to do things which were prejudicial and detrimental to the interests of the institution like unauthorised and reckless dissipation of the funds of the institution, but the argument was rejected in these terms:

"I wonder how on such a slender foundation the functioning of the gov-

erning body could be altogether stopped when there was no allegation against the individuals concerned. Even if it is ultimately held that these co-opted members were not validly elected — a possibility somewhat remote — even then, there is nothing to indicate that by allowing them to function as such during the pendency of the suit the cause of the institution would be seriously prejudiced. No case to that effect has been made out by the plaintiffs at all.

The other members of the governing body are either ex officio members of the institution or persons nominated by the Government and the University. They can always keep a check upon the co-opted members if they wanted to do anything prejudicial to the institution even assuming that those members were properly elected. It is the function of the governing body to transact all business in connection with the institution and control the budget and the disbursements.

All the functions would be stultified if the governing body was not allowed to function even as it is. As I have said, there is no clear finding in either of the two judgments of the Courts below that there was any injury likely to be caused to the plaintiffs. Indeed there is no definite allegation either. In such a case, an order of injunction restraining the defendants to function was absolutely uncalled for. On the contrary, the balance of convenience was entirely in favour of the defendants and the interest of the institution demands that the governing body should continue to function.

It is suggested that probably some unauthorised expenditure may be incurred by the present governing body in the name of the institution. As I have said, there are already a number of persons there who are expected to control the co-opted members. Even as against the co-opted members there is not a word of complaint."

I have no hesitation in holding that the apprehensions of the plaintiff are more imaginary than real and it would be highly unfair to the members of the executive committee consisting of responsible and respectable members to speculate that they would deliberately do anything detrimental to the interests of the Chamber. In this connection it has to be noticed that it is not even the case of the plaintiff that the producer members were elected by any particular party or faction opposed against the plaintiff or the members of his group so as even to afford a foundation for an argument that these members would instigate the other members of the executive committee to do things solely with a view to spite the plaintiff and the members of his group.

Defendants 4 to 12 are all members elected in the general body meeting in accordance with the practice which has been in vogue for all these years and the fact that the legality of their election is challenged does not by itself lead to the inference that they will function in the executive committee to the detriment of the interests of the Chamber.

23. In this view it is unnecessary to elaborately consider the various suggestions made by Sri Raman as to how the scope of the interim injunction could be restricted. For instance with regard to the functions of the activities of the Raw Film Committee which undoubtedly performs very important functions from the point of view of members of the Chamber, Mr. Raman contended that according to the rules prevailing from 1957, the Secretaries are not doing any important function; their job is merely the ministerial act of convening the meeting and that this can be done by any other member and an interim injunction would not interfere with the activities of the Chamber. On the other hand Mr. Thyagaraja Iyer drew my attention to the proceedings of the Chamber dated 21-7-1965 at which rules of the Raw Film Committee have been amended allotting effective functions to the Secretaries of the Chamber. They are all made ex-officio members of the Raw Film Committee and the duty is cast upon them to participate in the deliberations of the committee.

In a proceeding of the Chambers dated 1-8-1966, the plaintiff was present in the executive committee meeting in which the amendments of the rules of the Raw Film Committee dated 21-7-1965 were approved and it was treated as a sub-committee of the executive committee. On this, arguments were advanced, as to how far the executive committee of the Chamber can amend the rules of the Raw Film Committee, but it is unnecessary to pursue that discussion as the fact remains that the plaintiff himself was a party to the proceedings of the Chamber at which the office bearers were made ex-officio members of the Raw Film Committee. Today the Raw Film Committee functions only in accordance with the reconstitution as per the resolution of the Chamber dated 21-7-1965. It would create confusion and complications if it were to be held that deliberations and proceedings of the Raw Film Committee cannot be conducted in pursuance of the later resolution.

At any rate, at the stage of this interlocutory application, it will not be open to the plaintiff to take up the position that the Secretaries are not ex-officio members of the Raw Film Committee. To sum up, therefore, I have not the slightest hesitation in holding that the plaintiff, who after all is only one indivi-

dual member of Chamber has not made out any case for holding that the balance of convenience is in his favour so as to suspend the activities of the Chamber which has in its roll about 1600 members.

24. It only remains to deal with the conduct of the plaintiff as bearing upon the discretion of the Court and on which repeated stress was laid by Sri Thyagaraja Iyer. The notices were furnished on the 20th of May and the plaintiff had ample time to raise his objections and have the electoral rolls rectified. The two notices, as observed earlier, set forth all the details, drew pointed attention of the members to Rule No. 8 and Rules 5 and 36. The plaintiff who was in the Executive Committee on prior occasions had full knowledge and was fully alive to the alleged defects existing in the roll of the members of the Chamber. He stood as a contesting candidate and deliberately took a chance of being elected on the basis of this defective electoral roll. It is only when the election went against him, he has raised these objections.

25. It is established law that if in such a situation, when a party who has acquiesced in the election to which he objects or he is raising an objection which might have been put forward against himself on a previous election or in the same election, he participated in the election, contested for a seat in the election, the Court in the exercise of its discretion will refuse to award him any relief. This rule has been uniformly applied in all proceedings where the party concerned applied for the issue of a writ of quo warranto. It is sufficient to refer to the following observations of Mellor, J., in the leading decision in *R. v. Loft-house*, (1866) LR 1 QB 433:

"The relator must not be disqualified by having acquiesced or concurred in the act which he comes to complain of, or in similar acts at former elections."

Shee, J., said:

"Cases have been brought to our notice which show that where a man with the knowledge of the irregularity of a particular course, nevertheless concurs in it, he cannot afterwards take advantage of the irregularity. In the present case Mr. Maw voted on a voting paper which he knew or believed to be irregular. He therefore comes precisely within the rule enunciated by Lord Kenyon, C. J. in *Rex v. Clarke*, (1880) 1 East 38 at pp. 46-47. The Courts have on several occasions said and said wisely, that they would not listen even to a corporator who has acquiesced or perhaps concurred in the very act which he afterwards comes to complain of when it suits his purpose; and so far I think we have determined rightly. 'And there are other cases to

the same effect. The present relator has concurred in the very act he now complains of, for he has used voting papers in blank in this very election and in others. Therefore in the exercise of our discretion, we ought not to assist him."

The principle of this case has been followed and applied in several cases in India. Reference may be first made to the decision in *Miss Cama v. Banwarilal*, AIR 1953 Nag 81 in which it was held that the Court would not listen to a candidate who has acquiesced or concurred in the very act which he afterwards comes to complain of, when it suits his purpose. In that case the petitioner was not allowed to question the election as she was aware of the provision; she was an advocate and at the time of the scrutiny of the nominations of the contesting candidates, she did not raise any objection, but waited till she was defeated in the election.

I may next refer to the Bench Decision of this Court in *A. R. V. Achar v. Madras State*, 1954-1 Mad LJ 102=(AIR 1954 Mad 563) in which the applicant for the issue of a writ of quo warranto acquiesced in and actually contested the election and it was held that the petitioner had by his own conduct precluded himself from obtaining the discretionary relief in the hands of the Court. (Vide observations at page 109 where the principle of the decision (1866) LR 1 QB 433 is discussed). The same principle was applied in a Bench judgment of the Patna High Court consisting of Ramaswamy, C. J., (as he then was) and Choudhary, J., in the case of municipal elections and it was held that when the petitioner with full knowledge of the illegality participated in the election and thus acquiesced or concurred in the election, the Court would in its discretion would refuse him any relief.

It is unnecessary to multiply the cases on the point and it is sufficient to refer to the latest Bench decision of this Court consisting of Chandra Reddy, C. J., and myself in which a person who acquiesced in the election being conducted on the basis of the division of wards effected by the Inspector under the Madras Panchayats Act was refused the discretionary relief under Article 226 of the Constitution on the ground that he could not be allowed to raise an objection which might have been put forward against himself at a previous election or cognizant of the objection and acquiesced in the same.

26. Though these are all decisions rendered in applications for the issue of a writ of quo warranto, on principle, it cannot make any difference, because in the instant case, the plaintiff has filed a regular suit and asked for an interim injunction. In

Bhupendra Nath Basu v. Ranjit Singh. ILR 41 Cal 384=(AIR 1914 Cal 152) where the plaintiff filed a suit under Section 42 of the Specific Relief Act seeking the declaration of the invalidity of an election, it was held that as the grant of a declaratory relief was essentially in the discretion of the Court, the principles followed by the Courts of Common Law in granting or refusing prerogative writs should apply to such suits. Fletcher, J., observed as follows at page 391:

"In my opinion in a suit of this nature what you have got to do is this. You have got to apply the principles of the Courts of Common Law in granting or refusing the prerogative writs. Those were reasonable rules which were founded on experience not of many years but of centuries. Those were the rules which governed the practice of the Courts as to interfering in cases of disputes relating to elections to all bodies other than the two Houses of Parliament, which are not subject to the jurisdiction of any Court, but decided for themselves who were elected and who had the right to sit and vote in either of those two Houses. But in all other bodies the right of election in which the Court had jurisdiction to interfere was governed by the principles by which the Courts of Common Law granted or refused the prerogative writs."

In that case, the discretionary relief of declaration was refused having regard to the particular conduct of the plaintiff. The same principle was applied in the case of a Taluk Board Election, the validity of which was questioned under Section 42 of the Specific Relief Act by a Bench of this Court in *Lakshminarasimha Somayajiyar v. Ramalingam Pillai*, 39 Mad LJ 319=(AIR 1920 Mad 573) following the decision of the Calcutta High Court in ILR 41 Cal 384=(AIR 1914 Cal 152). In that case also the plaintiff competed for the seat, participated in the election and acquiesced in every step in the election till he sustained defeat at the elections and then brought the suit. Sadasiva Iyer, J., observed that the conduct of the plaintiff in having accepted the election proceedings as having been regularly begun is sufficient to disentitle the plaintiff from the relief even assuming that a valid electoral register did not exist (Vide observations at page 324). Spencer, J., stated the law in similar terms at page 329, after pointedly referring to the decision of the Calcutta High Court:

"The plaintiff's suit deservedly fails for another reason. When the register was prepared he did not adopt the procedure provided by Rule 10 (4) of objecting up to the 20th of September. The election was on October 2nd and in his petition

to the Collector, dated October 6th (Exhibit L) he did not raise this point. He went to the poll on the footing of the register being a valid one. The technical point he has taken in these proceedings is evidently an after-thought. He is therefore not entitled to the equitable relief of a declaration on a matter connected with the preparation of an electoral register. In ILR 41 Cal 384=(AIR 1914 Cal 152) it was held that in similar circumstances connected with an election where the conduct of the plaintiff had been remiss and dilatory, the Court ought not to interfere and give him a declaratory decree in the exercise of its discretionary jurisdiction, under Section 42 of the Specific Relief Act."

Confronted with this well-established rule which regulates the discretion of the Court, Sri V. P. Raman made an attempt to distinguish these cases on the ground that in the instant case, his client could not have raised an objection at any earlier stage. He could not have anticipated all these members who were wrongly on the rolls to participate in the election and that it is only when he felt aggrieved as a result of the defeat at the elections that the plaintiff could possibly agitate the matter in the suit. He also relied upon a decision of the Calcutta High Court in *S. K. Sawday v. N. Singha Roy*, ILR 1944-2 Cal 464=(AIR 1946 Cal 206). I am not prepared to accept this argument. It is open to the plaintiff or any member of the Chamber to apply to the executive committee to delete the names of members who according to the plaintiff have been wrongly enrolled or wrongly continued to be members and the executive committee is bound to consider that objection after giving notice to the members concerned and if the decision of the executive committee went against the plaintiff, he would be entitled to file a suit for rectification of the roll of members of the Society, just as in the case of shareholders' register of a Company. I do not see any principle of law by which a member is precluded from insisting that the electoral roll should be maintained correctly and that the electorate should not consist of members who do not satisfy the conditions and qualifications as prescribed by the rules. Surely, the plaintiff is not bound to meekly submit to the decision of the executive committee in the matter of the maintenance of the rolls of the members of the Chamber. It is a right which inheres in the members under the rules to protest against the inclusion of persons who are not qualified to be members. The decision of the Calcutta High Court relied upon by him is distinguishable as it related to a suit in which a person sought the relief that some person should be included in the rolls. Even

so there are observations in that decision to recognise the right of the member to object to the wrongful inclusion of the members on the rolls of the Society distinguished from a right to claim for the inclusion of a person as a member.

If Mr. Raman's contentions were to be accepted, it will be an intolerable state of law if the executive committee would be allowed to enroll members and swell the electorate without any regard to the relevant provisions of the rules and yet the members concerned will have no effective right to question the wrong decisions of the executive committee but would be obliged to meekly submit to its decision and agitate the question only in a suit after the elections are over. I have no doubt that the plaintiff could well have raised this objection at any time previously or at any rate after the announcement of the election of the office-bearers by issue of the notice convening the meeting of the 11th.

27. There is no need, to elaborate the point urged about the false personation as it does not contain any particulars and how the false personation took place. The point about all the forms being in English again has no substance because these forms were used by the general body all these years without any objection by any member concerned and the elections were going on year after year with these forms.

28. Some point was made on behalf of the defendants that the plaintiff is only an associate member and he cannot question the election and if at all it could only be by a member who has authorised the plaintiff. *Prima facie* my view is that the plaintiff who contested the election will have a right to question the legality of the election proceedings. It must be remembered that it is not the firm which becomes elected as an office bearer, but it is only the authorised member.

29. I had dealt with the matter in such great detail only because of the elaborate arguments addressed on both sides, the plaintiff attempting to make out patent illegalities on the face of the record while the defendants controverted the same. It is necessary to reiterate that the observations that are made in this judgment on the rival contentions of the parties do not by any means constitute any final decision of this Court on the point in controversy. These observations have been made only as bearing upon the question whether the plaintiff has made out a strong *prima facie* case.

30. Independently of these observations, I must say, I have refused the interim injunction on the main ground that the plaintiff is guilty of acquiescence and

wrongful and unhealthy conduct and he has not by any means come to Court with clean hands which is the essential foundation of his right to obtain the discretionary relief at the hands of this Court. I have also refused the interim injunction on the ground that the balance of convenience is all in favour of defendants and against the plaintiff.

31. Before I close, it has to be mentioned that this is a case in which the plaintiff could establish his case only after adducing evidence and even in the interlocutory application stage it became apparent that the plaintiff cannot therefore make out a *prima facie* case.

32. In these circumstances, the settled practice is to refuse an interim order and direct the immediate and speedy trial of the suit. I therefore direct that the suit shall be posted for trial and disposal within two months from today, i.e., on the 4th of September 1967. Within two weeks from today, the defendants should file the written statements and within three weeks thereafter, there should be mutual discovery and inspection. The case will be posted for final hearing and disposal on the 4th of September, 1967. The documents which were all seized by the Commissioner and produced in Court in Application No. 1217 of 1967 shall be returned back to the defendants 3 and 4 Secretaries of Defendant Chamber except the voters' list. The first defendant Chamber shall pay a sum of Rs. 250/- as additional remuneration to the Commissioner. The interim injunction is vacated and the applications are dismissed. There shall be no costs.

33. In this proceeding, I have not accepted the arguments and contentions of Sri V. P. Raman; even so, I wish to express my appreciation of the able and lucid arguments presented by him.

GGM/D.V.C.

Petition dismissed.

AIR 1969 MADRAS 55 (V 56 C 10)
M. ANANTANARAYANAN, C. J. AND
NATESAN, J.

Sahib Transport Service, Sankarankoil, Appellants v. K. Balasubramaniam and others, Respondents.

Writ Appeals Nos. 79 and 84 of 1966, D/- 23-3-1967, from judgment of Srinivasan, J., in W. P. Nos. 1263 of 1964 and 3015 of 1965, D/- 24-12-1965.

Motor Vehicles Act (1939), Ss. 58 and 61 — Application for renewal of permit — Death of applicant during pendency of application and after date of expiry of permit to be renewed — *Heir*

CL/HL/B213/68

of deceased succeeding to possession of vehicle can continue renewal proceeding and get permit transferred to him — (Motor Vehicles Rules (Mad) (1940), Rr. 184, 185).

To a limited extent at least, a permit does survive the permit-holder. Section 61 of the M. V. Act, may be in a restricted manner, recognises the heritable character of a permit, the beneficial interest which the person succeeding to the possession of the vehicles has in the permit. Having regard to modern concepts of property, the right is certainly proprietary and descends on the person who takes possession of the vehicles and the permit is attached to the vehicles and goes with the possession of the vehicles. May be there is a presumption that a licence is personal to the grantee; but the presumption is rebutted as the Act itself provides for transfer *inter vivos* in certain circumstances and also provides for a person succeeding to the possession of the vehicles to secure the permit relating to the vehicles. It cannot therefore be said that the permit dies with the holder. It has to be alive and effective for the transfer to operate on it: Case law discussed. (Paras 5 & 6)

Under the terms of S. 58, till renewal the permit ceases to be effective after the period originally specified; on renewal the original permit becomes current and reanimated for the extended period. It is as if the permit, when it was issued originally, had been issued for the full term as extended. As the vehicle could not be plied without a current permit, when it is under suspended animation, a temporary permit is provided under S. 62 for the period the renewal proceedings are pending. The system of covering the interval between the expiry of the period covered by the permit and renewal with temporary permits instead of permitting the operator to run on the original permit itself, though its duration has expired, cannot affect the true position that if a renewal is secured for the permit, it is the original permit that is made effective. Though R. 185 of Motor Vehicles Rules before its repeal kept permit effective once the application for renewal had been made, even without further orders in stated situations, same only emphasised the effect of renewal. Its repeal cannot affect the true character of a renewed permit brought about by the section providing for renewal and the other rules which remain substantially unaltered. In place of Rule 185, S. 62 sub-clause (d) has been introduced. There is no discord between this provision, probably intended to speed up disposal of renewal applications and the inference of the continuity of the permit on renewal suggested by the gov-

erning section interpreted having regard to the overall scheme of the Act. Once an application for renewal has been duly made, the pre-emptive or preferential right to secure the route by the renewal of the permit is a substantial right as such rights go and the permit should be deemed to be alive for the purpose of the renewal. That being so there is nothing incongruous or anachronistic in regarding the person in whose name the permit stands, as the holder of a permit, even though the period of the permit has expired provided he has in accordance with law in time applied for renewal: Case law discussed. (Para 7)

It would be open to the successor to pursue the application for renewal made by the deceased holder of the permit. Section 58 lays no special emphasis on the person of the permit holder. The absence of any specific provision in the Act for continuance of the application cannot stand in the way of the concerned Authority recognising the rights of the successor and permitting him to continue the application for renewal. There is no provision in the Act providing for abatement of such an application. The power of the Regional Transport Authority to recognise the successor in interest is implicit under the law which it administers. The preferential right to renewal is not a mere expectation. The successor is in the same identical position as the deceased permit holder. To deny the successor audience at the hearing of the renewal application will be to extinguish rights without a hearing. The cardinal rule of natural justice, Audi Alteram Partem will require the Authority to hear him on the application. Unless expressly ruled out, the rule of Audi Alteram Partem could supplant gaps in statutory provisions governing Tribunals adjudging rights of parties. The omission of the Legislature will be supplied by the fundamental principles governing all adjudications whether judicial or quasi-judicial affecting the interests of individuals or their property. The successor to the possession of the vehicles will therefore be entitled to a hearing on the renewal application: Case law Ref.

(Paras 10 and 11)

In conclusion, if during pendency of application for renewal of permit, a temporary permit is granted and even if the applicant dies after date of expiry of original permit, heir of deceased succeeding to the possession of the vehicle covered by the permit can continue renewal proceeding and get permit transferred to him: Order of Srinivasan J., in W. P. Nos. 1263 of 1964 and 3015 of 1965, D/- 24-12-1965 (Mad), Affirmed.

(Para 12)

Cases Referred:	Chronological	Paras
(1967) AIR 1967 Mad 100 (V 54) =		
(1966) 1 Mad LJ 363, Viswanathan v. Shanmugham	5, 6	
(1966) AIR 1966 SC 455 (V 53) =		
1966-1 SCR 485, Bundelkhand M. T. Co. v. Behari	7	
(1964) AIR 1964 Mad 356 (V 51) =		
ILR (1963) Mad 627, Kuppuswami v. Ramachandran	6, 10	
(1963) AIR 1963 Mys 278 (V 50), Meenakshi v. Mysore State Transport Appellate Tribunal	10	
(1957) AIR 1957 SC 489 (V 44) =		
1957 SCR 663, V. C. K. Bus Service v. Regional Transport Authority, Coimbatore	7	
(1957) AIR 1957 Mad 392 (V 44) =		
ILR (1957) Mad 675, R. A. Natarajan v. Regional Transport Officer, Chingleput	7	
(1957) Writ Petn. No. 459 of 1957, (Mad), Ulaganathan v. State Transport Appellate Tribunal	10	
(1957) 1957-2 All ER 823=1958-1 QB 36, R. v. Derby Borough Justices	10	
(1954) AIR 1954 SC 728 (V 41)=		
1955 SCR 707, Saghir Ahmad v. State of U. P.	5	
(1953) AIR 1953 SC 333 (V 40)=		
1954 SCR 53, State of Trav. Co. v. Shanmugha Vilas Cashew Nut Factory	7	
(1953) AIR 1953 Mad 279 (V 40)=		
ILR (1953) Mad 304, C. S. S. Motor Service v. State of Madras	5	
(1951) 1951-2 All ER 587=1952 AC 109, East End Dwelling Co. Ltd. v. B. C. Finsbury	7	
(1912) 1912-2 KB 248=81 LJKB 648, Cooke v. Cooper	10	
(1902) 1902 KB 94=71 LJKB 43, M'Donald v. Hughes	10	
(1875) LR 1 Ch D 182=45 LJ Ch 83, In re Coal Economising Gas Co.	7	
(1832) 2 C & J 558=149 ER 235, Capel v. Child	11	

K. K. Venugopal and V. Manivannan, for Appellants; V. K. Thiruvengkatachari and Advocate-General, M. N. Rangachari and Govt. Pleader K. Thirumalai, for Respondents.

JUDGMENT:— These appeals have been preferred against a common order of our learned brother Srinivasan, J., in W. P. Nos. 1263 of 1964 and 3015 of 1965 discharging the Rule Nisi and dismissing the writ petitions filed under Article 226 of the Constitution. By the writs the appellants questioned the validity of the transfer and renewal in favour of the first respondent herein of six permits for stage carriages under Sections 58 and 61 of the Motor Vehicles Act 1939 by the Regional Transport Authority, Tirunelveli.

2. The six permits whose period was to expire on 3-1-1964 were held by one Ramaswamy Doss, and as provided under Section 58 of the Motor Vehicles Act, 1939 as amended under subsequent Act (hereinafter referred to as the Act) he duly applied for renewal of the said six permits on 9-10-1963. The application for renewal was notified under Section 57 (3) of the Act, on 28-10-1963. The appellant before us, a bus operator, preferred objections to the renewal of the six permits and also filed applications for grant to him of the six permits on the routes for his vehicles. The objections and the applications for fresh grant of permits to him were made by the appellant on 18-11-1963. The applications for fresh grant were notified in accordance with the provisions of the Act. Ramaswamy Doss, as may be expected, duly filed his objections to the fresh grant of permits claimed by the appellant. As the permits were expiring on 3-1-1964, the Regional Transport Authority under Section 62 (d) of the Act on 27-12-1963 itself granted temporary permits to Ramaswamy Doss for his six vehicles to take effect from 4-1-1964, pending decision on his application for renewal of the permits. Before the application for renewal came up for hearing and orders were passed, even on 7-1-1964 Ramaswamy Doss died.

The first respondent herein, son of Ramaswamy Doss, on 24-1-1964, intimated the Regional Transport Authority under Section 61 (1) of his intention as the person who had succeeded to the possession of the vehicles covered by the permits to use the permits. He also requested the Regional Transport Authority to implead him in the renewal application as the successor of the deceased Ramaswamy Doss that he may pursue the application for renewal. On 25-1-1964 the Regional Transport Authority took up for enquiry the application that had been made by Ramaswamy Doss for renewal of the permits. He granted the request of the first respondent herein who claimed to have succeeded to the possession of the vehicles in question by virtue of an agreement entered into between all the heirs of the deceased permit holder to continue the proceedings and after due hearing and consideration of the matters involved, overruling the objections of the appellants, granted the application for renewal of the permits. He ordered that the permits would be renewed for the usual period of three years. As a consequence, the application of the appellant herein for fresh grant of permits to him for the six routes involved was rejected. The first respondent was directed to send up the necessary certificates along with B permits of the buses for due endorsement of the rene-

wal. The first respondent submitted the existing permits for endorsement of renewal and on 10-2-1964 applied also under Section 61 (2) of the Act for transfer of the permits. The Regional Transport Authority on 10-2-1964 endorsed on the permits their renewal for three years from 31-1-1964, noting that from 3-1-1964 to 31-1-1964 they were covered by the temporary permits. The permits were also transferred to the name of the first respondent.

The appellant preferred appeals to the State Transport Appellate Tribunal from the orders refusing the grant of fresh permits to him. He also filed a revision to the Tribunal against the order granting renewal. On the rejection by the Tribunal of his appeals the appellant came up to this Court with W. P. No. 1263 of 1964 from the orders of the Tribunal dismissing the appeals. As it has been held that there could be no direct revision to the State Transport Appellate Tribunal from an order of the Regional Transport Authority, W. P. No. 3015 of 1965 was filed by the appellant questioning the order of the Regional Transport Authority granting the renewal.

3. The questions involved in both the writ petitions revolve round the validity of the renewals and the only questions argued by the appellant in the circumstances set out above were: whether the Authorities were in law competent to renew the permits, the applicant having died after the period of the permits had expired and before they were renewed, and whether the renewal could be effected in the name of the first respondent as the successor in interest of the deceased. The questions have been answered against the applicants; hence these appeals.

4. The arguments initially covered a wide ground; but on learned Counsel for the first respondent taking his stand firmly on Section 61 of the Act, the questions for consideration got narrowed down. The attack on the validity of the order is essentially rested on the language of Section 61 of the Act. Section 61 provides for transfer of the permit in favour of the person succeeding to the possession of the vehicles covered by the permit on the death of holder of the permit. It is argued by Mr. M. K. Nambiar, learned counsel for the appellant, that Ramaswamy Doss was not the holder of the six permanent permits in question on 7-1-1964 when he died, as these permits had expired on 3-1-1964. Only a renewal application was pending. It is therefore urged that there were no permits to be transferred, and that the Regional Transport Authority had no jurisdiction to order any renewal of the permits at the instance of a person claim-

ing to succeed to the possession of the vehicles. It is submitted that the right to a permit is personal in nature and does not survive the permit holder except to the extent in terms provided by the Act. It is pointed out that neither the Act nor the Rules provide for continuation of a renewal application by the person who has succeeded to the possession of the vehicles, and it is said that in the circumstances the application for renewal lapsed. Mr. M. K. Nambiar urges that a permit is the creature of statute and therefore its grant, renewal and transfer are governed by the statute which is a self-contained Code. Learned Counsel contends that from outside the Motor Vehicles Code no procedure could be inducted for situations not provided for that may crop up.

5. It is needless to labour at any length on the contention that a stage carriage permit is purely personal in nature and no right therein can survive the death of the permit holder. The matter has to be considered no doubt as conceived in the Act, but in the background of the citizen's fundamental rights under the Constitution, to acquire, hold and enjoy property and to practice any profession, or carry on any occupation, trade or business subject to laws imposing reasonable restrictions. It is clear that to a limited extent at least, a permit does survive the permit holder. Section 61 is there. Though a stage carriage permit is in one sense a creature of statute, as it goes with a vehicle and forms the life of the business of carriage of passengers on road, considered with the vehicle, it is a species of property and very valuable property for that. Running of buses is a commercial enterprise, and permit controls not only the owner of the vehicle in the use of the vehicle, but controls the vehicle itself by providing that it shall be used only in the manner authorised by the permit. In C. S. S. Motor Service v. State of Madras, AIR 1953 Mad 279. Venkatarama Ayyar, J., (as he then was of this Court) summed up the position of the transport operator thus:

"The true position, then is, that all public streets and roads vest in the State, but that the State holds them as trustees on behalf of the public. The members of public are entitled as beneficiaries to use them as a matter of right and this right is limited only by the similar rights possessed by every other citizen to use the pathways. The State as trustees on behalf of the public is entitled to impose all such limitations on the character and extent of the user as may be requisite for protecting the rights of the public generally but subject to such limitations the right of a citizen to carry on business in transport vehicles on pub-

lic pathways cannot be denied to him on the ground that the State owns the highways."

In *Saghir Ahmad v. State of U. P.*, AIR 1954 SC 728 at p. 735 the Supreme Court expressing entire agreement with the above observed:

"Within the limits imposed by State regulations any member of the public can ply motor vehicle on a public road. To that extent he can also carry on the business of transporting passengers with the aid of the vehicles. It is to this carrying on of the trade or business that the guarantee in Article 19 (1) (g) is attracted and a citizen can legitimately complain if any Legislation takes away or curtails that right any more than is permissible under clause (6) of that Article". In *Vishwanathan v. Shanmugham*, (1966) 1 Mad LJ 363 at p. 364=(AIR 1967 Mad 100 at p. 101) we observed with reference to a stage carriage permit:

"Under prevalent modern conditions, it is very valuable property. That it is heritable and alienable, the latter characteristic with certain restrictions, has been recognised by the provisions of the Motor Vehicles Act, and in the case-law; it has been the subject of partition by members of a joint family, and of divisions of the assets in a partnership. Thus, two complementary ideas have evolved side by side, the first dealing with a stage carriage permit purely as a licence, all remedies and procedures in respect of which are circumscribed by the self-sufficient Code of the Motor Vehicles Act and the Rules framed thereunder. The second evolution is what may be termed the common law development of this permit together with the stage carriage to which it relates, and without which it practically has no value or validity, forming the subject-matter of contracts of sale inter vivos, inheritance and succession, partition and division of assets among partners."

We have pointed out in that case that a permit or for that matter in some cases even a licence does not end with the death of the licence holder and become void. We have also pointed out therein that the permit remains in existence for the purpose of Section 61 of the Act. It is in this background as to the character of a permit that we shall now examine the relevant provisions.

6. Now permit as defined in the Act is a document issued by the prescribed Authority authorising the use of a transport vehicle as a contract carriage, or stage carriage, or authorising the owner as a private carrier or public carrier to use such vehicle. Section 42 prohibits the user of a vehicle without a permit, and except in accordance with the conditions of the permit. With reference to stage

carriage business, a vehicle without a permit is practically of little value. Section 58 relates to duration and renewal of permits. Section 59 places restrictions on transfer of permits inter vivos, and Section 61, to transfer of permits on death of the holder. Section 61 reads:

"(1) Where the holder of a permit dies, the person succeeding to the possession of the vehicles covered by the permit may, for a period of three months, use the permit as if it has been granted to himself.

Provided that such person has, within thirty days of the death of the holder, informed the transport authority which granted the permit of the death of the holder and of his own intention to use the permit:

Provided further that no permit shall be so used after the date on which it would have ceased to be effective without renewal in the hands of the deceased holder.

(2) The Transport Authority may, on application made to it within three months of the death of the holder of a permit, transfer the permit to the person succeeding to the possession of the vehicles covered by the permit."

This section, may be in a restricted manner, recognises the heritable character of a permit, the beneficial interest which the person succeeding to the possession of the vehicles has in the permit. Having regard to modern concepts of property, the right is certainly proprietary and descends on the person who takes possession of the vehicles and the permit is attached to the vehicles. Subject to the limitations of the Act the permit goes with the possession of the vehicles. Our attention has been drawn by learned Counsel for the appellant to *Butterworth's Words and Phrases Judicially Defined Vol. III*, 1964 supplement at page 58 where in relation to a local carrier's licence under the Road and Railway Transport Act (Northern Ireland) 1935 it was stated:

"What are the attributes of a local carrier's licence granted under the provisions of Section 16 of the Act? The word licence has a well recognised significance in English Law. According to our law a licence properly so called is merely a permission granted to person to do some act which but for such permission it would be unlawful for him to do. Being in its nature a mere personal privilege and nothing more than a mere personal privilege a privilege personal to the individual licensee such a licence cannot be transferred by him to anyone else and it dies with the person to whom it was given. Or a statute may authorize the granting of a licence to carry on some trade or business which the statute does not allow to

be carried on without such a licence. But whatever may be the type of licence, the presumption is that it is a purely personal privilege, that it is not capable of being assigned or transferred by the licensee to anyone else and that it comes to an end on the death of the licensee. No doubt one frequently hears the phrase 'transfer of a licence' especially in connection with the law relating to the sale of intoxicating liquors. But it is well established that even in this connection the phrase, though convenient, is nevertheless quite inaccurate and misleading. What is referred to as a transfer of a publican's licence is not in strict law a transfer at all. And what the assignee of licensed premises gets is a new licence and not the old licence transferred".

The principles above enunciated cannot apply to the stage carriage permits under consideration by which road transport business is sought to be regulated and restrictions imposed in public interest. May be there is a presumption that a licence is personal to the grantee; but the presumption is rebutted as the Act itself provides for transfer inter vivos in certain circumstances and also provides for a person succeeding to the possession of the vehicles to secure the permit relating to the vehicles. Under Section 61, till transfer is ordered for a period of three months the successor may use the permit as if it has been granted to himself and the section speaks of transfer of the permit to the persons succeeding to the possession of the vehicles covered by the permit. When the Act provides for transfer of permit on death we cannot say that the permit dies with the holder. It has to be alive and effective for the transfer to operate on it. In *Kuppuswami v. Ramachandran*, AIR 1964 Mad 356 at p. 358 a Division Bench to which one of us was a party observed:

"A permit once granted has to be considered as a species of property in the grantee and the death of the grantee would not take away the beneficial right of his legal representatives in the permit."

In (1966) 1 Mad LJ 363 at p. 372=(AIR 1967 Mad 100 at p. 106) already referred to we observed:

"It is true that a permit or licence does not end with the death of the licence-holder, and becomes void. For instance, it may be said to remain in existence for the further purposes of Section 61 of the Act."

The argument now is that Section 61, the only provision in the Act for the survivorship of the permit, applies only where the permit is a current permit and the holder of the permit dies during the currency of the permit. It is stated that

a permit whose duration has expired is no permit at all and as in the present case the permit had expired even on 3-1-1964, on his death Ramaswamy Doss was not the holder of a permit for any one succeeding to the possession of the concerned vehicle to become entitled to a transfer of the permit under Section 61. But Ramaswami Doss had, long before his death, in due time and according to the provisions of the Act, applied for renewal of the permits. The question is: does this keep the permit alive, may be in hibernation till renewal, or is the permit a dead one that Ramaswami Doss cannot be considered to have died as the holder of a permit?

7. Section 58 which provides for duration and renewal of permits runs thus:

"(1) (a) A stage carriage permit or a contract carriage permit other than a temporary permit issued under Section 62 shall be effective without renewal for such period, not less than three years and not more than five years, as the Regional Transport Authority may specify in the permit.

(2) A permit may be renewed on an application made and disposed of as if it were an application for a permit:

Provided that the application for the renewal of a permit shall be made:—

(a) in the case of a stage carriage permit or a public carrier's permit, not less than sixty days before the date of its expiry; and

(b) in any other case, not less than thirty days before the date of its expiry:

"Provided further that, other conditions being equal, an application for renewal shall be given preference over new applications for permits.

(3) Notwithstanding anything contained in the proviso to sub-section (2), the Regional Transport Authority may entertain an application for the renewal of a permit after the last date specified in the said first proviso for the making of such an application, if the application is made not more than fifteen days after the said last date and is accompanied by the prescribed fee."

From the very language of this section, Learned Counsel for the contesting respondent, Mr. V. K. Thiruvengatchari, contends that a permit does not become extinct and cease to be a permit for all purposes on the expiry of the period specified thereon. Learned Counsel contends that the mere fact that an application for renewal of a permit has to be made and disposed of as if it were an application for a permit does not make the renewed permit a fresh permit. While Mr. M. K. Nambiar for the appellant relied on the oft-quoted observations of Lord Asquith in *East End Dwelling Co. Ltd. v. B. C. Finsbury*, (1951) 2 All ER 587 at p. 599 that

"If one is bidden to treat an imaginary state of affairs as real one must surely, unless prohibited from doing so, also imagine as real the consequences and incidents which, if the putative state of affairs had in fact existed, must inevitably have flowed from or accompanied it and that if a statute says that one must imagine a certain state of affairs it does not say that, having done so, one must cause or permit one's imagination to boggle when it comes to the inevitable corollaries of that state of affairs."

Mr. V. K. Thiruvengkatachari referred to cases where a limitation has been engrafted on this principle, and drew our attention to the decision of the Supreme Court in *State of Travancore-Cochin v. Shanmugha Vilas Cashew Nut Factory*, 1954 SCR 53=(AIR 1953 SC 333). He also emphasised the caution which James, L. J., uttered in *In re, Coal Economising Gas Co.*, (1875) 1 Ch D 182 at pp. 188 and 189 to the following effect:

"Where the Legislature provides that something is to be deemed other than it is, we must be careful to see within what bounds and for what purpose it is to be so deemed."

Learned Counsel urged that while a fiction is to be adopted for a particular purpose the fiction must not be extended beyond its purpose and its operation should be limited to the purpose specified. He points out that S. 58(2) itself specifies the purpose for which a renewal application is to be deemed to be an application for permit. It is stated that it is in the matter of procedure as regards making of the application and disposal of it that it has to be treated as an application for a permit. While prescribing the procedure, in *Bundelkhand M. T. Co. v. Behari*, 1966-1 SCR 485 at p. 487=(AIR 1966 SC 455 at pp. 456-457) the Supreme Court points out that by Section 58 (2) (d) "the precedence for obtaining renewal is assimilated to the procedure prescribed for the application for a fresh permit."

Section 58 further provides that other conditions being equal, an application for renewal shall be given preference over new applications for permit. One thing is clear that even though an application for renewal of a permit may be treated as a fresh application for permit, the renewal that is ordered is of the old permit. There is no grant of any fresh permit. A permit is after all a document authorising the use of a transport vehicle as a stage carriage and Section 58 (1) (a) states that it shall be effective without renewal for such period, not less than three years and not more than five years, as the Regional Transport Authority may specify in the permit. That means, if renewed, the permit originally granted becomes effective for the extended period. So long as there is a possibility

of its being renewed it has life, though till renewal it may not be used to put the vehicle on the road. It may be considered extinct, only if there is no application for renewal or the renewal is refused. This question has been considered at length by this Court in *R. A. Natarajan v. R. T. Officer, Chingleput*, AIR 1957 Mad 392 at p. 394 under the Act as it stood before its amendment by Central Act 100 of 1956. The question arose in that case whether for breach of the conditions of the original permit, a penalty could be enforced during the further period for which the permit continued in force after renewal. Answering the question in the affirmative, this Court observed:

"In certain respects, the renewed permit may resemble a fresh permit, e.g., in the procedure that has to be followed before a renewal is made and the right of the transport authorities to impose new conditions. But the question is whether after renewal the original permit does not continue in force, for a further period. In our opinion, it certainly does according to the provision of the Act, the rules and the forms prescribed." The matter may be said to be finally set at rest by the Supreme Court in *V. C. K. Bus Service v. R. T. Authority, Coimbatore*, AIR 1957 SC 489 at p. 491 where the Supreme Court observed:

"Therefore, when there is a renewal, the effective period is not the original period specified, but the period up to which the renewal is granted. That indicates that the life of a renewed permit is one and continuous."

Learned Counsel for the appellant sought to make out that there is a radical amendment in the Rules under the Act after 1956 and that would make all the difference. It is contended that their Lordships have in the course of the discussion referred to and relied on Rule 185 which was there before the amendment, even as this Court had done in AIR 1957 Mad 392 at p. 394 for their conclusion, and that Rule 185 has since been repealed. Emphasis was laid for the appellant on the alternative provision in Section 62 (d) of the new Act. Rule 185 no doubt specifically provided:

"If an application for the renewal of a permit has been made in accordance with these rules and the prescribed fee paid by the prescribed date, the permit shall continue to be effective until orders are passed on the application or until the expiry of three months from the date of receipt of the application whichever is earlier. If orders on the application are not passed within three months from the date of receipt of the application, the permit-holder shall be entitled to have the permit renewed by the Transport

Authority for the period specified in the application or for one year whichever is less."

The permit was by this Rule kept effective once the application for renewal had been made, even without further order in stated situations. The Rule in question only emphasised the effect of renewal. Its repeal cannot, in our view, affect the true character of a renewed permit brought about by the section providing for renewal and the other Rules which remain substantially unaltered. Instead of Rule 185, has been introduced Section 62 sub-clause (d) whereunder a Regional Transport Authority may, without following the procedure laid down in Section 57, grant permits to be effective for a limited period not in any case to exceed four months, authorising the use of a transport vehicle temporarily pending decision on an application for the renewal of a permit. We see no discord between this provision, probably intended to speed up disposal of renewal applications and the inference of the continuity of the permit on renewal suggested by the governing section interpreted having regard to the overall scheme of the Act. Under the terms of Section 58, till renewal, the permit ceases to be effective after the period originally specified; on renewal the original permit becomes current and reanimated for the extended period. It is as if the permit, when it was issued originally, had been issued for the full term as extended. As the vehicle could not be plied without a current permit, when it is under suspended animation, a temporary permit is provided under Section 62 for the period the renewal proceedings are pending. To avoid, if possible any hiatus between the expiry of the period of the permit and its renewal the Legislature has provided for an application for renewal to be made in advance, not less than 60 days before the date of its expiry. But it could be filed even within 30 days before the date of its expiry and there is also provision for entertaining the application even later, if made at least 15 days before its expiry.

As the procedure for obtaining renewal is the same as in the case of an application for fresh permit, the Authority will have to publish the application, allow for the necessary time to elapse for representations, hear objections, etc. It may not be possible in all cases to go through the entire gamut of the procedure before the expiry of the permit, particularly when there are fresh applicants for the permit, as it has happened in the present case. Again no period has been specifically fixed within which a renewal application must be disposed of. We cannot conceive of any rational principle on which it could be said that

the character of the renewal is altered, by reason of the duration of the proceeding for renewal over which the permit holder has no control. The system of covering the interval between the expiry of the period covered by the permit and renewal with temporary permits instead of permitting the operator to run on the original permit itself, though its duration has expired, cannot affect the true position that if a renewal is secured for the permit, it is the original permit that is made effective.

In the instant case, well in advance of the period of expiry, the original holder of the permit had applied for renewal of the permits for a period of five years from 3-1-1964, the date of expiry. Orders for renewal of the permits were passed on 25-1-1964 and endorsement of renewal on the original permits effected on 10-2-1964. No doubt the endorsement states that renewal is to be for three years from 31-1-1964 noting that from 3-1-1964 to 31-1-1964 there were temporary permits. That there were temporary permits for a period, is only a statement of fact. It is a necessary note, as during the same period in respect of the same vehicles and over the same route two permits cannot be effective. There need be either a permanent or a temporary permit for the use of the vehicle. In the interregnum, the permanent permit was not effective in the language of Section 58, and the endorsement records the fact and points out that the duration was covered by temporary permits. The applicant had asked for renewal for a period of five years and the renewal had been granted for a shorter period.

Take for instance a case where a permit has been suspended for a period. During that period, the permit is not effective and will not authorise the permit holder to put the vehicle on the road. The effect of such suspension is not to make the permit a new one after the period of suspension is over. The same permit exists. Only it could not and was not used for the period. Similarly if pending orders on renewal temporary permits were issued, on renewal the original permit itself becomes effective for the renewed period. We may refer to certain other provisions which bring out clearly that a renewed permit is the original permit continued and not a fresh permit. Some of these aspects have been emphasised by this Court and the Supreme Court in the cases above cited. Under Rule 183 an application for renewal has to be in Form PRA. The application speaks of renewal of the permit described in the application. The number of the original permit, the date of its issue, the date of its expiry, the period for which renewal is desired and other particulars have to be specified in the

application. Rule 184 provides that the Transport Authority sanctioning an application for renewal of a permit shall call upon the permit holder to produce the registration certificate or certificates of the vehicle or vehicles and Part B or Parts A and B of the permit as the case may be and endorse the renewal in Parts A and B of the permit and return them to the holder. The Form of renewal of Part A of a permit runs:

"This permit is hereby renewed up to the day of subject to the following further conditions:—"
What is renewed, is the old permit which is submitted for endorsement of the renewal thereon. The original document which authorises the user of the vehicle, is made effective for a further period. A similar endorsement is made on Part B of the permit, Part B being the summary of Part A of the permit. Again, under Rule 167 while the fee for the grant of a fresh permit is Rs. 25/- the fee for renewal is only 12/-. Under Rule 195 within fourteen days of the expiry of the permit by efflux of time the permit has to be surrendered, while under Rule 184 the permit has to be surrendered for endorsement of the renewal and taken back. It is manifest from the provisions of the Act and the Rules made thereunder and the Forms followed in relation to renewal, that once a renewal is ordered the permit document originally issued is made to serve for the extended period. Its life is extended. The provision relating to appeals in S. 64 of the Act again emphasises and brings out clearly that an order for renewal is not the same as an order granting a fresh permit. Section 64 (1)(a) provides for appeal by any person aggrieved by the refusal to grant a permit and Sec. 64 (1) (e) separately and specifically provides for an appeal by a person aggrieved by the refusal of renewal of a permit. In our view once an application for renewal has been duly made, the pre-emptive or preferential right to secure the route by the renewal of the permit is a substantial right as such rights go and the permit should be deemed to be alive for the purpose of the renewal. That being so there is nothing incongruous or anachronistic in regarding the person in whose name the permit stands, as the holder of a permit, even though the period of the permit has expired provided he has in accordance with law in time applied for renewal.

8. Clearly therefore, when Ramaswamy Doss died having applied for renewal of the six permits in question and had been granted temporary permits pending orders on the renewal application, in perfect accord with the intentment of the Act it could be said that he was holder of the permits when he died. The

permits were not dead then for all purposes.

9. Section 61 (1) entitles the person succeeding to the possession of the vehicles on the death of the holder of a permit to use the permit as if it has been granted to himself. The effect of this fiction, is to make him holder of the permit for all purposes of the Act. During the period of three months he would be subject to all the obligations and has all the rights of a permit holder. We may envisage a case where the holder of a permit dies after duly applying for renewal but before the expiry of the permit. Without doubt the person succeeding to the possession of the vehicles would be entitled to use the permit during the remaining period as the grantee of the permit. To our mind it follows that he could secure temporary permits if before the expiry of the period, renewal is not ordered and he would also be entitled to pursue the renewal application. Of course he must have, within 30 days of the death of the permit holder, informed the Transport Authority of his intention to use the permit. The second proviso to Section 61 (1) is self explanatory and has obviously been placed *ex abundanti cautela*. The proviso points out that in the absence of renewal the permit cannot be used after the period specified. It emphasises the fact that a permit which is not effective is still a permit for the purpose of Section 61, though it cannot be used. If the period of permit has expired and ceased to be effective, the person succeeding to the possession of the vehicles cannot, by virtue only of the provision in Section 61 (1), use the permit for a further period of three months.

10. We see no substance in the argument that it would not be open to the successor to pursue the application for renewal made by the deceased holder of the permit, in the absence of any provision in the Act or Rules made thereunder. Section 58 speaks only about the renewal of permits and the application for renewal. No special emphasis is laid on the person of the permit holder. It may come in for consideration under the proviso to Section 58 (2) (a). If under the provisions of the Act the successor may claim and assert his right to renewal, in our view, the absence of any specific provision in the Act for continuance of the application cannot stand in the way of the concerned Authority recognising his rights and permitting him to continue the application for renewal. There is no provision in the Act providing for abatement of such an application. We have held that the right in a permit is not purely personal to the holder of the permit but that it can pass on to his successor. No doubt the grant of renewal is not automatic. But the applicant for renewal has been

given a preference over new applicants for permit. The effect of this pre-emptive right to the route is on its recognition to continue the original permit in the successor of the vehicles covered by the permit. Now what is the position of the application for renewal filed by the deceased? There is, an authority seized of a quasi-judicial proceeding in relation to a valuable right. There are no provisions in the Act authorising the Authority to terminate the proceeding on the death of the person who commenced it. The right, the subject of consideration in the proceeding, is one that does not come to an end with the death of the applicant. Under the law as we interpret it, it develops on the successor to the possession of the vehicles. In such circumstances, in our view, it would be the duty of authority, in the absence of any prescribed procedure or express or implied prohibition to mould its proceeding in accordance with the principles of natural justice and permit the continuance of the proceeding commenced by the deceased. In AIR 1964 Mad 356 at pp. 358 and 359 already referred to where pending a revision petition under Section 64-A of the Act against an order of the Regional Transport Authority refusing to grant variation of the permit the applicant died, it was held that the legal representatives of the applicant can pursue the revision petition. It was observed:

"In the case before us the proceedings initiated by Lakshmi were in relation to an existing right of property in the permits held by her. Such a right would therefore survive to her legal representatives. The benefit of the proceedings initiated by her would also survive to them. We agree with Srinivasan, J., that it was competent for the second respondent to continue the revision petition filed by Lakshmi under Section 64-A of the Motor Vehicles Act."

Reference was made for the appellant to the decision of Rajagopalan, J., in *Ulaganathan v. State Transport Appellate Tribunal*, W. P. No. 459 of 1957 (Mad.) where before the actual issue of the permit but after the order granting him the permit, the grantee of the permit died. The question arose whether the son of the grantee could apply under Section 61 for the transfer of the permit and whether he could defend the appeal from the order of the Regional Transport Authority directed against the grant of the permit to the deceased. No decision was given on the question whether the successor could defend the appeal. But it was held on the merits that the deceased was not the holder of the permit within the meaning of Section 61 when he died, the deceased having obtained only the right to obtain a permit. It was observed that the deceased was only entitled to

obtain a permit, the permit having been sanctioned to him, and that he did not obtain it. The case proceeded on the view that no interest survived to the legal representative. This case in the circumstances is not of much avail to the appellant. In similar circumstances a contrary view has been taken by a Division Bench of the Mysore High Court in *Meenakshi v. Mysore S. T. A. Tribunal*, AIR 1963 Mys 278 dissenting from *Ulaganathan's case*, W. P. No. 459 of 1957 (Mad.) It is not necessary for us here to examine the correctness or otherwise of *Ulaganathan's case*, W. P. No. 459 of 1957 (Mad.)

Our attention was drawn by Mr. V. K. Thiruvengkatachari for the respondent to *Cooke v. Cooper*, (1912) 2 KB 248 at pp. 250 and 251. In that case under the Licensing Act, Justices at a general annual licensing meeting refused to renew a licence to sell intoxicating liquors at a certain house on the ground that the house had not been well conducted and that the fitness of the licence holder was unsatisfactory. The licence holder appealed to the quarter sessions, and the owners of the house also appealed as the persons aggrieved. Before the hearing of the appeal the licence-holder died and the widow who had obtained letters of administration sought to maintain the appeal. There was objection to her continuing the appeal on the ground that the licence had become extinct. Lord Alverstone, C. J., observed:

"There is no reason why this case should not go back to the Justices to be dealt with. The case is governed by the principle of the decision in *M'Donald v. Hughes*, (1902) 1 KB 94. On the death of a licence holder the licence is not absolutely void. It remains in existence for the purposes of the representatives of a deceased licensee getting a renewal in his place, and being held liable if they carry on the business in breach of the Licensing Acts. In my opinion this licence remains in existence for the purpose of enabling the representatives to maintain this appeal."

Th above decision and the decision cited therein were applied recently in *R. v. Derby Borough Justices*, (1957) 2 All ER 823 at p. 825 another decision under the Licensing Act in England. A reference to the related law and the facts of the case will be useful and instructive showing how situations like the one in the instant case have been dealt with. Mrs. Short the holder of an off licence at one premises applied to the licensing Justices for an ordinary removal of the licence to a different premises. The application was granted subject to confirmation; but before the Confirming Authority met, Mrs. Short died, and when her executrix

however, submitted that he should not be understood as giving up his contention that Shop Rent is a duty of excise, so that it may be open to the State to urge before the Supreme Court in any appeal from our decision, that the majority view of the Supreme Court in *Shinde Brothers' Case*, AIR 1967 SC 1512 may be reconsidered.

60. In the light of the majority view of the Supreme Court in *Shinde Brothers' case*, AIR 1967 SC 1512, Section 24 of the new Excise Act (Mysore Act 21 of 1966) which declares that the sum accepted in consideration of grant of any lease relating to excisable articles, shall be the excise duty, cannot expand the definition of excise duty and cannot render Shop Rent a duty of excise.

61. Learned counsel for the petitioners contended that unless Arrack Shop Rent, or Toddy Shop Rent, is itself a tax, there can be no levy of surcharge or additional duty on such Shop Rent, that it is clear from the decision of the Supreme Court in *Shinde Brothers' case*, AIR 1967 SC 1512 that Shop Rent is not a duty of excise; and hence Education Cess cannot be levied on Shop Rent which is not a tax.

62. It was contended by learned counsel for the petitioners that the Education Act imposes Education Cess on an existing item of tax or duty and not on any other source of revenue. Our attention was drawn to the observations of the Supreme Court in *Shinde Brothers' case*, AIR 1967 SC 1512 while considering the nature of the Health Cess levied under the Mysore Health Cess Act, 1962. The material portion of Section 3 of that Act reads:

2. Levy of Health Cess — There shall be levied and collected a health cess at the rate of nine paise in the rupee on—

- (i) all items of land revenue;
- (ii) the items of State Revenue mentioned in Schedule A Schedule A includes duties of excise on alcoholic liquor. Sikri, J. who spoke for the majority of the Bench in *Shinde Brothers' case*, said at page 1519:

"It seems to us clear that the legislature was levying a health cess on a number of items of State revenue or tax and it adopted the form of calling it a cess and prescribed the rate of nine naye paise in the rupee on the State Revenue or tax. Section 4 of the impugned Act makes it quite clear that the cess is leviable and recoverable in the same manner as items of land revenue, State revenue or tax. 'In the context, the word 'on' in Section 3 does not indicate that the subject matter of taxation is land revenue or State revenue' but that 9 per cent of the land revenue or State revenue is to be levied and collected, the sub-

ject-matter remaining the same as in the law imposing land revenue or any duty or tax. If we read Sections 3 and 4 together the fact that the words "surcharge" or 'additional' duty have not been mentioned does not detract from the real substance of the legislation."

(Underlining (herein ' ') is ours).

63. The learned Special Government Pleader argued that Education Act imposes Education Cess on excise revenue which is of wider import than excise duty; that excise revenue comprises of not only duties of excise but also other sources of revenue like fee, rent, fine and confiscation under the Excise Act. He referred to Section 3 (1) of the Mysore Excise Act, 1901, which read:

3. In this Act, unless there be something repugnant in the subject or context—

(1) "Excise revenue" means revenue derived or derivable from any duty, fee, tax, rent, fine or confiscation imposed or ordered under the provisions of this Act or of any other law for the time being in force relating to liquor or intoxicating drugs.

64. He also referred to Section 2 (11) of the Mysore Excise Act, 1965, in which the definition of 'Excise Revenue' is the same as in the 1901 Act. The learned Special Government Pleader further argued that even if Shop Rent is not a duty of excise, it is still one of the items of excise revenue on which the Education Act levies Education Cess; that there is material difference between the language of Section 3 of, and Schedule A to, the Health Cess Act, and the language of Section 9 of the amended Schedule to, the Education Act; and hence the observations of the Supreme Court in *Shinde Brothers' case* regarding the nature and scope of Health Cess have no application to Education Cess.

65. Though clause (ii) of Section 3 of the Health Cess Act mentions items of State revenue, Schedule A to that Act refers only to duties of excise and not to excise revenue. But in the amended Schedule to the Education Act, the items referred to are land revenue, forest revenue and excise revenue.

We think, the learned Special Government Pleader is right in contending that the scope of the amended Schedule to the Education Act, is wider than that of Schedule 'A' to the Health Cess Act, and that under the Education Act the levy of Education Cess is not confined to duties of excise only, but extends to items which are not duties of excise but still come within excise revenue. We think, the learned Special Government Pleader is right in contending that the scope of the amended Schedule to the

Education Act, is wider than that of Schedule 'A' to the Health Cess Act, and that under the Education Act the levy of Education Cess is not confined to duties of excise only, but extends to items which are not duties of excise but still come within excise revenue.

66. The learned Special Government Pleader contended that both the Mysore Excise Act, 1901, and the Education Act were enacted before the Constitution when there was no limitation on the legislative competence of Mysore legislature; that even if Shop Rent comes within a category of tax which is beyond the legislative competence of the State under List II of the Seventh Schedule to the Constitution, Education Cess on the Shop Rent can be continued to be levied under Article 277 of the the Constitution; and hence it would not be necessary to ascertain into which category of tax, Shop Rent would fall.

67. On the other hand, learned Counsel for the petitioners contended that though the Education Act was first enacted in the year 1941 before the advent of the Constitution, the charging provisions for the Education Cess, namely, Section 9 and the Schedule to the Act, were amended by the Elementary Education (Amendment) Act, 1955; that the protection under Article 277 is not available to Education Cess, and that it is necessary to ascertain the nature and character of the Shop Rent to determine whether the State is competent to levy Education Cess on Shop Rent after the advent of the Constitution.

68. Even if a pre-Constitution tax or cess is outside the legislative competence of the State, Article 277 saves continuance of such tax until provision is made to the contrary by Parliament by law. In *Ram Krishna v. Janpada Sabha*, AIR 1962 SC 1073 the Supreme Court laid down that for continuance of a tax under Section 143 (2) of the Government of India Act, 1935 (which corresponds Art. 277 of the Constitution), three conditions should be satisfied. In a later decision, *Amraoti Municipality v. Ramchandra*, AIR 1964 SC 1166, the Supreme Court held that those very three conditions are equally applicable for continuance of a tax under Article 277 of the Constitution. Those three conditions are:

i) The tax was one which was lawfully levied;

ii) The identity of the body that collects the tax, the area for whose benefit the tax is to be utilised and the purpose for which the utilisation is to take place continue to be the same; and

iii) The rate of tax is not enhanced nor its incidence in any manner altered.

69. We shall now examine whether Education Cess levied on Arrack Shop

Rent, Toddy Shop Rent, or Beer Shop Rent, under the Education Act satisfies these tests to attract the benefit of Article 277 of the Constitution. As we have already held, there is no charge of Education Cess on Arrack Shop Rent, Toddy Shop Rent, or Beer Shop Rent, Tree, Tax, or Tree Rent either under the Education Act as originally enacted or as amended by the Elementary Education (Amendment) Act, 1944. Even if Education Cess was levied, as a matter of fact, on these items of Excise Revenue, it (Education Cess) cannot be said to have lawfully levied. Thus Education Cess on Shop Rent does not satisfy the first of the above three conditions.

70. It was contended by learned counsel for the petitioners that the second condition also is not satisfied because the area for whose benefit Education Cess is levied has not remained the same.

71. Section 7 of the Education Act provided that there shall be constituted in each District an Elementary Education Fund to which all collections from Education Cess and certain other receipts should be credited. Section 8 provided that all expenses incurred by the Government on elementary education in any District should be paid out of the Elementary Education Fund for that District. Sections 7 and 8 were repealed by the Mysore Elementary Education (Amendment) Act, 1955.

72. The effect of the repeal of Sections 7 and 8 of the Education Act, is that the proceeds of Education Cess will go to the consolidated Funds of the State and will become part of it, whereas before such repeal such proceeds would go to a separate earmarked fund for each District, and such fund had to be utilised only for meeting the expenses incurred on elementary education in that particular District. Thus before the commencement of the Constitution the area for whose benefit Education Cess was utilised, was each of the nine Districts of the then State of Mysore. But after the Mysore Elementary Education (Amendment) Act, 1955, repealed Sections 7 and 8, the proceeds of Education Cess, which goes to the consolidated Funds of the State, will be available for the benefit of the entire new State of Mysore. We think the learned counsel for the petitioners are right in contending that even the second of the aforesaid three conditions, has not been satisfied.

73. On account of the first two of the aforesaid three conditions not being satisfied, the saving under Article 277 is not available to Education Cess on Shop Rent, if Shop Rent falls outside any of the Entries in List II of the Seventh Schedule to the Constitution.

74. The learned Special Government Pleader next contended that Shop Rent comes within the ambit of Entry 8 of List II which reads: "Intoxicating liquors, that is to say, the production, manufacture, possession, transport, purchase and sale of intoxicating liquors."

75. The learned Special Government Pleader said that the language of any Entry in the Legislative Lists in the Seventh Schedule to the Constitution, should be given the widest scope of which their meaning is fairly capable and that each general word should, accordingly be held to extend to all ancillary and subsidiary matters which can fairly and reasonably be comprehended in it. We think this rule of interpretation of legislative Entries, is well accepted, and beyond any controversy.

76. But it is difficult to accept the further proposition of the learned Special Government Pleader that the legislative power to regulate or restrict manufacture, sale, and consumption of liquor would include the power to impose any tax which has the effect of discouraging consumption of liquor. No doubt, one of the objects of imposing taxes on liquor may be to check consumption. As observed by the Supreme Court in *Cooverjee Bharucha v. Excise Commr., Ajmer*, AIR 1954 SC 220 at p. 224 one of the purposes of the regulation of manufacture and trade in liquors is to raise revenue. Nevertheless, as pointed out by the Supreme Court in *Sundaramier and Co. v. State of Andhra Pradesh*, AIR 1958 SC 468 at p. 494, taxation is considered as a distinct matter for the purpose of legislative competence and the power to tax cannot be deduced from a general legislative Entry as an ancillary power. The legislative power to tax alcoholic liquor must be derived from one of the Entries of Taxation, i.e. Entries 46 to 63 in List II, of the Seventh Schedule. It has already been held that Shop Rent is not a duty of excise and does not come within Entry 51.

77. The learned Special Government Pleader contended in the alternative that Shop Rent can be regarded as a tax on luxuries coming within Entry 62 in List II of the Seventh Schedule to the Constitution. That entry reads:

"Taxes on Luxuries including taxes on entertainments, amusements, betting and gambling."

78. This contention was taken up by the State in its additional counter-affidavit and we permitted the State to raise that contention. The learned Special Government Pleader argued that intoxicating liquors like Toddy, Arrack and Beer, are luxuries and hence Arrack Shop Rent Toddy Shop Rent and Beer Shop Rent can be regarded as taxes on luxuries.

79. Learned counsel for the petitioners disputed the proposition that alcoholic liquors are luxuries. The petitioner in W. Ps. Nos. 1393; 1800 of 1967 and 612; 944; 1016; 862; 863; 864 and 832 of 1968 filed an additional affidavit in which he averred that Toddy is not an item of luxury at all. Learned counsel for the petitioners argued that the State has not placed any material at all in support of its assertion that alcoholic liquors are articles of luxuries.

80. The learned Special Government Pleader referred to the decisions of Kerala High Court in *T. K. Abraham v. Travancore-Cochin*, AIR 1958 Ker 129 (FB) and *Kaithakuttu v. Board of Revenue*, AIR 1966 Ker 46 in which tobacco was held to be an article of luxury. The learned Special Govt. Pleader argued that if tobacco is an article of luxury, there can be no doubt alcoholic liquors are articles of luxury.

81. Without deciding, we shall assume for sake of arguments that alcoholic liquors are articles of luxury. Before Shop Rent can be regarded as a tax on luxuries, it must first be established that Shop Rent is a tax. In *Shinde Brothers' case*, AIR 1967 SC 1512 Sikri J., who delivered the majority judgment, observed that Toddy Shop Rent is a payment for the exclusive privilege of selling Toddy in certain shops and that the licensee pays what he considers to be equivalent to the value of that right.

82. As stated by B. K. Mukherjea, J. (as he then was) in *Commr. Hindu Religious Endowment, Madras v. L. T. Swamiar*, AIR 1954 SC 282 at p. 295, one of the essential characteristics of tax is that it is an imposition made for public purpose without reference to any special benefit to be conferred on the payer of the tax; in other words, there is no element of quid pro quo between the tax payer and the public authority. Since the payment of Shop Rent is for the benefit which the licensee gets in form of exclusive privilege to sell liquor in certain area or in certain shops, Shop Rent cannot be regarded as a tax at all.

83. Even assuming for the sake of arguments that alcoholic liquors are articles of luxury and that Shop Rent is a tax, we shall examine whether Shop Rent can be regarded as a tax on luxuries coming within Entry 62 in List II of the Seventh Schedule to the Constitution.

84. Mr. K. Sreenivasan, learned counsel for some of the petitioners, drew our attention to Section 18 of the Mysore Excise Act, 1901, which provides that duty in liquor may be levied by payment of a sum in consideration of the grant of any exclusive or other privilege

of selling by retail. Mr. Sreenivasan also pointed out that in section 24 of the Mysore Excise Act, 1965, the Legislature has declared that the sum accepted in consideration of the grant of any lease relating to any excisable article under section 17, shall be the excise duty. Mr. Sreenivasan argued that though that declaration is ineffective in rendering Shop Rent a duty of excise, it is not open to the court to regard Shop Rent as a tax on luxuries coming within Entry 62, in List II, where there is express legislative declaration that Shop Rent is a duty of excise.

85. We think that there is considerable force in this contention. There is no manifestation of the legislative intent to treat alcoholic liquors as articles of luxury and to impose tax on them as articles of luxury. On the other hand, the legislative intent appears to be to collect excise revenue in the form of Shop Rent.

86. Learned counsel for the petitioners argued that taxes can be classified as taxes on person, like Poll tax and Income tax, taxes on things like property tax, and taxes on transactions and activities like sales tax and Excise Duty, and that a tax on luxuries under Entry 62 in List II of the Seventh Schedule, is a tax on articles of luxury and not a tax on enjoyment or activities leading to enjoyment. In support of this proposition, learned counsel for the petitioners relied on the observations of the Bombay High Court in *State of Bombay v. Chamarbaugwala*, AIR 1956 Bom 1, Chagla, C. J. speaking for the Bench, said at page 11:

"With regard to luxuries it is significant to note that the plural and not the singular is used, and the luxuries in respect of which a tax can be imposed under entry 62 is a tax on goods of articles which constitute luxuries, and it is again significant to note that the topic of luxuries only is to be found in entry 62 in the taxation power and not in either entry 33 or 34. That clearly shows what was contemplated was a tax on certain articles or goods constituting luxuries and not legislation controlling an activity which may not be a necessary activity but may be unnecessary and in that sense a luxury.

87. Reference was also made to the following observations of Kerala High Court in AIR 1966 Ker 46 at p. 51:

"It seems to me that 'luxury tax' is a tax on an article in order that it might be a luxury tax, this article must be an article of luxury."

88. Learned counsel for the petitioners argued that Shop Rent is not levied on the articles of luxury, namely alcoholic liquors, nor on the person who consumes liquor and thereby engages in

an activity of luxury, but is collected from the vendor of liquor for the liquor for the exclusive privilege of selling liquors, and that there is no proximate nexus between the levy of Shop Rent and consumption of alcoholic liquors.

89. The learned Special Government Pleader argued that a tax on luxuries can be levied on a person who vends articles of luxury as he will indemnify himself at the expense of persons using articles of luxury. In support of his contention, he relied on the decision of the Supreme Court in *State of Bombay v. R. M. D. Chamarbaugwala*, AIR 1957 SC 699 in which the validity of tax levied on the promoters of lotteries and prize competitions came up for consideration.

90. Under Entry 62 in List II, Taxes on Luxuries include taxes on entertainments, amusements, betting and gambling. The Bombay High Court had struck down section 12-A of the Bombay Lotteries and Prize Competitions Control and Tax Act on the ground that that section did not fall within Entry 62, for, it imposed a tax not on the gamblers but on the promoters of prize competition and the tax so levied could be regarded as a tax on the trade of prize competition carried on by such promoters. The Supreme Court held that the Bombay High Court had taken too narrow a view of the matter. Upholding the validity of the tax, S. R. Das, C. J., who spoke for the Bench, said at pp. 710 and 712:

"Entry 62 talks of taxes on betting and gambling and not of taxes on the men who bet or gamble"

It is a kind of tax which, in the language of J. S. Mill quoted by Lord Hobhouse in *Bank of Toronto v. Lambe*, (1887) 12 A. C. 575, is demanded from promoter in the expectation and intention that he shall indemnify himself at the expense of gamblers who sent entrance fee to him"

91. The tax levied under section 12-A of that Act was on the sum received or due in respect of lottery or prize competition or in a lump sum having regard to the circulation or distribution of newspaper or publication containing forms of entries for prize competition. The Supreme Court was of the view that in the ultimate analysis it was a tax on each entry fee received from each individual competitor. In other words, there was direct correlation between the amount of tax levied on the promoter and the total value of entry fee received by him.

92. The learned Special Government Pleader next referred to the decision of the Supreme Court in *Western India Theatres v. Cantonment Board, Poona*,

AIR 1959 SC 582. There, tax on entertainment was levied on cinemas, dramas and circus at certain rates per show, and on horse races and amusement parks at certain rates per day. The validity of the tax was challenged by a cinema exhibitor.

93. The Supreme Court upheld the tax as falling within Entry 50 in List II to the Seventh Schedule to the Government of India Act, 1935, which read, "Taxes on luxuries or entertainments or luxuries." The Supreme Court said that there is no reason to give a restricted meaning to this Entry so as to confine the operation of the law to be made thereunder only to taxes on persons receiving the luxuries, entertainments or amusements, that there can be no reason to differentiate between the giver and the receiver of luxuries, entertainments or amusements, and that both may with equal propriety be made amenable to the tax.

The following passage in the judgment at p. 585 brings out the distinction between tax on luxuries and tax on trade or calling:

"... Nor is the impugned tax a tax imposed for the privilege of carrying on any trade or calling. It is a tax imposed on every show that is to say, on every instance of the exercise of the particular trade, calling or employment. If there is no show, there is no tax. A lawyer has to pay a tax or fee to take out a license irrespective of whether or not he actually practises. That tax is a tax for the privilege of having the right to exercise the profession if and when the person taking out the license chooses to do so. The impugned tax is a tax on the act of entertainment resulting in a show."

94. From the aforesaid two decisions of the Supreme Court, the propositions that emerge are, (i) that a tax on luxuries be imposed either on the person providing or giving luxuries or on the person receiving luxuries, or both; and (ii) that the amount of tax on luxuries must be correlated to the value, quality, or quantity of luxuries and the tax should not be imposed for the privilege of carrying on any trade or calling providing luxuries.

95. We shall now apply the aforesaid two propositions to determine whether Shop Rent can be regarded as a tax on luxuries. That the tax is levied on the vendor of Liquors and not on the consumers of liquor, is not, by itself, a factor that militates against the tax being a tax on luxuries. But the material question is whether Shop Rent is imposed for the privilege of selling alcoholic liquors or whether it is correlated to the quality, quantity or value of liquors sold by the Vendor.

96. In AIR 1967 SC 1512, Sikri, J., delivering the majority judgment in that case examined the true character or nature of Toddy Shop Rent and observed, inter alia, that it is a payment for the exclusive privilege of selling Toddy in certain shops, that the licensee pays what he considers to be equivalent to the value of such right, that he may sell little, less or more than anticipated, depending on various factors, and that what he recoups would depend upon the amount of sales and the conditions prevailing during the licensing year. His Lordship further observed at page 1521 that the levy of Shop Rent is in respect of the business of carrying on the sale of Toddy.

97. In the light of the opinion expressed by the majority of the Bench in Shinde Brothers' case, AIR 1967 SC 1512 we must hold that Shop Rent is not correlated to the quality, quantity, value of luxuries i.e. liquors but is imposed for the privilege of vending liquor, and hence it cannot be regarded as a tax on luxuries coming within Entry 62 in List II of the Seventh Schedule to the Constitution, even if it is assumed that alcoholic liquors are articles of luxury and Shop Rent is a tax.

98. Learned counsel for the petitioners contended that Education Cess on Arrack, Shop Rent, Toddy Shop Rent, and Beer Shop Rent, is a tax on trade falling under Entry 60 in List II, and that under Article 276 (2) of the Constitution, the total amount payable in respect of any one person shall not exceed Rs. 250/- per annum. Support for this contention was sought to be derived from the observation of Sikri, J., in Shinde Brothers' case that the levy of Toddy Shop Rent is in respect of the business of carrying on the sale of Toddy.

99. But we think this observation cannot be understood as laying down that Toddy Shop Rent is a tax on trade in Toddy. As stated earlier, His Lordship observed that Shop Rent is a payment for the exclusive privilege of selling Toddy in certain shops and Shop Rent which is a payment for such benefit, is not a tax at all. If Shop Rent itself is not a tax there is no question of its being a tax on trade or calling. Education Cess which is in the nature of a surcharge or an increment to an existing tax, cannot be levied on Shop Rent which is not a tax, and the purported levy of Education Cess on Shop Rent cannot be regarded as a tax on trade or calling.

100. Lastly, it was contended by learned counsel for the petitioners that Education Cess cannot be levied on any item of Excise Revenue as the Education Act contains no provisions for assessment, for giving opportunities to tax-payers to put forth their objections as to their liability and the extent of such liability.

and for collection, and that in the absence of a machinery for assessment and collection, Education Cess cannot be collected.

101. An identical contention was considered and repelled by the Supreme Court in Ahmedabad Manufacturing and Calico Printing Co., Ltd. v. State of Gujarat, AIR 1967 SC 1916. Hidayatullah, J. (as he then was), who spoke for the Court said at page 1920:

"Finally, there is the argument that the Cess Act, in not, providing its own procedure of assessment and in not giving the tax-payers an opportunity for putting forward their objections by way of representation, appeal or otherwise before the tax is finally fixed offends the principles of natural justice. This argument is not correct. The cess is nothing more than an addition to existing taxes. As it is a percentage of another tax, the determination of the cess is not by an independent assessment. It is an arithmetical calculation based on the result of assessment under other Act or Acts. Those Acts allow the raising of objections and provide for appeals. It is only, the result of assessment after scrutiny, objection and appeals which forms the basis for the application of a percentage. There is no need for further scrutiny, objection or appeals. Nor is the Cess Act bad because it is not self-contained in the matter of assessment. In all cases of imposition of cesses for special administrative purposes (such as health cess, road cess, education cess, etc.) this method is followed. Being an addition to another tax this is the only method possible. The legislation on the subject of the imposition, levy and collection of a cess is made complete by incorporation of and reference to another piece of legislation. This practice is neither ineffective nor unconstitutional and cannot be said to be bad."

102. In view of the above pronouncement, the last contention of the petitioners has no substance.

103. The learned Special Government Pleader contended that it was not open to the petitioners to question their liability to pay Education Cess on Shop Rent, Tree Tax, and Tree Rent, as they had entered into contracts with the State before obtaining licences to vend liquors, and had agreed to pay Education Cess on the said items of Excise Revenue, and that they were bound to pay Education Cess under such contracts even if levy of Education Cess was without the authority of law.

104. In reply to this contention, learned counsel for the petitioners urged that any agreement to pay a tax or cess which is not imposed under any authority of law, is void and unenforceable

and does not create any legal obligation to pay such tax or cess, nor precludes the petitioners from claiming refund of such tax or cess paid to the State.

105. Reliance was placed on the decision of the Supreme Court in Moti Ram Deka v. N. E. F. Rly., AIR 1964 SC 600. There, Rules 148 (3) and 149 (3) contained in the Indian Railway Establishment Code, Vol. I, which empowered the Railway Authorities to terminate the services of a Railway employee by serving a notice on him, were held to be repugnant to Art. 311 (2) of the Constitution. It was however urged on behalf of the Railway Authorities that Railway servants who entered service with full knowledge of these Rules, could not be allowed to complain that the Rules contravene Art. 311 and are, therefore, invalid. Repelling that contention, this is what Gajendragadkar, J. (as he then was), who spoke for the majority, said at page 611:

"In our opinion, this approach may be relevant in dealing with purely commercial cases governed by rules of contract; but it is wholly inappropriate in dealing with a case where the contract or the rule is alleged to violate Constitutional guarantee afforded by Art. 311 (2); and even as to commercial transactions it is well known that if the contract is void, as for instance, under section 23 of the Indian Contract Act, the plea that it was executed by the party would be of no avail. In any case, we do not think that the argument of contract and its binding character can have validity in dealing with the question about the constitutionality of the impugned rules."

106. Disposal of the privilege to vend liquor is not purely a matter of contract. It is governed by the statute namely, the Mysore Excise Act. Powers and obligations of the State and Rights and liabilities of the licencees, are governed by the Statute and rules thereunder. Further, Art. 265 of the Constitution declares that no tax shall be levied or collected except by authority of law. A tax cannot be levied or collected by the State under a contract. A contract to pay a tax not levied by the authority of law, is inconsistent with Art. 265 of the Constitution, and is in the same position as a contract which violates the Constitutional guarantee afforded by Art. 311. Hence the mere fact that before obtaining licences to sell liquor, the petitioners had executed in favour of the State, contracts covenanting to pay Education Cess on certain items of Excise revenue, would not render levy on Education Cess valid if such levy is without the authority of law.

107. However, the learned Special Government Pleader argued that there was no legal impediment to the peti-

tioners agreeing to pay to the State certain additional amounts or certain percentage over and above their respective bid amounts or amounts tendered by them to obtain the exclusive privilege of vending liquor and that the covenant to pay Education Cess can be construed as covenant to pay certain amounts or a certain percentage over and above bid or tender amount. But what the petitioners had covenanted to pay in the contracts entered with the State, was Education Cess and not any such amounts or percentage of bid or tender amounts other than Education Cess. If what they had undertaken to pay by way of Education Cess, is found to be tax without the authority of law, such undertaking is void, and cannot be treated as an undertaking to pay a specified sum or specified percentage of bid or tender amounts.

108. Our conclusion may be summed up thus:

i. The Education Act does not impose the charge of Education Cess on Arrack Shop Rent, Toddy Shop Rent and Beer Shop Rent, Tree Tax and Tree Rent;

ii. Continuance of the levy of Education Cess in the Old Mysore Area of the new State of Mysore, has not been shown to offend Art. 14 of the Constitution;

iii. Shop Rent is not a duty of excise and hence Education Cess cannot be levied on Arrack Shop Rent, Toddy Shop Rent or Beer Shop Rent;

iv. Education Cess on Shop Rent, is not a tax on trade as Shop Rent is not a tax on trade;

v. Education Cess can be levied and collected even in the absence of provisions of creating a machinery for assessment and collection of Education Cess.

vi. The levy of Education Cess on Shop Rent after the commencement of the Constitution, is not saved by Art. 277 of the Constitution;

vii. Shop Rent not being a tax, is not a tax on luxuries; and

viii. The petitioners can question the validity of the levy of Education Cess on Shop Rent, Tree Tax and Tree Rent in spite of their having agreed to pay Education Cess on those items.

109. In view of the above conclusions, the levy of Education Cess on Arrack Shop Rent, Toddy Shop Rent, and Beer Shop Rent, Tree Tax and Tree Rent, is hereby declared invalid.

110. The next question is as to what reliefs should be given in these petitions. Most of the petitioners have sought for a direction restraining the authorities from collecting Education Cess on Arrack Shop Rent, Toddy Shop Rent or Beer Shop Rent, or on Tree Tax or on Tree Rent. Many of them have also prayed for refund of amounts illegally collected

from them by way of Education Cess. Once the levy of Education Cess on the said item, is held to be invalid, a direction restraining the authorities from collecting such cess, should follow. Accordingly, a direction to that effect is issued in each of these cases.

111. Regarding refund of amounts collected illegally from the petitioners by way of Education Cess, the learned Special Government Pleader contended that the petitioners should file separate suits claiming such refund, that it would be open to the State to raise in such suits the plea of limitation, and that we should not grant the relief of refund in these petitions.

112. In *Sales Tax Officer v. Kanhaiya Lal*, AIR 1959 SC 135 the Supreme Court held that if it is established that payment, even though it be of a tax, has been made by the party labouring under a mistake of law, the party is entitled to recover the same, that the party, receiving the same is bound to repay or return it and that no distinction can be made in respect of a tax liability and any other liability on a plain reading of section 72 of the Indian Contract Act. We think, it does not admit of serious doubt that the petitioners have paid Education Cess on Arrack Shop Rent, Toddy Shop Rent or Beer Shop Rent, or Tree Tax, and Tree Rent under a mistake of law, that is, under a mistaken impression that they were liable to pay Education Cess on these items. Hence they are entitled to recover the same subject to the law of limitation.

113. On the question whether a suit for refund is the appropriate remedy or whether a refund should be ordered in proceedings under Art. 226 of the Constitution, the Supreme Court said in *State of Madhya Pradesh v. Bhailal Bhai*, AIR 1964 SC 1006 that in a petition under Art. 226 of the Constitution, even if the court finds that the impugned assessment was void, being made under a void provision of law and the payment was made under a mistake, still the Court is not bound to exercise its discretion directing repayment. The Supreme Court added:

"Whether repayment should be ordered in the exercise of this discretion will depend in each case on its own facts and circumstances. It is not easy nor is it desirable to lay down any rule for universal application. It may however be stated as a general rule that if there has been unreasonable delay the Court ought not ordinarily to lend its aid to a party by this extraordinary remedy of mandamus. Again, where even if there is no such delay the Government of the Statutory Authority against whom the consequential relief is prayed for raises a *prima facie* triable issue as regards the availability of such relief on the merits

on the grounds like limitation the Court should ordinarily refuse to issue the writ of mandamus for such payment. In both these kinds of cases it will be sound use of discretion to leave the party to seek his remedy by the ordinary mode of action in a civil court and to refuse to exercise under Art. 226 of the Constitution.

114. Learned counsel for the petitioners argued that the petitioners became aware of the illegality of Education Cess on several items of Excise Revenue, only after the Supreme Court rendered decision in AIR 1967 SC 1512 holding levy of Health Cess on Toddy Shop Rent was invalid, that the said decision was rendered only on 26-9-1966, and that all these petitions have been filed well within three years from that date.

115. Apart from the ground that Shop Rent is not a duty of Excise which ground the parties must have known only after the pronouncement of the Supreme Court in Shinde Brothers' Case, AIR 1967 SC 1512 we have upheld the contention of the petitioners that the Education Act does not impose a charge to Education Cess on Arrack Shop Rent, Toddy Shop Rent and Beer Shop Rent, Tree Tax, and Tree Rent. When the petitioners became aware of this ground of invalidity of Education Cess on all or any of the aforesaid items of Excise Revenue, is, *prima facie*, a triable issue.

116. In W. Ps. Nos. 950 to 954; 957 and 959 to 961 of 1968 the periods in respect of which Education Cess had been paid by the petitioners on Arrack Shop Rent and Toddy Shop Rent, have not been specified. Hence we cannot issue any direction for refund of sums paid by the petitioners by way of Education Cess on Arrack Shop Rent and Toddy Shop Rent. However, it will be open to those petitioners to make representation before the authorities for refund of such amounts after furnishing the necessary details, and if such representations made, the authorities shall consider their claims for refund in the light of our pronouncement but without prejudice to any objection on the ground of limitation.

117. In W. Ps. Nos. 832 and 863 of 1968 the claim is for refund of Education Cess paid on Toddy Shop Rent and Tree Tax respectively for the year 1963-64. The petitions have been filed more than three years after the close of those years. Likewise in W. Ps. Nos. 985 and 986 of 1968 the claims relate to refund of Education Cess paid on Toddy Shop Rent for the year 1952-53. The petitions have been filed more than 14 years after the close of that year. The question of limitation regarding these claims, may arise for consideration. Hence in these four petitions, we do not direct any re-

fund of Education Cess, but leave it open to these petitioners to seek their remedy by way of suit or other proceedings, if they so desire.

118. In W. P. No. 1393 of 1967, the petitioner has claimed refund of the amounts paid by him towards Education Cess on Toddy Shop Rent for the period 1964-65 to 1966-67. The petition was filed on 24-6-1967. We have directed refund of amounts, if any, paid by him subsequent to 24-6-1964, leaving it open to him to seek his remedy by way of suit or other proceedings if he so desires, in respect of amounts paid by him, if any, prior to 24-6-1964.

119. In W. P. No. 2161 of 1967, the petitioner has claimed refund of amounts paid by him towards Education Cess on Toddy Shop Rent, Tree Tax and Tree Rent for the period 1962-63 to 1966-67. The petition was filed on 18-9-1967. We have directed refund of amounts, if any, paid by him subsequent to 18-9-1964 leaving it open to him to seek his remedy by way of a suit or other proceedings if he so desires, in respect of payments, if any, made prior to 18-9-1964.

120. In W. P. No. 864 of 1968 the petitioner has claimed refund of amounts paid towards Education Cess on Tree Tax for the period 1964-65. The petition was filed on 14-3-1968. We have directed refund of amounts, if any, paid subsequent to 14-3-65 leaving it open to him to seek his remedy in respect of payments, if any, made prior to 14-3-1965, by way of suit or other proceedings, if he so desires.

121. We shall now detail below our directions for refund in individual petitions:

122. W. Ps. Nos. 1096 and 1097 of 1966: The Respondents are directed to refund that amounts, if any, paid by the petitioners, towards Education Cess on Arrack Shop Rent for the period 1-7-1966 to 30-6-1967.

123. W. P. No. 1393 of 1967: The Respondents are directed to refund the amounts, if any, paid by the petitioner subsequent to 24-6-1964, towards Education Cess on Toddy Shop Rent for the period 1964-65 to 1966-67.

124. W. P. No. 1800 of 1967: The Respondents are directed to refund the amounts, if any, paid by the petitioner towards Education Cess on Toddy Shop Rent for the year 1967-68.

125. W. P. No. 2069 of 1967: The Respondents are directed to refund the amounts, if any, paid by the petitioner towards Education Cess on Arrack Shop Rent for the year 1967-68.

126. W. P. No. 2160 of 1967: The Respondents are directed to refund the amounts, if any, paid by the petitioner towards Education Cess on Toddy Shop Rent for the year 1967-68.

127. W. P. No. 2161 of 1967: The respondent is directed to refund the amounts if any, paid by the petitioner subsequent to 18-9-1964 towards Education Cess on Toddy Shop Rent, Tree Tax and Tree Rent for the period 1962-63 to 1966-67.

128. W. Ps. Nos. 2637 to 2639 of 1967: The respondents are directed to refund the amounts, if any, paid by the petitioners towards Education Cess on Beer Shop Rent for the year 1967-68.

129. W. P. No. 2995 of 1967: The respondents are directed to refund the amounts, if any, paid by the petitioner towards Education Cess on Toddy Shop Rent for the period 1-1-1968 to 30-6-1969.

130. W. Ps. Nos. 2996 and 2997 of 1967 and 92 of 1968: The respondents are directed to refund the amounts, if any, paid by the petitioners towards Education Cess on Arrack Shop Rent and/or Toddy Shop Rent for the period 1-1-1968 to 30-6-1969.

131. W. Ps. Nos. 108 and 221 of 1968: The respondents are directed to refund the amounts, if any, paid by the petitioners towards Education Cess on Arrack Shop Rent and Toddy Shop Rent for the period 1-1-1968 to 30-6-1969.

132. W. P. No. 240 of 1968: The respondents are directed to refund amounts, if any, paid by the petitioner towards Education Cess on Toddy Shop Rent for the period 1-1-1968 to 30-6-1969.

133. W. Ps. Nos. 392, 393 and 520 to 524 of 1968: The respondents are directed to refund the amounts, if any, paid by the petitioners towards Education Cess on Arrack Shop Rent, and Toddy Shop Rent for the period 1-1-1968 to 30-6-1969.

134. W. Ps. Nos. 612, 627 to 631 of 1968, 639 and 640 of 1968: The Respondents are directed to refund the amounts, if any, paid by the petitioners towards Education Cess on Toddy Shop Rent for the period 1-1-1968 to 30-6-1969.

135. W. P. No. 862 of 1968: The respondents are directed to refund the amounts, if any, paid by the petitioner towards Education Cess on Tree Tax for the year 1967-68.

136. W. P. No. 864 of 1968: The respondents are directed to refund the amounts, if any, paid by the petitioner subsequent to 14-3-1965 towards Education Cess on Tree Tax for the year 1964-65.

137. W. P. No. 944 of 1968: The respondents are directed to refund the amounts, if any, paid by the petitioner towards Education Cess on Tree Tax for the year 1965-66.

138. W. P. No. 989 of 1968: The respondents are directed to refund the amounts if any, paid by the petitioner towards Education Cess on Toddy Shop

Rent and Tree Tax for the period 1-1-1968 to 30-6-1969.

139. W. P. No. 1016 of 1968: The respondents are directed to refund the amounts if any, paid by the petitioner towards Education Cess on Tree Tax for the year 1966-67.

140. W. Ps. Nos. 1041 and 1044 of 1968: The respondents are directed to refund the amounts, if any, paid by the petitioners towards Education Cess on Arrack Shop Rent for the months of January and February 1968.

141. W. P. No. 1090 of 1968: The Respondents are directed to refund the amounts, if any, paid by the petitioner towards Education Cess on Arrack Shop Rent and Toddy Shop Rent for the period 1-1-1968 to 30-6-1969.

142. W. Ps. Nos. 1105, 1106, 1109 and 1110 of 1968: The respondents are directed to refund the amounts if any paid by the petitioners towards Education Cess on Arrack Shop Rent for the period 1-1-1968 to 30-6-1969.

143. W. Ps. Nos. 1107 and 1108 of 1968: The respondents are directed to refund the amounts if any, paid by the petitioners towards Education Cess on Toddy Shop Rent for the period 1-1-1968 to 30-6-1969.

144. In all these petitions, parties are directed to bear their own costs.
GGM/D.V.C. Order accordingly.

AIR 1969 MYSORE 41 (V 56 C 9)
M. SANTOSH, J.

Mysore State Road Transport Corporation through its Chairman Central Office, Bangalore and another, Appellants v. Khaja Mohiddin and others, Respondents.

Second Appeals Nos. 117, 118, 119 and 120 of 1967 connected with 881, 882, 883 and 884 of 1967, D/- 26-3-1968 from judgments of Dist. J. Raichur D/- 12-9-1966.

(A) State Reorganisation Act (1956), S. 116 (1) — Deemed to have been appointed — Meaning—(Words and Phrases — Deemed to have been appointed).

Section 116 (1) uses the words "deemed to have been appointed" which shows that the persons holding posts and offices under the old State have not been really so appointed, in the new State.
AIR 1957 Mad 769, Rel. on.

(Para 5)
(B) Constitution of India, Arts. 311 (1), 309 — Protection under — Cannot be taken away by any legislation or by Rule under Article 309.

It is well settled that the Constitutional guarantee given to a Civil servant by Art. 311 cannot be taken away either

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by the Legislature by any law or by any rule made under Article 309 by the Governor. Thus neither the legislature nor the Governor may enact a rule under Article 309 vesting power of dismissal in a Subordinate authority i.e. an authority subordinate in rank to the authority which had appointed the civil servant. Any rule or statute which permits such an action must be held to be ultra vires as infringing the provisions of Art. 311 (1) of the Constitution. AIR 1937 PC 27 and AIR 1949 PC 112 and AIR 1963 Punj 370 and AIR 1954 Pat 285, Rel. on.

(Para 6)

(C) Constitution of India, Art. 311 (1) — 'An authority subordinate' — Does not mean an existing subordination — Authority appointing public servant ceasing to exist — Effect — Subordinate Officer can not dismiss the servant — Such dismissal contravenes Art. 311 (1) — AIR 1960 Madh Pra 254 and AIR 1959 Madh Pra 43 and AIR 1958 Cal 356, Dissented from.

The expression 'an authority subordinate' does not indicate an existing subordination and it cannot be contended that the authority dismissing the civil servant suffers no subordination at the time of dismissing because the post of the former appointing authority had ceased to exist. A civil servant should not be deprived of the valuable constitutional guarantee given to him under Art. 311 (1) for no fault of his, simply because, the authority which appointed him had ceased to exist.

The meaning of Article 311 (1) is that if there is no officer of equal rank to the appointing officer available, then the order will have to be passed by an officer of superior rank. In no circumstances can such an order be passed by an officer of lesser rank. AIR 1963 Punj 370 and AIR 1962 Cal 3 and AIR 1964 Madh Pra 114, Rel. on; AIR 1960 Madh Pra 254 and AIR 1959 Madh Pra 43 and AIR 1958 Cal 356 Dissented from.

(Paras 7, 8)

Thus where a conductor had been appointed by the Superintendent, Road Transport Department of the erstwhile State of Hyderabad who was the head of the Department, the State Government being the only authority superior to him, and after the reorganisation of States, when he was an employee of the Mysore Government Road Transport Dept. he was dismissed by the Divisional Controller who was admittedly subordinate to the General Manager.

Held that the Superintendent of the Road Transport Department of the erstwhile Hyderabad State was equivalent to the post of the General Manager of the Mysore Government Road Transport Department and the dismissal by the Divisional Controller, who was a subordi-

nate to the General Manager, was bad, Decision in R. S. A. 627 of 1964 (Mys), Foll.

(Paras 9, 11)

Held further that the fact that the Mysore State Transport Corporation has been constituted on 31-7-1961 and all civil posts of the Mysore Government Road Transport Department have been abolished, did not affect the position of the Conductor, as under the Rules framed by the Mysore Government, the Corporation has succeeded to the rights and liabilities of the Mysore Government Road Transport Department.

(Para 10)

(D) High Court Rules and Orders — Mysore High Court Rules (1959), Ch. III, R. 7 — Reference to Division Bench — When competent.

The mere fact that certain points had not been urged in a previous appeal when the party concerned had the opportunity and failed to do so, is no ground to refer the subsequent case to a Division Bench.

(Para 9)

Cases Referred: Chronological Paras

- (1964) AIR 1964 Madh Pra 114
(V 51) = 1964 MPLJ 86, Ramratan Balchand v. State of Madhya Pradesh 8
- (1964) RSA No. 627 of 1964 (Mys), 4, 9, 11
- (1963) AIR 1963 Punj 370 (V 50) = 65 Pun LR 964, Gurmukh Singh v. Union of India 6, 8
- (1962) AIR 1962 Cal 3 (V 49), Anukul Chandramondal v. Commissioner of Income-Tax; West Bengal 8
- (1960) AIR 1960 Madh Pra 254 (V 47) = 1960 MPLJ 85, Antarsingh v. State of Madhya Pradesh 7
- (1959) AIR 1959 Madh Pra 43 (V 46) = 1959 MPLJ 423, Raghunath Singh v. State of Madhya Bharat 7
- (1958) AIR 1958 SC 228 (V 45) = 1958 SCR 1013, Rajvi Amar Singh v. State of Rajasthan 7
- (1958) AIR 1958 Cal 356 (V 45) = 62 Cal WN 531, Dualal Ranjan Adetya v. R. K. Bose 7
- (1957) AIR 1957 Mad 769 (V 44) = ILR (1957) Mad 1010, Balakrishnan Nair v. State of Madras 5
- (1954) AIR 1954 Pat 285 (V 41) = ILR 33 Pat 148, Mahadev Prasad Roy v. S. N. Chatterjee 6
- (1949) AIR 1949 PC 112 (V 36) = 50 Cri LJ 383, North West Frontier Province v. Suraj Narain Anand 6
- (1937) AIR 1937 PC 27 (V 24) = ILR (1937) Mad 517, Rangachari v. Secretary of State 6

In S. A. Nos. 117 to 120 of 1967: R. S. Mahendra, for Appellants; M. M. Jagirdar, (for No. 1); and K. S. Ramdas, High Court Govt. Pleader, (for No. 2); for Respondents; In S. A. Nos. 881 to 884 of 1967, K. S. Ramdas, High Court Govt. Pleader, for Appellant; M. M. Jagirdar, (for No. 1); and R. S. Mahendra, (for No. 2), for Respondents.

JUDGMENT: These 8 appeals arise out of a common judgment of the learned District Judge, Raichur, allowing a batch of appeals filed by the Conductors, working in the Mysore Government Road Transport Department in Raichur District, who had been dismissed from service. As the same questions arise in these appeals, they are dealt with in one judgment. The respondents were working as conductors in the Hyderabad Road Transport Department and after the new Mysore State was formed, they were allotted to Mysore and continued to work as conductors in Raichur Department of the Mysore Government Road Transport Department. After Departmental Enquiry, they were dismissed by the Divisional Controller of the Mysore Government Road Transport Department, who will be hereinafter referred to as "the Controller". After the said order of dismissal was confirmed by the General Manager, they filed suits in the Court of the Subordinate Judge, Raichur, for declaration that the order of dismissal passed by the Controller was illegal and void and they continued to be in service and were entitled to full pay. The case of the respondents was that they had been appointed by the Superintendent, Road Transport Department of the erstwhile State of Hyderabad (who will be hereinafter referred to as "the Superintendent"), and the said Superintendent was the head of the Road Transport Department. The contention of the respondents was that Article 311 (1) of the Constitution of India guarantees to them that they shall not be dismissed or removed from service by an authority subordinate to the authority who appointed them and, as the Superintendent was the head of the Road Transport Department, they could only be removed by the head of the Mysore Government Road Transport Department, i.e., the General Manager, and not by the Controller, who is a subordinate authority. The trial court dismissed all the suits. The learned District Judge in appeal held that in these cases Art. 311 (1) of the Constitution had been violated and allowed the appeals holding that the dismissal of the respondents was null and void. In R. S. As. 117 to 120/67, the appellant is the Mysore State Road Transport Corporation, who was defendant 2 in the trial Court. R. S. As. 881 to 884 of 1967 are by the State of Mysore who was defendant-1 in the trial court.

These appeals are directed against the said judgment and decree passed by the learned District Judge allowing the appeals of the respondents-conductors.

2. Sri Mahendra, learned counsel appearing on behalf of the Mysore State Road Transport Corporation, which will hereinafter be referred to as "the Corporation", has contended that after 1-11-1956, the respondents-conductors came over to the new Mysore State and that as per section 116 of the States Reorganisation Act of 1956, the respondents shall be deemed from 1-11-1956 to have been duly appointed by the competent authority in the new State of Mysore. The competent authority to appoint and dismiss conductors in the new Mysore State, is the Divisional Controller and as such, there is no violation of Article 311 of the Constitution. Sri Mahendra also argues, even without taking into account Section 116 of the States Reorganisation Act the question of subordination referred to in Art. 311 arises only when both the authorities exist. Here, in the new State of Mysore, there is no post of, Superintendent, Road Transport, and hence it cannot be said that Divisional Controller is subordinate to the Superintendent and as such, there is no violation of Art. 311 of the Constitution.

Sri Mahendra also contends that the respondents are entitled to get a declaration only if the posts exist. Here, the Mysore State Road Transport Corporation was constituted on 31-7-1961 and all Civil posts in the Mysore Government Road Transport Department came to be abolished, and, as after 1961 there was no such civil post, the prayer asked for by the respondents that they still continue in the service of the defendants cannot be granted.

3. Sri Ramadas, learned counsel appearing on behalf of the State of Mysore has adopted the arguments of Sri Mahendra.

4. Sri Jagirdar, learned counsel appearing on behalf of the respondents, has supported the judgment of the learned District Judge. He argues that it has been admitted by the appellants that the Superintendent, who appointed the respondents, was the head of the Road Transport Department of the erstwhile Hyderabad State and the only authority above him was the Government. In the Mysore Government Road Transport Department, the General Manager was the head of the Department; and the General Manager, being the equivalent authority, was the only person who was competent to dismiss the respondents. The Divisional Controller was admittedly an officer subordinate to the General Manager and as such he had no competence to dismiss the respondents. He argues

that Section 116 of the States Reorganisation Act does not apply to the present case and there has been no fresh order of appointment of the respondents when they came over to the new State of Mysore. Sri Jagirdar has strongly relied on a decision of this court in R. S. A. No. 627 of 1964 (Mys) wherein, on similar facts, where the conductor had been appointed by the Superintendent, this court held that the Divisional Controller had no competence to dismiss him and there was violation of Art. 311 of the Constitution. Sri Jagirdar also contends that sub-section (7) of section 115 of the States Reorganisation Act guarantees that the respondents' conditions of service shall not be varied to their disadvantage. As under their service conditions, the respondents could only be removed by the head of the Department, as per the guarantee given to them by Sub-section (7) of section 115 of the States Reorganisation Act, the respondents cannot be removed by any person other than the head of the Transport Department.

5. The first contention of Sri Mahendra is that under section 116 of the States Reorganisation Act, the respondents are deemed to have been appointed by the competent authority in the new State of Mysore, who is the Divisional Controller. The said Controller is competent (to appoint) the respondents and also to dismiss them. It may be mentioned that this point has not been raised by the defendants in their written statement. No such issue was framed in the trial court nor was any such contention advanced in both the courts below. It may further be mentioned that this point has not even been raised in the grounds of appeal before this Court. As Sri Mahendra contends that this is purely a question of law which can be raised by him before this Court, I will briefly deal with the same. It may be pointed out that section 116 of the States Reorganisation Act uses the words 'deemed to have been appointed' which shows that they have not been really so appointed. That this is so, is laid down by the Madras High Court in Balakrishnan Nair v. State of Madras, AIR 1957 Mad 769. Discussing the object of section 116 of the States Reorganisation Act, Rajamanar, C. J., speaking for the Bench, in paragraph 3, has observed as follows:

"The object of section 116 (1) of the Act was to regularise what otherwise would have been an irregular state of affairs so far as public services were concerned. On the appointed day there would be officers belonging to the Madras service holding office or discharging duties of posts and offices in the areas which on that day would stand transferred to a new State, Kerala or Mysore.

Such officers would not cease to belong to the Madras service. A question might arise as to their competency to act as officers in an area which was no longer part of Madras. It is to overcome this difficulty that the aid of a fiction is sought and such officers are deemed as from that day, that is, 1st November 1956, to have been duly appointed to their respective posts and offices by the Government of the new State. The fact that they are deemed to have been appointed shows that they really have not been xx xx."

6. Apart from this, it is well settled that the Constitutional guarantee given to a Civil servant by Art. 311 of the Constitution cannot be taken away either by the Legislature by any law or by any rule made under Art. 309 by the Governor. This has been laid down by the Privy Council in Rangachari v. Secretary of State, AIR 1937 PC 27. It has again been reiterated by their Lordships of the Privy Council in N. W. F. Province v. Suraj Narain Anand, AIR 1949 PC 112. Various High Courts have also followed the said decisions of the Privy Council. In Gurmukh Singh v. Union of India, AIR 1963 Punj 370, Faishaw, C. J., speaking for the Bench, has pointed out that in no circumstance can an order of dismissal be passed by an officer of lesser rank. Any rule or statute which permits such an action must be held to be ultra vires as infringing the provisions of Art. 311 (1) of the Constitution. Similarly in Mahadev Prasad Roy v. S. N. Chatterjee, AIR 1954 Pat 285, Ramaswami, J., as he then was, has held that neither the legislature nor the Governor or Rajpramukh may enact a rule under Art. 309 vesting power of dismissal in a Subordinate authority, an authority subordinate in rank to the authority which had appointed the Civil servant, and the constitutional protection contained in Art. 311 could not be wiped out and destroyed by the exercise of the power conferred under Art. 309. I am therefore of opinion that there is no merit in the first contention advanced by Sri Mahendra.

7. In support of his second contention Sri Mahendra has strongly relied on the judgment of Krishnan, J. in Antarsingh v. State of M. P., AIR 1960 Madh Pra 254. In the said decision, a Police Constable who was appointed by the Deputy Inspector General of Police of the erstwhile Indore State, was continued in the service of Madhya Bharat State without any order of fresh appointment. His removal from service by the Superintendent of Police, Indore, was held to be not bad as violating Art. 311 (1). His Lordship held that at no moment the Deputy Inspector General of the erst-

while Indore State co-existed with the Superintendent of Police in the Dist. of Indore and therefore, the Superintendent of Police in the State of Madhya Bharat was not an authority actually subordinate to the Deputy Inspector General in the erstwhile Indore State. The same view had earlier been reiterated by Krishnan, J. in *Raghunath Singh v. State of Madhya Bharat*, AIR 1959 Madh Pra 43 wherein His Lordship held that as the appointing authority in the erstwhile State was defunct, the petitioner must show that the removing authority was subordinate to the appointing authority otherwise, Art. 311 was not attracted. In *Dual Rajan Adetya v. R. K. Bose*, AIR 1958 Cal 356, a single Judge of the Calcutta High Court, Mukherjee, J., held that the expression 'an authority subordinate' indicated an existing subordination and not where the authority dismissing the civil servant at the time of dismissing, suffers no subordination because the post of the former appointing authority had ceased to exist. In arriving at the said conclusion Krishnan, J. relied on AIR 1958 SC 228. But, as pointed out by Sri Jagirdar, the said Supreme Court decision refers to merger or absorption of States and not to integration of States under the States Reorganisation Act. The conditions of service which applied to the Civil servants in the old State, due to merger, were no longer in force and the new State entered into fresh contracts with the civil servants. I may also mention with respect, that it is not possible for me to agree with the view enunciated by the said Madhya Pradesh and Calcutta decisions. If that view is correct, simply because the appointing authority ceases to exist, it would actually mean the denial or taking away of the constitutional right given to the civil servants, under Art. 311 (1) of the Constitution. In my opinion, a civil servant should not be deprived of this valuable constitutional guarantee given to him under Art. 311 (1) for no fault of his, simply because, the authority which appointed him had ceased to exist. I may also mention that this point also has not been pleaded by the appellants in their written statement, nor was it urged in both the courts below.

8. I am inclined to agree with respect with the view taken by the various High Courts in the decisions relied on by Sri Jagirdar in answer to the appellants' second contention. In AIR 1963 Punj 370 referred to earlier, Falshaw, C. J. speaking for the Bench, in paragraph 14 has observed as follows:

"In my opinion the only proper course when the question of dismissing the plaintiff in this case came up was that if there was no officer of the rank of

Deputy Inspector General, then the order of dismissal should have been passed by the Inspector General himself. In my opinion, the meaning of Article 311 (1) is that if there is no officer of equal rank to the appointing officer available, then the order will have to be passed by an officer of superior rank. In no circumstances can such an order be passed by an officer of lesser rank."

In the above case, the petitioner was appointed as Assistant Sub-Inspector of Police in Delhi State by the Deputy Inspector of Police. The post of Deputy Inspector General ceased to exist. The petitioner was dismissed by an order of the Senior Superintendent of Police who has been vested with the powers of the Deputy Inspector General. Their Lordships held that the dismissal contravened Article 311 (1), since a Superintendent of Police even where he is designated as Senior Superintendent is subordinate to the Deputy Inspector General.

In *Anukul Chandramondal v. Commissioner of Income Tax*, AIR 1962 Cal 3 where the Officer was appointed by the Head of the Department and thereafter he was transferred to some other Department, the Calcutta High Court held that as the person was appointed by the head of one Department, he cannot be removed except by a person not lower in rank to the head of the Department to which he was transferred. In *Ramratan Balchand v. State of Madhya Pradesh*, AIR 1964 Madh Pra 114, in Division Bench decision, Dixit, C. J. held that where the Sub Inspector of Police was appointed by the Inspector General of Police of Rajasthan and in consequence of reorganisation of States, he was allotted to the State of Madhya Pradesh, he could be dismissed by the corresponding authority of that State; where he was dismissed by the Deputy Inspector General of Police who was appointed to hold charge of current duties of the Inspector General of Police in addition to his own, it was held that as he was appointed and authorised to perform the current duties of the Inspector General of Police without being clothed with his rank, the order of dismissal was bad and inoperative. With respect, I would prefer to follow the view taken by the said decisions mentioned above, in preference to the earlier decision cited by Shri Mahendra.

9. As contended by Sri Jagirdar, the facts of the case in *R. S. A. 627 of 1964* (Mys) decided by this court are exactly similar. In that case also, the conductor had been appointed by the Superintendent, Road Transport Department of the erstwhile State of Hyderabad. After the reorganisation of States, when he was an employee of the Mysore Government Road Transport Department he was dis-

missed by the Divisional Controller. He filed a suit for declaration that the order of his dismissal was illegal and inoperative and consequently, he continued in service and was entitled to arrears of salary, and claimed arrears of salary. Somnath Iyer, J. held that the Superintendent of the Road Transport Department of the erstwhile Hyderabad State was equivalent to the post of the General Manager of the Mysore Government Road Transport Department and, as the plaintiff was dismissed by the Divisional Controller, who was a subordinate of the General Manager, the dismissal was bad. His Lordship while dismissing the appeal, observed as follows:

"The admissions made by defendant 2 in the reply to the interrogatories administered by the plaintiff was that the plaintiff was appointed by the Superintendent of the Road Transport Department in the erstwhile State of Hyderabad. What was further admitted by Defendant 2 was that the Superintendent of the Road Transport Department in the State of Hyderabad was subordinate to none except the Government of the State of Hyderabad. So, it is clear, as rightly found by the courts below, that the post in the Mysore Government Road Transport Department which was equivalent to the post of a Superintendent of the Road Transport Department in the erstwhile State of Hyderabad was the post of the General Manager of the Mysore Government Road Transport Department. But the plaintiff was dismissed by the Divisional Controller in the Mysore Government Road Transport Department and the Divisional Controller was admittedly subordinate to the General Manager in that Department."

The facts of that case are exactly similar to the facts of the instant case and the said decision applies fully to the instant case. But it is contended by Sri Mahendra that the various legal points urged by him in this case have not been urged or considered in the said judgment and as the points raised by him are important questions of law, the matter may be referred to a Division Bench for an authoritative ruling. As the various points urged by Sri Mahendra, were not urged before Somnath Iyer, J. the question of considering these points in that case did not arise. It no doubt goes to the credit of Sri Mahendra that he has discovered new legal points and has ably argued them. It is true these points were not urged either in R. S. A. 627 of 1964 (Mys) or in the instant case before the trial or appellate courts. But, the mere fact that the points had not been urged in R. S. A. 627 of 1964 (Mys) when the Mysore State Road Transport Corporation had the opportunity and failed to do so, is no ground to refer, this case to a

Division Bench. Besides, I have dealt with the new points and for the reasons mentioned above, I am of opinion that there is no substance in the said contentions and hence I do not consider it necessary to refer the matter to a Division Bench for decision.

10. Finally it was contended by Sri Mahendra that the respondents are entitled to get a declaration that they continue in service only if the posts exist. He argues that in this case, since the Mysore State Transport Corporation has been constituted on 31-7-1961 and all civil posts of the Mysore Government Road Transport Department have been abolished, the prayer of the respondents for a declaration that they still continue in service of the defendants cannot be granted. It may be mentioned that this contention has not been put forward and pleaded by the appellants. No issue on this point has been raised in the case and the respondents have not been called upon to meet the said contention and given an opportunity to have their say. I do not also have benefit of the views of the court below on this aspect of the matter. It is sufficient to say that by Rules 5 and 6 the Corporation has succeeded to the rights and liabilities of the Mysore Government Road Transport Department. By Rule 7, the members of the staff of the Mysore Government Road Transport Department have a right to opt to serve under the Corporation. If the services of the respondents had not been wrongfully terminated, they would have naturally opted to serve under the Corporation and continued as conductors. Because of the default committed by the appellants, and their wrongful dismissal the respondents should not be penalised.

11. From the answers given by the appellants to the interrogatories, it is clear that Sri S. P. Naik, who was the Divisional Traffic Officer, Class I, was in charge exercising the powers of the Divisional Controller of Raichur. Similarly Sri Khadri was authorised to exercise the powers of the Divisional Controller. It is therefore clear that these officers were not even officers holding the rank of a Divisional Controller. It is also admitted by the appellants that the post of Divisional Controller was subordinate to the General Manager. There is no dispute that the Superintendent, Road Transport Department of the erstwhile State of Hyderabad, was the head of the Department. As laid down by this court in R. S. A. 627 of 1964 (Mys), the equivalent post to that of the Superintendent of the Road Transport Department of the erstwhile Hyderabad State, in the Mysore Government Road Transport Department, was that of the General Manager. As part of Art. 311 (1) of the Constitution, only the General

Manager of the Mysore Government Road Transport Department or any higher authority was competent to remove the respondents from service. The Divisional Controller being a subordinate of the General Manager was not competent to dismiss the respondents from service. The order of the court below cannot be said to be illegal or erroneous.

12. In the result, there is no merit in these appeals and they are dismissed. In the circumstances of the case, there will be no orders as to costs.

DRR

Appeals dismissed.

AIR 1969 MYSORE 47 (V 56 C 10)

A. R. SOMNATH IYER
AND AHMED ALI KHAN, JJ.

Wool Industry Development, Co-operative Association Ltd. Ranibennur, Petitioner v. Khadi and Village Industries Commission, Bombay and others, Respondents.

Writ Petn. No. 1485 of 1968, D/- 1-7-1968.

Khadi Village Industries Commission Act (1956), Ss. 15, 19 — Constitution of India, Arts. 14, 15—Granting rebate to some and not to others, or giving rebate on one type of goods is not discrimination. (Paras 5, 6, 7, 8, 10)

R. S. Mahendra and V. N. Satyanarayana, for Petitioner; R. M. Patil and V. H. Ron, for Respondent No. 2.

JUDGMENT: Under the provisions of the Khadi and Village Industries Commission Act, 1956 which will be referred to as the Act in the course of this judgment, a Commission known as the Khadi and Village Industries Commission, which will be referred to as the Commission, was established under Section 4 of that Act. The purpose of the Act was the development of Khadi and village industries and other matters connected therewith, and, Section 15 of the Act enumerated the functions of the Commission which included the encouragement of the production of Khadi and the development of village industries and research in the technique of the production of khadi. Section 19 of the Act authorised the Commission to spend such sums of money as it thought fit on the purposes authorised by the Act.

2. At one stage the Commission decided for the encouragement of the production of woollen blankets, to pay rebate on the retail sales of such woollen blankets referred to as kambals and kambalis at the rate of 10%. Pursuant to a decision which was reached by the Commission as a result of the investigation which it made on 19/20th November 1967, the payment of such rebate with

respect to retail sales of blankets was discontinued with effect from April, 1, 1968. The petitioner before us is a co-operative society which engages itself in the manufacture of woollen blankets. According to the affidavit produced on its behalf in this writ petition, it purchases wool from others and manufactures blankets and sells them both to retail and wholesale purchasers.

3. The complaint made on behalf of the petitioner in this writ petition is that the discontinuance of the payment of rebate by the Commission was discriminatory and transgressed the right of the society to continuance of that assistance, and so, it asks us to quash the resolution and decisions of the Commission by which the payment of rebate on retail sales of woollen blankets was discontinued. It also asks for a direction to respondent 1 which is the Commission and respondent 2 who is the Director of Khadi and Village Industries Commission in Mysore to continue to allow the rebate which the society was receiving until now.

4. According to the revised decision taken by the Khadi Commission, the rebate is now paid only in respect of sales made to Central and State Governments and plantations. What is discontinued is the rebate which was paid in respect of retail sales.

5. This rebate was paid only by way of an assistance which the Commission, in the exercise of its wisdom considered necessary for the production of Khadi and the development of village industries. The assistance which the Khadi Commission may make available in that way is not an assistance which is claimable as of right. The Commission, as the scheme of the Act discloses, is endowed with the power to formulate its policies and to reach its own decisions as to the assistance which it should make available to the manufacturers. It has also the power to decide who should be the recipient of such assistance.

6. There is thus no right in the exercise of which the petitioner-society can contend that the Commission is under a duty to continue to make available the rebate which at one stage the Commission decided to grant.

7. But it was urged by Mr. Mahendra appearing for the society that it has been subjected to hostile discrimination. We do not think that there is any substance in this argument. The submission that the grant of the rebate in respect of sales to the Central and State Governments and its refusal in respect of retail sales amounts to such discrimination is groundless, since the classification made by the Commission is a reasonable classi-

fication. It is obvious that the Commission was of the view that the grant of rebate in respect of sales to the State and Central Governments or to plantations would, having regard to the magnitude of the transactions, promote the purpose of the Act and develop the khadi industry, and, the selection made in that way cannot invite the criticism of discrimination.

8. The Commission had the power to decide whether the grant of rebate in respect of retail sales does or does not promote the purposes of the Act, and, if it reached the conclusion that it does not, it is not for us to substitute our own judgment or conclusion in place of the conclusion reached by the Commission.

9. Moreover, in the counter-affidavit produced on behalf of the Commission it is explained that the Commission after a consideration of the whole question discovered that a large number of co-operative societies did not undertake production and retail sales activities of woollen blankets in conformity with the pattern of assistance of the Commission, and that in consequence, in many cases the rebate and subsidy allowed had to be disallowed subsequently. That was the reason assigned by the Commission for the stoppage of the rebate on retail sales, and it is clear that the ground assigned for such discontinuance is not an irrelevant ground.

10. It was next submitted that the rebate with respect of individual sales continues to be paid in respect of retail sales of woollen cloth out of which garments are prepared. This cloth is described in the affidavit as woollen apparel. Mr. Mahendra constructed the argument that, if on that kind of woollen cloth rebate was continued to be paid in respect of retail sales, there would be small reason for discontinuance of the rebate when woollen cloth was sold in the form of blankets. Here again woollen apparel out of which garments are prepared such as suitings and shirtings and the like is not similar to woollen blankets, and, if the Commission thought that even in respect of retail sales rebate should be allowed in the case of woollen apparel, but that such rebate is not justified in the case of retail sales of woollen blankets, and they had grounds for thinking so, the petitioner cannot contend that he has been subjected to any discrimination.

11. It was at one stage submitted that the petitioner is subjected to enormous prejudice and loss in respect of retail sales of woollen blankets, and that while it is under a duty to sell the blankets at the price fixed by the Commission, the rebate which it was receiving until now

has become unavailable. But with this aspect of the matter we are not concerned in this writ petition so long as the rebate which the petitioner was receiving until now was only in the form of assistance to which it was not as of right entitled.

12. We therefore dismiss this writ petition. No costs.
BDB/D.V.C. Petition dismissed.

AIR 1969 MYSORE 48 (V 56 C 11)

G. K. GOVINDA BHAT

AND M. SADANANDASWAMY, JJ.

B. Subhas Chandra Shetty, Petitioner v. State of Mysore and another, Respondents.

Writ Petn. No. 1864 of 1967, D/- 20-12-1967.

Constitution of India, Art. 16 (4)—Socially backward class — School teacher is not a member of backward class — Even if such teacher after retirement takes to agriculture as his occupation, he does not qualify under Mysore Government Order No. ED 75 TGL D/- 26-7-1963 — Admission to Medical College cannot be granted to his son on ground of one belonging to socially backward class.

The occupations contemplated by Order No. ED 75 TGL D/- 26-7-1963 by the Government of Mysore for the purpose of Art. 16 (4) of the Constitution, are not casual or temporary occupations but the habitual occupations of families; otherwise a person may claim to be treated as backward in one year and forward in another as it suits to his advantage. Any other interpretation would also result in one member of a family being classed as belonging to the socially and educationally backward while another not. The order has treated the family as a unit for classification. It is not possible to envisage a situation where one member of the family is treated as backward while another not. A School teacher cannot even after retirement be treated as belonging to socially and educationally backward classes, merely because he chooses agriculture, one of the occupations specified in para 3 of the order. Where such teacher belongs to an Undivided Hindu family whose income exceeds Rs. 1200/- the fact that the income of such teacher is less than Rs. 1200/- will not enable him to qualify for the income test under the order. AIR 1963 SC 649, Rel. on; AIR 1964 SC 1172, Ref. (Paras 11 to 13)

Cases Referred: Chronological Paras
(1964) AIR 1964 SC 1172 (V 51) —
(1964) 6 SCR 962, Rajagopalachari v. Corporation of Madras

(1963) AIR 1963 SC 649 (V 50)=

1963 Supp 1 SCR 439, M. R. Balaji v.

State of Mysore

11

K. Jagannatha Shetty for Petitioner;
E. S. Venkataramiah, High Court Spl.
Government Pleader, for Respondents.

GOVINDA BHAT J.: This is a writ petition under Article 226 of the Constitution of India by an unsuccessful applicant for admission to the pre-professional course leading to M. B. B. S. Degree in the Mysore Medical College for a Writ in the nature of mandamus directing the respondents (the State of Mysore and the Chairman of the Selection Committee for admission to the Government Medical Colleges, Bangalore Medical College, Bangalore), to admit the petitioner to the pre-professional course leading to M. B. B. S. Degree.

2. Respondent No. 1 the State of Mysore has framed rules called the Mysore Medical Colleges (Selection for Admission) Rules by Notification dated the 19th May 1967 for admission to pre-professional course leading to M. B. B. S. Degree in the Government Medical College.

Under Rule (6) of the said Rules, 30 per cent of the seats are reserved for persons belonging to the 'backward classes'. The procedure for Selection has been laid down by Rule 11 which provides that the Selection Committee shall prepare a list of persons arranging them in the order of merit on the basis of marks obtained in the optional subjects of the qualifying examination. The petitioner who had secured 201 out of 300 marks in P. C. B. (optionals), claimed the benefit of reservation for backward classes. The Selection Committee rejected the petitioner's claim that he belongs to the backward classes on the ground that his father did not satisfy the conditions specified in the Government Order No. ED 75 TGL 63 dated 26th July 1963. The petitioner did not qualify for selection from the merit pool and consequently his application for admission was rejected.

3. It is not disputed that if the petitioner is a member of the backward classes he should have been given a seat. Candidates belonging to the backward classes who had secured a total of 192 marks and above were selected; the petitioner having secured 201 marks would have been selected if his claim for being treated as a member of the backward class had been accepted.

4. The only question for decision is whether the Selection Committee was in error in rejecting petitioner's claim that he is a member of the backward class. In order to decide the said question, it is necessary to set out the Government Order for classification of backward classes

in the State for purposes of Art. 15 (4) of the Constitution of India, hereinafter called the 'Order'. It reads;

"Education Secretariat.

Issues Orders re: classification of backward classes in the State for purposes of Article 15 (4) of the Constitution and reservation of seats in Technical and Professional Institutions:

Read: 1. G. O. No. KD 156 TGL 60 dated 10th July 1961.

2. D. O. No. ED 156 TGL 60 dated 5th August 1961.

3. G. O. No. KD 48 TGL 62 dated 31st July 1962.

ORDER No. ED-75 TGL dated Bangalore, the 26th July 1963.

"Government have all along been anxious to make special provision for the advancement of socially and educationally backward classes. In the light of the several attempts made at classification and judicial pronouncements by various High Courts and the Supreme Court, Government have since reviewed the position for the determination of socially and educationally backward classes.

2. Backwardness for purposes of Article 15 (4) of the Constitution must be social and educational. The problem of determining who are socially and educationally backward classes is a very complex one. An elaborate investigation and collection of data and examination of such data which would inevitably involve considerable length of time, may be desirable. But the obligation of the State to make special provision for the advancement of the backward classes is a pressing problem and cannot be postponed. Pending such elaborate study and investigation of the problem, Government consider that the classification of socially and educationally backward classes should be made on the following basis:

(1) Economic condition; and

(2) Occupation.

3. Social Backwardness: It is a matter of common knowledge that poverty is one of the main factor contributing to social backwardness.

The per capita income of the State for the year 1961 was Rs. 266 per annum. Taking an average family to consist of 5 members, the average income of the family comes to Rs. 1300/- per year. Even though this income is low having regard to the present day cost of living, Government are of the opinion that a family whose income is Rs. 1200/- per annum or less can be regarded as economically backward.

In addition to economic condition, the other determining factor for social backwardness is occupation. Persons or classes following occupation of agriculture, petty business, inferior services, crafts or other occupations involving manual

labour, are in general socially backward. The environmental conditions are also not conducive to progress either in the social sphere or in education. Amongst them, there is little or no urge for progress and improvement of their condition. The Government, therefore, list the following occupations (persons pursuing those occupations) as contributing to social backwardness:

- (1) Actual cultivators;
- (2) Artisan;
- (3) Petty businessman;
- (4) Inferior service (i.e. Class IV in Government service and corresponding class or service in private employment) including casual labour; and
- (5) Any other occupation involving manual labour.

"4. Educational Backwardness: It is well known that while the general level of education and literacy in the State is low, it is lower still among the poorer sections of the people. Especially among agriculturists, artisans, petty businessmen, persons in inferior services and persons following occupations involving manual labour, the level of education and literacy is even lower, and they may reasonably be considered to be educationally backward.

5. 'Hence, classes of people whose annual income is Rs. 1200/- per annum or less and who are pursuing occupations set out in para 3 above can reasonably be classified as socially and educationally backward classes and are hereby so classified.'

6. As regards the quantum of reservation, Government consider that it would be reasonable to reserve 30 per cent of the seats in Professional and Technical Colleges and Institutions for the Backward classes (who answer the criteria mentioned above). This reservation is in addition to the reservation of 15 per cent and 3 per cent to students belonging to Scheduled Castes and Scheduled Tribes in Mysore State.

By Order and in the name of the Governor of Mysore.

Sd/- B. R. Varma,
Secretary to Government,
Education Department.

(Underlining (here in ' ') is ours)

5. By the Order the Government have classified the classes of people following the occupations specified in para 3 therein, and whose annual income does not exceed Rs. 1,200/- as socially and educationally backward.

6. The reasons for rejection of the claim of the petitioner set out in paragraph 3 of the counter-affidavit filed by the Secretary of the Selection Committee are:

(i) that the petitioner's father is a retired teacher and that school teachers

as a class do not come under any of the occupations listed in para 3 of the Order, and

(ii) that the petitioner's father had given his share of income from his undivided family as Rs. 348-20 per annum; therefore his family income was Rupees 4,526-60 which exceeds Rs. 1200/- the maximum prescribed in the Order.

7. The petitioner's case is that his father retired from service about a month after the Government passed the Order, that after retirement he is pursuing the occupation of agriculture and that the material date under the Order for inclusion in the backward classes is the date of the application for admission. His further case is that the income of the undivided family is not the income of his father and as such it cannot be taken into consideration.

8. It was not disputed by the learned Counsel for the petitioner that when the Order was passed, petitioner's family was not eligible for inclusion among the backward classes. But, it was argued that after retirement, petitioner's father is only a pensioner and his present occupation being agriculture, he satisfies the occupational qualification.

9. Learned Counsel argued on the basis of the decision in *Rajagopalachari v. Corporation of Madras*, AIR 1964 SC 1172 that a pensioner is in no employment and he does not carry on any profession, trade, calling or employment and that he is merely in receipt of income for past services in employment and therefore the fact that the petitioner's father is a retired teacher does not disentitle him for inclusion in the Backward Classes. If he satisfies the occupational and income qualifications laid down by the Order and that the past occupation of petitioner's father and the income of his undivided family are wholly irrelevant.

10. The Order was issued by the State Government for purposes of Article 15 (4) (sic) of the Constitution for making special provision for the advancement of the socially and educationally backward classes of citizens in the State of Mysore. The basis of the classification of the socially and educationally backward classes of citizens, according to the Order is their economic condition and occupation. Classes of people following certain occupations as mentioned in para 3 of the Order are, in general, socially backward and their environmental conditions are not conducive to progress either in the social sphere or in education.

11. The occupations contemplated by the Order, in our opinion, are not casual or temporary occupations, but the habitual occupations of families; otherwise a

person may claim to be treated as backward in one year and forward in another as it suits to his advantage. Any other interpretation would also result in one member of a family being classed as belonging to the socially and educationally backward while another not. It was pointed out in *M. R. Balaji v. State of Mysore*, AIR 1963 SC 649 that the special provision for advancement of backward classes under Clause (4) of Article 15 of the Constitution is for classes of citizens and not for individual citizen as such. The classes of citizens falling under the group of socially and educationally backward classes are actual cultivators, artisans, IV Class Government employees etc, whose annual income does not exceed Rupees 1,200/-. The order has treated the family as a unit for purposes of classification. Therefore, what has to be seen is whether a particular family to which the candidate belongs is socially and educationally backward. When the family is considered as a unit for purposes of classification, it is not possible to envisage a situation where one member of the family is treated as backward while another is not.

12. The petitioner's father was a school teacher employed in the service of the erstwhile District Board in South Kanara. He retired in about August 1963. A school teacher is not considered as belonging to the socially and educationally backward classes. While in service, it is not disputed that his family was not one belonging to the socially and educationally backward classes. After retirement, it cannot be said that the retired teacher became socially and educationally backward, merely because he has chosen one of the occupations specified in para 3 of the Order. It is common knowledge that even after retirement, a school teacher is held in the same esteem in society as before and a retired school teacher who takes to agriculture, in our opinion, cannot be regarded as belonging to the socially and educationally backward classes.

13. It is not disputed that the annual income of the Hindu undivided family of the petitioner's father exceeds Rupees 1,200/-. Though technically the income of the undivided family is not the income of its individual members, the social status of a member of a joint Hindu family, it cannot be denied, has relation to the wealth and income of the joint family. Therefore, the view of the Selection Committee that the petitioner's father does not satisfy the income test also cannot be said to be unreasonable.

14. In the result this Writ Petition fails and is dismissed. No costs.
GGM/D.V.C. Petition dismissed.

AIR 1969 MYSORE 51 (V 56 C 12)

T. K. TUKOL AND M. SANTHOSH, JJ.

Mysore Machinery Manufacturers Ltd.
Bangalore, Appellants v. State of Mysore
and another, Respondents.

Writ Petn. No. 1021 of 1967, D/- 6-6-1967.

Constitution of India, Art. 226 — Mandamus — Dismissed workmen staying on premises of factory and refusing to leave — It is not stay-in-strike — It is offence of criminal trespass — Complaint to police for removal of such workmen from premises — Police has power to take action under Criminal P. C. or Mysore Police Act — Inaction by police authorities — Mandamus can be issued against them — Criminal P. C. (1898), Ss. 155, 156 — Mysore Police Act, 1963 (4 of 1964), S. 55 — Industrial Disputes Act (1947), Ss. 2 (q), 25, 28, Sch. 2, Item 5 — Trade Unions Act (1926) (as amended by Act of 1947), S. 2 (1) — Penal Code (1860), Ss. 441 and 447.

Where the relationship of master and servant has ceased between the workmen and the management, by the order of dismissal any assertive action by the workmen in remaining on the premises and refusing to leave the premises, attended with threats of injury and violence on the part of the labour with a view to prevent the willing workers from entering into the factory premises and the supervisory staff of the management from looking after their property and further, their unauthorised occupation of the premises to the exclusion of the management cannot but be regarded as disclosing an intention to commit offences. The action of the workmen constitutes an offence of criminal trespass under sections 441, 447, I. P. C. AIR 1960 SC 160, Relied on.

In such a case, if a complaint is filed by the management to the police authorities disclosing reasonable grounds for believing that offences under Ss. 341 and 447, I. P. C. were being committed and for necessary action, the police authorities can take action under Ss. 155 and 156 of the Cr. P. C. and under section 55 of the Mysore Police Act, 1963. AIR 1958 Raj 202 and (1939) 306 U. S. 240.

(Paras 12, 13, 16)

The act of the dismissed workmen, of remaining on the premises and refusing to leave, does not amount to "stay-in-strike" or "sit-down-strike". AIR 1960 SC 160, Distinguished.

Whether the termination of employment was legal or illegal is immaterial. It is not necessary for the police under such circumstances to consider such ques-

tion. What they have to consider in situations of this type is to ascertain from the facts placed before them as to whether those facts give reasonable grounds for believing commission of cognizable offences or threat of commission of such offences being held out by the workmen. If they come to the conclusion, they have to act and exercise such of the powers vested in them under the law as would meet the particular situation. The fact that there are no individual complaints from the willing workmen does not detract the tenability of the action prayed for by the Management, namely getting the premises cleared from the grip of the dismissed workmen.

(Para 19)

If the police authorities fail to take action, the management can approach the High Court for issue of writ of mandamus against the police authorities. That the management should have approached the Magistrate for redress and that as it had not availed of that alternative remedy open to him under the law, the High Court should not use its discretionary power of issuing a writ of mandamus does not debar the High Court from exercising its discretionary power of issuing a writ. The most expeditious remedy contemplated by law and the right of protection given by law is that of approaching an executive officer like the police; the various provisions of the Code of Criminal Procedure and the Mysore Police Act do indicate bifurcation between the powers and duties of the police and those of a Magistrate. The nature of the remedy sought for by the aggrieved party is also a decisive factor. The most expeditious action contemplated by law is an approach to the police, who when they are satisfied that cognizable offences are being committed, can take immediately preventive measures as also, punitive measures. Even if a Magistrate were approached by the petitioner, the Magistrate would have to direct the police to make an enquiry and submit a report as to what is required to be done. In other words, the Magistrate himself has got to see that his order is executed through the machinery of the police. (Para 20)

Cases Referred: Chronological Paras

- (1960) AIR 1960 SC 160 (V 48) = 12
 1960-1 SCR 806, Punjab National Bank Ltd. v. All India Punjab National Bank Employees' Federation
 (1958) AIR 1958 Raj 202 (V 45) = 12
 (1958) 2 Lab LJ 628, Sadul Textile Mills Ltd. v. Workmen of Sadul Textile Mills
 (1939) 306 U. S. 240 = 83 Law ED 14
 627, National Labour Relations Board v. Fansteel Metallurgical Corporation 17

G. R. Ethirajulu Naidu and V. N. Satyanarayana, for Appellant; E. S. Venkataramiah, High Court Special Government Pleader, for Respondents.

TUKOL, J.: This is an unusual writ petition under Article 226 of the Constitution of India against the respondents including the Commissioner of Police (respondent No. 2) praying for the issue of a writ of mandamus or other appropriate direction to take steps for the prevention of commission of offences by the dismissed workmen and to remove the dismissed workmen from the premises of the petitioner-factory so as to prevent them from indulging in the commission of further offences and for taking such action as is necessary under the law to maintain law and order.

2. The facts and the circumstances under which the present writ petition has been filed may be briefly summarised as follows:

The petitioner is the Mysore Machinery Manufacturers Ltd. This factory is engaged in the manufacture of plant and machinery for supply to various manufacturing units and to other factories. It has a capital of about Rs. 20 Lakhs in the form of machinery installed within the premises, and the capacity of its workmen attending to the various operations is about 500. On the 1st April 1967, the workmen entered the factory, as usual for work and nothing happened till about 4 P.M. on that day. When the first shift came to an end, 270 workmen refused to leave the premises and the Director in charge of the management passed an order of dismissal against those workmen. The workmen who were so dismissed continued to remain within the premises of the factory in spite of the warning that their conduct amounted to misconduct as offending the various Standing Orders of the Company. These workmen had stopped work and a charge-sheet was issued against them on 4th April 1967 asking them to show cause why action should not be taken against them, for acts of misconduct detailed in the charge-sheet. It is pertinent to mention that this charge-sheet and show-cause notice were issued after setting aside the earlier order of dismissal of 1st April 1967. On 6th April 1967, the workmen filed their statements denying the allegations made against them and contending that there was no strike on their part but that there was illegal lock-out on the part of the management. They stated that "overstay inside the factory after doing our work as usual is not a strike, it is not an offence as alleged". It is unnecessary for us to narrate the contentions of the workmen in this writ petition for two reasons: Firstly, they are not parties to the present writ petition and secondly the State

Government has made a reference under Section 10 (1) of the Industrial Disputes Act, 1947, to the Additional Industrial Tribunal at Bangalore, on 25th April 1967 requiring the tribunal to decide whether the stoppage of work was a strike or a lock-out and whether the dismissal of 267 workmen was justified or not and whether they were entitled to reinstatement with back wages and continuity of service.

3. Reverting to the material facts of the present case, it may be stated that even before the 4th April 1967, the Director of the petitioner company had addressed a letter to the Sub Inspector of Police (Annexure C-1) on 1st April 1967. It refers to some previous discussions between that officer and the Director, and to the requests that were made by the management. On 13th April 1967, the Director addressed two communications (Annexures D and E) respectively to the Deputy Commissioner and District Magistrate and to the Commissioner of Police, Bangalore City and the third, on 4th May 1967 to the Secretary to the Government of Mysore in the Home Department. The communications addressed to the Deputy Commissioner and the Commissioner of Police are identically worded. It is enough to mention that so far as the District Magistrate is concerned, he informed the Commissioner of Police (Annexure "G") on 19th April 1967 requesting him "to look into the alleged disorderly and illegal actions of the workers said to be taking place in the premises of the factory and to take such action as deemed fit in the circumstances." The communication addressed to the Commissioner of Police refers to the order of dismissal passed against 270 workmen (including the office-bearers of the Union) and states as follows:

"The abovesaid 270 workers of the factory still continue to remain unlawfully and unauthorisedly within the precincts of the factory and have, in fact, stayed within the premises of the factory without interruption from 1-4-67 to the time of making this application. Even though no acts of violence excepting stone throwing and damaging the buildings of the Company have occurred up-to-now, we have authentic information that the workmen may indulge in violent activities, especially after receiving the dismissal order.

"Some of our supervisory staff have also reported that threats were made indirectly to them that if they continue to come to the factory and attend to their work, bodily harm may be done to them. We also apprehend danger to the property of the factory. Two sides of the factory are fenced with only barbed wire and the workers who are inside the factory are lifting the barbed

wire and are going out and coming in during the night time. With our meagre watch and ward staff it is not possible to check their ingress and digress. We are not able to check the finished goods, tools and cutting tools, etc., lying inside the factory and we apprehend that thefts might have occurred and we also apprehend that thefts may occur in future.

"There are 205 workers who are peacefully discharging their duty during the shift allotted to them and we apprehend bodily harm to them also. The situation is explosive and breach of peace and destruction of property is apprehended to be imminent.

"We, therefore, pray to take necessary action to see that these disorderly and illegal actions of the said 270 workers be prohibited and steps be taken to remove them from the factory premises and also to protect the valuable properties lying inside the factory."

It is the case of the petitioner that no effective relief as prayed for by its application to the Commissioner of Police was given to the Management of the factory. The Secretary to the Government, Home Department, sent a communication to the Inspector-General of Police on 27th April, 1967 (Annexure "H") enclosing the communication addressed by the petitioner as per Annexure "F" and requesting him to take necessary action in the matter. It appears that the petitioner had approached the Commissioner of Labour on 2-5-1967 (Annexure J) requesting him to direct the workers not to molest them in their usual occupation and to withdraw them from the premises so that the work may go on smoothly. The Commissioner of Labour responded on the very next day (Annexure K) intimating that his office could only advise the workers through their Union to withdraw from the premises and that he had no other powers beyond giving persuasive advice. The present writ petition came to be filed on 9-5-1967 praying for the aforesaid reliefs.

4. In the affidavit accompanying the petition, it has been stated that since no action had been taken by the Commissioner of Police in spite of the representation dated 13th April 1967, the petitioner had thought it fit to approach the Court for immediate relief. It is stated in the affidavit that the dismissed workmen were indulging in unlawful acts from the 1st April 1967. It is stated that they were arming themselves with lethal weapons like iron rods, sharp materials and other hardware and threatening the supervisory staff and the other 200 and odd workmen who were prepared to work. It is also stated that the members of the staff and manage-

ment were being prevented from entering the factory and that the materials in the factory were being removed unauthorisedly. Express reference is also made to the workmen meddling with the plant and machinery unauthorisedly and to throwing of stones and obstructing entry into the premises. Fear is also expressed that damage would be caused to the costly machinery. The affidavit also contains extracts from the relevant Standing Orders which prohibit the workmen going on strike without notice and entering the factory premises before the working hours or remaining within the factory premises after the working hours without permission. Reference is also made to the various clauses of the Standing Order No. 36 which enumerates the types of conduct which amount to misconduct. There is a further reiteration of the fact that the movements and acts of the dismissed workmen were causing or were calculated to cause alarm, danger and harm to the person and property and that reasonable apprehensions were being entertained that offences involving force and violence were likely to be committed.

5. Respondent No. 2 has filed a counter-affidavit. He has stated in the first paragraph that he was filing the counter-affidavit on the basis of the available records. According to him, the petition does not disclose any cause of action for the issue of a writ of mandamus as there was no breach of statutory duty on the part of the respondents. His further contention is that the substantial issues raised in the writ petition are already pending adjudication before the Industrial Tribunal. It is admitted that the 270 workmen said to have been dismissed were carrying on strike in the factory but that the strike was peaceful without any likelihood of danger to any person or property of the petitioner. The Commissioner of Police further states:

"The employees who remained in the factory premises were found to be absolutely peaceful. There was no threat or damage to person and property. As the circumstances did not warrant any further action, the local Police was instructed to be vigilant and to see that no untoward incident happened."

The affidavit also makes reference to some criminal complaints filed against the workmen. There is also denial of the facts alleged in the affidavit of the petitioner as regards the threat to person and property. It has also been stated that necessary police arrangements had been made for keeping watch and for taking care to see that no untoward incident occurred.

In his supplementary counter-affidavit, the second respondent has stated that none of the 9 persons mentioned in his

affidavit who had filed affidavits before this Court had lodged any complaint in the jurisdictional police station, either about the alleged threats or about the obstruction to carry on the work. He has also stated that the Sub-Inspector of Police and other higher officers had been frequently visiting the factory and were making enquiries about the developments taking place in the factory premises.

6. It is not necessary to refer to the details contained in the affidavit of the Secretary to the Government, since it is confined to certain discussions that are alleged to have taken place between the Director and himself.

7. The first contention that has been urged on behalf of the respondents is that the complaint filed by the petitioner, disclosed no cognizable offence and that there was no breach of any statutory duty cast on any of the respondents so as to entitle the petitioner to a writ of mandamus.

8. In order to decide this question, it is necessary to refer to the relevant provisions of law in order to ascertain the scope of the obligations and duties cast on a police officer like respondent No. 2. We may first refer to the Mysore Police Act, 1963, which in Chapter VI enshrines and enumerates the executive powers and duties of the police. Section 65 (b) and (c) lays down that it shall be the duty of every police officer to the best of his ability to obtain intelligence concerning the commission of cognizable offences or designs to commit such offences and to lay such information and to take such other steps consistent with law and with the orders of his superiors, as shall be best calculated to bring offenders to justice. Clause (d) of that section lays down that it shall be the duty of every police officer to prevent the commission of offences, while clause (e) casts identical duty to prevent to the best of his ability the commission of public nuisances. Section 66 refers to the power of the police officer to enter places of public resort while Section 67 refers to his power to search suspected persons in a street, etc. Section 73 lays down that it shall be the duty of the Police to see that every regulation and direction made by an authority under Sections 42, 54, 55, 56 or 63 is duly obeyed. Section 55, which has a bearing on the point at issue refers to the powers of the Commissioner of Police as regards removal of persons about to commit offences. Clause (b) empowers the Police Commissioner to direct a person in writing to remove himself from any area or part of the area within his local jurisdiction when "there are reasonable grounds for believing that such person is engaged or is

about to be engaged in the commission of an offence involving force or violence or an offence punishable under Chapter XII, XVI or XVII of the Indian Penal Code, or in the abetment of any such offence, and when in the opinion of such officer witnesses are not willing to come forward to give evidence in public against such person by reason of apprehension on their part as regards the safety of their person or property". Section 70 makes it obligatory on all persons to conform to the reasonable directions of a Police Officer given in fulfilment of any of his duties under the Act. Section 71 empowers a police officer to restrain or remove any person resisting or refusing or omitting to conform to any direction referred to in Section 70. That section also empowers him to take such person before a Magistrate or, in trivial cases, to release him when the occasion is past.

9. Besides these powers, we may refer to some of the provisions contained in Chapter XIV of the Code of Criminal Procedure. Section 154 lays down that "every information relating to the commission of a cognizable offence if given orally to an officer in charge of a police-station, shall be reduced to writing by him or under his direction, and be read over to the informant; and every such information, whether given in writing or reduced to writing as aforesaid, shall be signed by the person giving it, and the substance thereof shall be entered in a book to be kept by such officer in such form as the State Government may prescribe in this behalf." Section 155 (1) refers to the information given to an officer in charge of a police station in respect of non-cognizable offences. That section makes it obligatory on such police officer to enter in a book to be kept for the purpose the substance of the information given; there is an obligation cast on him to refer the informant to the Magistrate. Section 156 empowers him to investigate into cognizable offences while Section 157 prescribes the procedure to be followed where cognizable offences are suspected and where the police officer sees no sufficient ground for entering on an investigation. Under this section, if, from the information received or otherwise, an officer in charge of a police station has reason to suspect the commission of an offence which he is empowered under Section 156 to investigate he shall forthwith send a report of the same to a Magistrate empowered to take cognizance of such offences upon a police-report and proceed in person, or depute one of his subordinate officers for making investigation.

10. From the aforesaid provisions it is clear that when an officer receives in-

formation complaining of the commission of a cognizable offence he has to make a report to the Magistrate and start investigation. If, on the other hand, he considers that the information given discloses a non-cognizable offence, he has to enter in a book kept for the purpose the substance of the information and he must direct the informant to approach the Magistrate. The other powers under the Mysore Police Act require him to take preventive steps either by directing the persons about to commit an offence to remove themselves from the premises or by taking necessary action himself to remove them so as to prevent the commission of the offence complained of.

11. What is however seriously urged on behalf of the respondents is that the complaint given by the petitioner to the Commissioner of Police and the other facts placed before him did not disclose the commission of any cognizable offence. In referring to the facts alleged in the petition, it is necessary to mention that none of the respondents has secured the affidavit of that Police Officer who actually visited the factory premises and verified the truth or falsehood of the facts set out in writ petition or in the application filed before the Commissioner of Police. As we have already stated, the Commissioner of Police has sworn from the records before him. In these circumstances, we are inclined to accept the various averments made in the application to the Commissioner of Police supported by various averments contained in the present affidavit as setting out facts which are not controverted. If these facts are accepted, as we are inclined to accept them for the aforesaid reason, we have to hold that the information disclosed that about 270 workmen have been squatting inside the factory day and night since about 1st April 1967, have been preventing the supervisory staff of the management from entering that part of the factory which is in their occupation, that they are preventing the other willing workmen from working the factory, that they had armed themselves with deadly weapons threatening the willing workers of the factory, that they had thrown stones and damaged the factory buildings and that they have been committing such acts as are calculated to cause alarm, danger and harm to the person and property of the management. In our opinion, the facts disclosed by the complaint filed by the petitioner before the Commissioner of Police disclosed reasonable grounds for believing that offences under sections 341 and 447 of the Indian Penal Code were being committed. The former section provides punishment for wrongful restraint while the latter provides punishment for criminal trespass.

Section 339 of the Indian Penal Code defines 'Wrongful restraint'. It reads:

"Whoever voluntarily obstructs any person so as to prevent that person from proceeding in any direction in which that person has a right to proceed, is said wrongfully to restrain that person."

Exception — The obstruction of a private way over land or water which a person in good faith believes himself to have a lawful right to obstruct, is not an offence within the meaning of this section."

From the facts alleged it appears to us that the complaint and the averments in the affidavit do disclose that some at least of the dismissed workmen were voluntarily obstructing the management from entering into the premises of the factory which they have a right to enter and were also prohibiting the willing workers from proceeding to the place of work which they have a right to proceed and continue their work. Section 441 of the Indian Penal Code defines 'criminal trespass.' It reads:

"Whoever enters into or upon property in the possession of another with intent to commit an offence or to intimidate, insult or annoy any person in possession of such property, or, having lawfully entered into or upon such property, unlawfully remains there with intent thereby to intimidate, insult or annoy any such person, or with intent to commit an offence, is said to commit 'criminal trespass.'"

We may also mention that the offences under sections 341 and 447, I. P. C. are cognizable, bailable and compoundable.

12. It has been urged with sufficient emphasis by the learned Government Pleader that 'stay-in-strike' is a weapon sanctioned by law and that it is open to industrial workmen to resort to it whenever necessary for the enforcement of their demands and that such 'stay-in-strike' does not amount to criminal trespass.

In support of this argument, reliance has been placed on paragraph 47 of the judgment of the Supreme Court in Punjab National Bank, Ltd. v. All India Punjab National Bank Employees' Federation, AIR 1960 SC 160. That paragraph reads:

"Does the conduct of the strikers as found by the appellate tribunal constitute criminal trespass under S. 441 of the Indian Penal Code? That is the next point which calls for decision. It is argued that the conduct of the employees amounts to criminal trespass which is an offence and as such those who committed criminal trespass would not be entitled to reinstatement. According to the Bank the employees committed criminal trespass inasmuch as they either entered un-

lawfully or having lawfully entered continue to remain there unlawfully with intent thereby to insult or annoy their superior officers. It would be noticed that there are two essential ingredients which must be established before criminal trespass can be proved against the employees. Even if we assume that the employees' entry in the premises was unlawful, it is difficult to appreciate the argument that the said entry was made with intent to insult or annoy the superior officers. The sole intention of the strikers obviously was to put pressure on the Bank to concede their demands. Even if the strikers might have known that the strike may annoy or insult the Bank's officers it is difficult to hold that such knowledge would necessarily lead to the inference of the requisite intention. In every case where the impugned entry causes annoyance or insult it cannot be said to be actuated by the intention to cause the said result. The distinction between knowledge and intention is quite clear, and that distinction must be borne in mind in deciding whether or not in the present case the strikers were actuated by the requisite intention. The said intention has always to be gathered from the circumstances of the case and it may be that the necessary or inevitable consequence of the impugned act may be one relevant circumstance. But, it is impossible to accede to the argument that the likely consequence of the act and its possible knowledge must necessarily import a corresponding intention. xx xx xx"

On the strength of this passage, the learned Government Pleader contends that it is not possible to hold that the dismissed workmen had committed criminal trespass.

In that case, their Lordships were dealing with 'pen-down strike'. The employees had entered the office and were occupying their seats, but were refusing to take pen and continue the work during office hours. The facts of that case are easily distinguishable. In the first instance, the 'pen-down strike' was wholly confined to the regular working hours. In the second place, there was neither any order of suspension nor any order of dismissal against any of the employees. In the present case, 270 workmen, whose activities are said to be responsible for the present writ petition, have been suspended from work. There was an order of dismissal also. They have been continuing in the factory premises day and night outside office hours. It is alleged that they have been threatening their co-workers and preventing them from working in the factory and have been preventing the supervisory staff of the management from entering that part of the factory where

they have been squatting unauthorisedly. It is also alleged that some of them have armed themselves with lethal weapons and have damaged some walls of the factory by throwing stones. In deciding that knowledge and intention can legitimately be attributed to the dismissed workmen, we may refer to the last portion of paragraph 45 of the judgment of the Supreme Court already referred to, wherein their Lordships have stated—

"They entered the premises as employees of the Bank and having taken their seats they exercised their right of striking work. If the Bank has suspended the employees it would have been another matter; but so long as the relationship of master and servant continued the employees could not be said to have committed civil trespass when they entered the premises at the time."

It can be easily concluded from these observations of their Lordships that where the relationship of master and servant has ceased, any assertive action attended with threats of injury and violence on the part of the labour with a view to prevent the willing workers from entering into the factory premises and the supervisory staff of the management from looking after their property and further, their unauthorised occupation of the premises to the exclusion of the management cannot but be regarded as disclosing an intention to commit offences.

13. The view expressed above by us that the action of the dismissed workmen amounts to a criminal trespass and that the respondent 2 can take action finds support from the views expressed in the two decisions to which we are presently making a reference.

14. In *Sadul Textile Mills Ltd. v. Workmen of Sadul Textile Mills*, 1958-2 Lab LJ 628 : (AIR 1958 Raj 202), their Lordships of the Rajasthan High Court were considering the implications of a stay-in-strike and the nature of the conduct of the workmen with reference to their claim for reinstatement etc. They quoted the following passage from Teller's "Labour Dispute and Collective Bargaining" as giving an acceptable definition of a 'sit-down strike' and its nature.

"Sit-down strike is defined as occurring whenever a group of employees or others interested in obtaining a certain objective in a particular business forcibly take over possession of the property of such business, establish themselves within the plant, stop its production and refuse access to the owners or to the others desiring to work. Sit-down strike should more accurately be defined as a strike in the traditional sense to which is added

the element of trespass by the strikers upon the property of the employer. All the cases have uniformly out-lawed the sit-down strike."

15. The effect on the employer of the position taken up by the employees in a case like the present one was considered by their Lordships and the following passage may be quoted usefully from the judgment of Wanchoo, C. J.:

"By remaining on the property, they practically deprived the employer of his property and also practically stopped him from carrying on his business with the help of others. Further, a great burden is put on the management when the striking workers remain inside the mill and in possession of it, to arrange for the protection of the employer's property. There is at the very least an element of trespass upon the property of the employer in the case of a sit-down or stay-in-strike and such a strike must, therefore, in our opinion, be always unjustified, whatever may be the justification of an ordinary strike in similar circumstances."

16. We have already indicated that as soon as an order of suspension or dismissal was made, the right of the workmen to remain in the premises came to an end and their continuance on the property of the management with the avowed object of excluding the management from the use of the factory and preventing the supervisory staff and other willing workmen by intimidation and threat of violation from attending to their duties would attract the relevant provisions of the Penal Code relating to a criminal trespass and wrongful restraint.

17. In *National Labour Relations Board v. Fansteel Metallurgical Corporation*, (1939) 306 U. S. 240 the employees had resorted to violence and coercion. The Supreme Court of America had to consider what would be the nature of the strike resorted to by such workmen and observed as follows:

"But reprehensible as was that conduct of the respondent, there is no ground for saying that it made the respondent an out-law or deprived it of its legal rights to the possession and protection of its property. The employees had the right to strike but they had no license to commit acts of violence or to seize their employer's plant. We may put on one side the contested questions as to the circumstances and the extent of injury to the plant and its contents in the efforts of the men to resist eviction. The seizure and holding of the buildings was itself a wrong apart from any acts of sabotage. But in its legal aspect the ousting of the owner from lawful possession is not essentially different from an assault upon

the officers of an employing company or the seizure and conversion of its goods, or the despoiling of its property or other unlawful acts in order to force compliance with demands. To justify such conduct because of the existence of labour dispute or of an unfair labour strike would be to put a premium on resort to force instead of legal remedies and to subvert the principles of law and order which lie at the foundations of society." Proceeding further, Hughes C. J., who delivered the judgment of the majority observed:

"This was not the exercise of 'the right to strike' to which the Act referred. It was not a mere quitting of work and statement of grievances in the exercise of pressure recognised as lawful. It was an illegal seizure of the building in order to prevent their use by the employer in a lawful manner and this by acts of force and violence to compel the employer to submit. When the employees resorted to that sort of compulsion they took a position outside the protection of the statute xx xx xx xx".

18. We are not concerned in this case with the question as to whether the termination of their employment was legal or illegal. What we are concerned with is the conduct of the dismissed workmen in persisting to remain on the property even after the order of dismissal and during day and night. This conduct, in our opinion, as already observed, is not only wholly unjustified but is also illegal bringing the action of such of them as are persisting in such conduct within the four corners of the law.

19. What has been urged on behalf of the respondents is that they had taken all the necessary precautions in order that there should not be any breach of peace or any untoward incident. While the management has prayed for a positive action on the part of the police, the respondent has pleaded in defence the passive attitude adopted by the police to meet the situation. It is further contended that when the dispute between the workmen and the employer is before the Industrial Tribunal, it would not be correct on the part of the Police to take any action against the workmen. We must make it clear that in the action prayed for by the management no question arises for decision as to whether the order of dismissal or suspension is legal or illegal. It is not necessary for the police also under such circumstances to consider such question. What they have to consider in situations of this type is to ascertain from the facts placed before them as to whether those facts give reasonable grounds for believing commission of cognizable offences or threat of commission of such offences being held out by the

workmen. If they come to the conclusion, as the present facts have left no doubt in our mind, that there are reasonable grounds for believing that cognizable offences are being committed, they have to act and exercise such of the powers vested in them under the law as would meet the particular situation. It is further stated in the counter-affidavit that no offence was committed by the workmen and that there were no individual complaints from the willing workmen at the hands of the dismissed workmen. The management has prayed the Commissioner of Police by the application dated 13th April 1967 for immediate relief of getting the factory premises cleared from the grip of the dismissed workmen to facilitate their running the factory. It does not appear from the attitude adopted by the Management that they are interested in prosecuting the dismissed workmen. All that they seem to be concerned with is to have such facilities at the hands of the law as would enable them to work out their factory and protect the interests of such of the workmen as are willing to work in the factory. The fact that there are no individual complaints from the willing workmen does not detract the tenability of the action prayed for by the Management. We are therefore unable to appreciate the passive attitude adopted by the respondents in the present case. It may be that certain indiscreet threats held out by the Director of the Company in his letter dated 1st April 1967 to the effect that the Government of Mysore would be held responsible for any damage that they might suffer owing to the denial of the protection by the police, might be somewhat offensive. But, that should not however prevent respondent No. 2 from taking such action as is necessary under the law. It is not unusual that sometimes parties who have suffered use either unparliamentary or harsh language, but that cannot detract a public servant discharging his lawful duties from performing what the law requires him to do.

20. It was lastly contended by the learned Government Pleader that the petitioner should have approached the Magistrate for redress and that as he had not availed himself of that alternative remedy open to him under the law, this Court should not use its discretionary power of issuing a writ of mandamus against the respondents. We do not think that the failure of the petitioner to approach the Magistrate in a particular case either debars him from approaching this Court or debars us from exercising our discretionary power of issuing a writ. The most expeditious remedy contemplated by law and the right of protection given by law is that

of approaching an executive officer like the police; the various provisions of the Code of Criminal Procedure and the Mysore Police Act do indicate bifurcation between the powers and duties of the police and those of a Magistrate. The nature of the remedy sought for by the aggrieved party is also a decisive factor. The most expeditious action contemplated by law is an approach to the police, who when they are satisfied that cognizable offences are being committed, can take immediately preventive measures as also punitive measures. In the present case, what has been sought for is a preventive measure, preferably for removal of the dismissed workmen from the premises of the factory to facilitate the working of the factory. Even if a Magistrate were approached by the petitioner, the Magistrate would have to direct the police to make an enquiry and submit a report as to what is required to be done. In other words, the Magistrate himself has got to see that his order is executed through the machinery of the police. That is why in cognizable offences the law requires the police to take action without waiting for the orders of the Magistrate.

21. For the reasons stated above, we have come to the conclusion that a writ as prayed for will have to issue. As we have already indicated, there are various measures the adoption of which can give immediate relief to the petitioner. It is possible to direct the dismissed employees still squatting within the premises of the factory to disperse and remove them from the premises of the factory. It is also possible to remove them bodily from the premises of the factory. It is possible to arrest them and keep them under detention for such time as is necessary or until the order of the Magistrate. It is not for the court to advise as to what is the remedy to be adopted. It is a matter for the decision of the police officer in charge of this particular case to decide what he should do and what course he should adopt in order to give an effective relief to the petitioner.

22. We accordingly direct that a writ of mandamus shall issue against respondent No. 2 to remove the dismissed workmen from the premises of the factory and take such other action as is necessary to prevent the commission of the offence by the dismissed workmen so as to enable the petitioner to get exclusive control and possession of his premises. The petitioner shall get his costs from the respondents. Advocate's Fee Rs. 100/-.

RGD

Writ issued.

AIR 1969 MYSORE 59 (V 56 C 13)

M. SADASIVAYYA AND

D. M. CHANDRASHEKHAR, JJ.

Mythili, Petitioner v. State of Mysore by its Chief Secretary and others, Respondents.

Writ Petn. No. 2296 of 1965, D/- 23-11-1967.

Constitution of India, Arts. 14 and 16—Provisions of Art. 14 do not ensure absolute uniformity—Likewise equality of opportunity for appointment to public offices under Art. 16 need not be absolute — Rule 2 of Mysore Absorption of Instructors and Assistant Instructors in Tailoring Rules providing for appointment of retrenched craft teachers from Commerce and Industries Department as Tailoring Instructors in Education Department notwithstanding any orders fixing the qualification for such Instructors, do not violate Arts. 14 and 16 of the Constitution — Such retrenched crafts teachers form a separate class.

(Para 8)

Prahalada, for Petitioner; E. S. Venkataramaiah, High Court Spl. Government Pleader, for Respondents 1 to 3 and H. B. Datar, for Respondents 7 to 10.

CHANDRASHEKHAR, J.: The petitioner was formerly working as a teacher in Primary School. By the memo dated 17-10-1962 (marked as Exhibit 'B') issued by the Deputy Director of Public Instruction, Chitradurga, she was temporarily promoted as Tailoring Instructor (the name of the post is used uniformly irrespective of the sex of the incumbent) and posted to the Government High School, Shantigram, Hassan District. By the Memo dated 19-10-1965 (marked as Exhibit 'D') issued by the Director of Public Instruction in Mysore, respondent-17 was appointed as Tailoring Instructor and posted to the Government High School at Shantigram in the place of the petitioner. In this petition under Article 226 of the Constitution, the petitioner has challenged the memo (Exhibit 'D') by which she was sought to be replaced by respondent-17.

2. After filing this petition, the petitioner made an application for an interim order staying the operation of the impugned memo. But, before any order could be made on such application, she was relieved from the post of Tailoring Instructor in Government High School at Shantigram and respondent-17 took charge of that post.

3. Respondents 4 to 38 were serving as Crafts Teachers and Assistant Crafts Teachers in the Department of Industries and Commerce. When those posts were abolished, the Governor in exercise

of the power under the proviso to Article 309 of the Constitution, made rules called "The Mysore Absorption of Instructors and Assistant Instructors in Tailoring Rules, 1965" which were published by the Notification dated 29-5-65 (marked Exhibit 'C'). Rule 2 of these Rules provides that notwithstanding anything contained in the Mysore State Civil Service (General Recruitment) Rules, 1958, and the orders fixing the general qualification for Instructor and Assistant Instructor in Tailoring, the persons mentioned in column 2 of the Schedule to corresponding entry in column 3, with effect from the date of the Notification, be deemed to have been absorbed in the category of posts in the Mysore Education Department mentioned in the corresponding entry in column No. 4 thereof.

4. It is in pursuance of these Rules that respondent-17, who was formerly serving as Crafts Teacher in the Department of Industries and Commerce and whose services had been terminated, was appointed as Tailoring Instructor and posted to the Government High School, Shantigrama.

5. Mr. Prahalada, the learned counsel for the petitioner contended that while the petitioner possessed the qualifications prescribed for the post of Tailoring Instructor in High Schools, many of the respondents who had been appointed as Tailoring Instructors under the aforesaid Rules, did not possess the requisite qualifications for being so appointed.

6. Mr. Prahalada did not dispute that respondent 17 who was posted in place of the petitioner possessed the requisite qualifications for being appointed as Tailoring Instructor in High School, but, what Mr. Prahalada contended was that if such of the respondents who did not possess the requisite qualifications had not been appointed, the necessity for reverting the petitioner from the post to which she had been temporarily promoted, would not have arisen.

7. At the time when respondents 4 to 38 had been appointed as Tailoring Instructors in High Schools, the qualifications for those posts had not been prescribed by any Rules made by the Governor under the proviso to Article 309 of the Constitution. But, those qualifications were prescribed merely by a Government Order. Even if those qualifications had been prescribed by Rules made by the Governor under the proviso to Article 309 of the Constitution, it was open to the Governor, by subsequent Rules, to modify those qualifications in respect of any class of appointees so long as Articles 14 and 16 were not violated. But Mr. Prahalada argued that the aforesaid Rules made by the Governor for

the absorption of the Crafts Teachers retrenched from Department of Industries and Commerce, violated Articles 14 and 16 of the Constitution because those Rules enabled the retrenched Crafts Teachers to be appointed as Crafts Instructors in the Education Department, without regard to their possessing requisite qualifications.

8. It is well settled that Article 14 of the Constitution does not ensure absolute uniformity; and that it permits different classes being treated differently, provided the same results from classification based on criteria having reasonable relation to the object sought to be achieved by such classification. Likewise, equality of opportunity for employment or appointment to public offices under Art. 16 need not be an absolute equality. Equality of opportunity guaranteed under Art. 16 is not violated by different classes of applicants with different attainments like previous experience, being dealt with differently so long as such classification is founded on a reasonable basis.

The aforesaid Rules made by the Governor provide for absorption of the category of officials who had been working as Crafts Teachers in another Department of the Government (namely, the Industries and Commerce Department) and whose services were terminated on account of abolition of those posts. They had acquired experience while they were working as Crafts Teachers in the Industries and Commerce Department. Taking into account such experience and the need to absorb those officials into service, these Rules did not insist on those retrenched officials having the general qualifications which might otherwise be required for persons directly recruited or promoted to those posts. We think in the circumstances, the said retrenched officials, who were subsequently absorbed as Crafts Instructors in the Education Department, form a separate class for whom special provision could be made regarding their eligibility, without violating Articles 14 and 16 of the Constitution; and Rule 2 of the said Rules and the classification made therein can be justified on the ground of the officials absorbed under those Rules having acquired the necessary experience while discharging similar duties when they were working in the Department of Industries and Commerce before their services were terminated on account of abolition of the posts in that Department.

9. Thus, the petitioner has not established that the appointment of respondents 4 to 38 made in accordance with the said Rules were invalid or violative of Arts. 14 and 16. Moreover, respondent 17, who replaced the petitioner, had been

appointed as Crafts Teacher on 29-5-1961, while the petitioner was promoted temporarily as Tailoring Instructor subsequently, i.e., only on 17-10-1962.

10. However, Mr. Prahalada next contended that under the terms of the memo by which the petitioner was promoted temporarily as Tailoring Instructor, she could not be reverted unless that temporary vacancy ceased or until that post was filled by appointment by the Public Service Commission. The memo by which the petitioner was promoted, clearly stated that such promotion was purely on a temporary basis. On a proper construction of the memo it appears to us that the two events, namely, the cessation of the temporary vacancy and the appointment by the Public Service Commission for that post, merely indicate the outermost points of time beyond which she could not be continued in that post and that it did not mean that the authorities could not revert her to the lower post earlier to either of these points of time for any valid reason.

11. For the reasons stated above, this petition fails and is dismissed. But, we make no order as to costs.
GGM/D.V.C. Petition dismissed.

AIR 1969 MYSORE 61 (V 56 C 14)

**A. R. SOMNATH IYER
AND AHMED ALI KHAN, JJ.**

H. D. Kolkar, Petitioner v. State of Mysore by its Chief Secretary, Vidhana Soudha, Bangalore and others, Respondents.

Writ Petn. No. 2545 of 1965, D/- 16-4-1968.

Bombay Police Act (22 of 1951), S. 25 (2) (a), (c) — Bombay Police (Punishment and Appeal) Rules (1956), Rule 17 (2) — Validity — Power of State Government to enhance punishment under its revisional jurisdiction — S. 25 (2) (c) does not authorise revisional jurisdiction — Rule 17 (2) is invalid.

Rule 17 (2) of the Bombay Rules made under S. 25 (2) (c) of the Act, which confers the revisional power on the State Government under which it can enhance punishment imposed under section 25 (2) (a), is invalid for, the Act does not authorise the exercise of any revisional jurisdiction by the Government when once decision for imposition of punishment has been made by the authority under S. 25 (2).

(Paras 21, 19)

It is clear from the language of sub-clause (c) of section 25 (2) that the only rules and orders which could be made under that clause are rules and orders

to which the 'exercise' of the power conferred by section 25 (2) (a) is 'subject.' The words 'the exercise of any power' with which clause (c) opens, demonstrate that a rule or order authorised by it could only control or regulate the power legislatively bestowed on the designated functionaries. But that power of supervision through a rule or order is restricted to the control of the power exercisable by the functionaries to whom it is confided by sub-section (2) which exhausts itself when it is exercised.
(Para 18)

Hence once the exercise of such power results in the imposition of a punishment or exoneration, that punishment or exoneration becomes final subject only to an appeal which is authorised by S. 27, and hence rule 17 (2) of the Bombay Rules by which Government by a rule made by themselves acquired power to exercise revisional jurisdiction and to make an enhancement of punishment was clearly beyond their competence.

(Para 20)

H. B. Datar, for Petitioner; U. L. Narayana Rao, for E. S. Venkataramaiah, High Court Special Government Pleader, for Respondents.

SOMNATH IYER, J.: The petitioner who became a Head Constable after his allotment to the new State of Mysore, started service as a Police constable in the State of Bombay in the year 1935. A disciplinary proceeding against him was commenced in the new State of Mysore in the year 1962. The charge against him was that he was found missing from his post between 11-30 p.m. on March 21st, 1962 and 3-30 p.m. on the next day. The Assistant Superintendent of Police who conducted the enquiry submitted his report to the concerned Superintendent of Police who accepted it. The Superintendent of Police found the petitioner guilty of the charge, and demoted him as police constable. The appeal preferred by the petitioner to the Deputy Inspector General of Police was dismissed, and thereafter the petitioner invited trouble by presentation of revision petition to the State Government under rule 17 of the Bombay Police (Punishment and Appeal) Rules, 1956. When that revision petition was presented, Government asked him to show cause against the enhancement of the punishment imposed by the Superintendent of Police, and after hearing the petitioner, the punishment was enhanced to a punishment of dismissal.

2. In this writ petition, Mr. Datar made two submissions for the petitioner. The first was that the disciplinary proceeding was not conducted in accordance with law, and the second was that the enhancement of the punishment was beyond the competence of Government.

3. In support of the first submission, more than one argument was advanced. It was first contended that the enquiring authority refused to supply the petitioner copies of the statements of witnesses recorded during the preliminary enquiry to which the chargesheet, a copy of which was served on the petitioner, referred. It was next contended that not all the three documents to which the chargesheet referred as the basis of the disciplinary proceeding, were supplied to the petitioner.

4. There does not appear to be any substance in these submissions since in the statement of the petitioner recorded on May 14, 1962 by the enquiring authority, he admitted that all the documents referred to in the chargesheet had been supplied to him. It is true that the petitioner did make a requisition for the supply of certain documents on April 2, 1962 and on April 14, 1962, and that that requisition was turned down through the communications addressed to him by the enquiring authority on April 11, 1962 and April 19, 1962. But whatever might have been the position consequent upon those communications sent by way of reply, it is abundantly clear from the admission made by the petitioner on May 14, 1962 that all the documents referred to in the chargesheet had been supplied to him by then.

5. It was next contended that the Superintendent of Police made a mechanical adoption of the findings of the enquiring authority without an independent discussion of the material on record and of the arguments advanced on behalf of the petitioner.

6. It is true that the Superintendent of Police stated that all the contentions raised by the petitioner had been adequately discussed by the enquiring authority. But that does not mean that there was no independent application of the mind of the Superintendent of Police to these materials. We are convinced that there was no mechanical adoption of the findings of the enquiring authority and that there was an independent application of the mind of the Superintendent of Police to the evidence on which he rested his finding.

7. We are not impressed by the argument that the Inspector General of Police who heard the appeal did not make an adequate discussion of the evidence. We find that he did. It is seen from his order that he not only depended upon the evidence produced in support of the charge, but also upon the admission made by the petitioner that he had absented from his post at the relevant point of time. The Deputy Inspector General of Police considered his explanation and justification for such absence and discarded it for

the reason that in his opinion the evidence produced by him in justification of his absence was untrustworthy.

8. We do not therefore accept the argument that the disciplinary proceeding was not conducted in accordance with law or that there was any abdication of appellate power by the Deputy Inspector General of Police.

9. We now proceed to consider the argument concerning the competence of Government to enhance the punishment imposed by the Superintendent of Police. As we have already stated that enhancement was made in a revision petition presented by the petitioner under rule 17 of the Bombay Police (Punishment and Appeal) Rules, 1956 to which we shall refer as the Rules in the course of this judgment. That rule reads:

"1. The State Government shall alone have the power of revision and revision shall lie only in respect of punishments which are appealable.

2. The State Government, of its own motion or otherwise, call for the record of any case in which an order has been made by an authority subordinate to it in the exercise of any power conferred on such authority by the Rules and may:

(a) confirm, modify, or reverse the order, or

(b) direct that further enquiry be held in the case;

(c) reduce or enhance the punishment inflicted by the order;

(d) make such other order in the case as it may deem fit.

Provided that where it is proposed to enhance the punishment inflicted by any such order, the police officer concerned shall be given an opportunity of showing cause against the proposed enhancement."

10. The show cause notice issued to the petitioner when Government proposed to enhance the punishment was issued under sub-rule '2' of the above Rules. But by the time, the impugned enhancement was made by Government, the Mysore Police Act, 1963, had come into force, and that Act repealed the Bombay Police Act and the Rules made thereunder. The power to hear a revision petition and to make an enhancement of a punishment imposed in disciplinary proceeding was conferred on Government under the new Act by section 25 (2) of that Act, the provisions of which are similar to the provisions of rule 17 (2) of the Bombay Rules. So it was that when Government made the impugned enhancement on October 15, 1965, they purported to make that enhancement under section 25 (2) of the new Mysore Police Act, 1963.

11. The twin argument presented by Mr. Datar about the competence to make

the enhancement was firstly that with respect to a punishment imposed before the new Act came into force, power could not be exercised under the new Act, and secondly, that that part of rule 17 (2) of the Bombay Rules which authorised enhancement of punishment by the State Government was invalid.

12. Mr. Narayana Rao, the learned Government Pleader, is, in our opinion, right in making the submission that although the impugned enhancement purports to have been made under S. 25 (2) of the new Act, it is in substance an enhancement made under rule 17 (2) of the Bombay Rules. It is clear from Section 25 of the new Act that the power to enhance the punishment imposed in a disciplinary proceeding could be exercised only where a punishment is imposed under section 23 of that Act. That being so and since it had not commenced to operate when that punishment was imposed but was imposed only under section 25 (2) (a) of the Bombay Police Act, 1951, the power to make an enhancement if that power was available, was that which rule 17 (2) of the Bombay Rules created. We are therefore of the opinion that notwithstanding the misdescription of the statutory provision under which the impugned enhancement was made, that enhancement was in reality made in the exercise of the power created by rule 17 (2) of the Bombay Rules.

13. The question therefore is whether that part of rule 17 (2) of the Bombay Rules which authorises Government to enhance a punishment is open to the denunciation that it is invalid. It is seen from the preamble to the Bombay Police (Punishment and Appeal) Rules, 1956 that they were made in the exercise of power conferred by section 25 (2) (c) of the Bombay Police Act, 1951 read with section 5 (b) of that Act. Section 5 (b) to which that preamble refers has really no relevance, since, that clause does no more than to authorise the State Government to determine the recruitment, pay, allowances and other conditions of service of the police force. The true source of the power in the exercise of which rule 17 (2) was made is clearly section 25 (2) (c) to which the preamble to the Rules refers.

14. Now section 25 consists of three parts. Sub-section (1) which is the first part authorises the State Government or any officer authorised by sub-section (2) in that behalf to impose a punishment of suspension, reduction, dismissal or removal of an Inspector or other member of the subordinate ranks of the police on grounds enumerated in that sub-section. Sub-section (2) (a) consists of two parts. The first part authorises the Inspector General of Police, the Commissioner and

the Deputy Inspector General of Police to impose punishments which the State Government could impose under sub-section (1). The other part of that sub-section authorises a District Superintendent of Police to impose similar punishments on a police officer subordinate to him below the grade of an Inspector. It is in the exercise of this power that the Superintendent of Police reduced the petitioner from the rank of a head constable to the rank of a police constable.

15. Now, sub-section (2) (a) of section 25 reads:

"The Inspector General, the Commissioner, and the Deputy Inspector General shall have authority to punish an Inspector or any member of the subordinate ranks under sub-section (1). A District Superintendent shall have the like authority in respect of any police officer subordinate to him below the grade of Inspector and may suspend an Inspector who is subordinate to him pending inquiry into a complaint against such Inspector and until an order of the Inspector General or Deputy Inspector General can be obtained."

16. Clause (c) of section 25 (2) which confers power on the Government to make rules for the regulation of the power conferred by Section 25 (2) reads:-

"The exercise of any power conferred by this sub-section shall be subject always to such rules and orders as may be made by the State Government in that behalf."

17. The source of the power in the exercise of which Rule 17(2) of the Rules was made by the State Government as stated in the preamble to those Rules is this clause, and the question is whether this clause authorises Government to acquire power under a rule made under this clause for the enhancement of a punishment imposed under sub-section (2) (a) of S. 25. In our opinion, it does not.

18. It is clear from the language of sub-clause (c) of section 25 (2) that the only rules and orders which could be made under that clause are rules and orders to which the 'exercise' of the power conferred by section 25 (2) (a) is 'subject.' The words 'the exercise of any power' with which clause (c) opens, demonstrate that a rule or order authorised by it could only control or regulate the power legislatively bestowed on the designated functionaries. Governmental supervision, so authorised by the clause, may include proper distribution of the power to be exercised, the prescription of procedure and regulation in other ways. But that power of supervision through a rule or order is restricted to the control of the power exercisable by the functionaries to whom it is confided

by sub-section (2) which exhausts itself when it is exercised.

19. But, Rule 17 (2) does not regulate such power. It bestows on Government an independent revisional jurisdiction and the power of enhancement, which could be exercised after the power exercised under section 25 (2) has produced a decision. But it is obvious from the language of section 25 (2) (c) that while the power exercisable under section 25 (2) is subject to Governmental regulation, the decision which comes into being, as a consequence of such exercise, is not.

20. Once the exercise of such power results in the imposition of a punishment or exoneration, that punishment or exoneration becomes final subject only to an appeal which is authorised by S. 27 and that power was exercised by the Deputy Inspector General of Police in the case before us. The Act does not authorise the exercise of any revisional jurisdiction by Government in that sphere and the acquisition of such jurisdiction or the power to enhance the punishment is plainly impossible under a rule made under section 25 (2) (c).

21. That being so, rule 17 (2) of the Bombay Rules by which Government by a rule made by themselves acquired power to exercise revisional jurisdiction and to make an enhancement of punishment was clearly beyond their competence.

22. We, therefore, set aside the impugned enhancement. The result is that the punishment imposed by the Superintendent of Police which was confirmed by the Deputy Inspector General of Police stands restored.

23. No costs.

BNP/D.V.C.

Petition allowed.

AIR 1969 MYSORE 64 (V 56 C 15)

B. M. KALAGATE AND K. R.

GOPIVALLABHA IYENGAR, JJ.

Ramachandra, Appellant v. Anasuyabai and others, Respondents.

Appeal No. 224 of 1961 D/- 29-2-1968 against judgment and decree of Civil J., Hubli, D/- 31-8-1961.

(A) Succession Act (1925), S. 2 (h) — Oral will — On death of husband, his wife acting on instructions of her husband giving away some properties to a relation under a deed — Deed mentioning motive of transfer being the wish of deceased husband — Wife acting against her own interest by giving away property which she could alienate for necessity — Oral will by deceased husband can be inferred.

HL/HL/D421/68

After the death of husband a Hindu widow inherits her husband's property which she is competent to alienate in case of necessity.

Where a Hindu widow acting on oral instructions of her husband executes a deed transferring some properties to a relative and mentions in the deed her motive as being to carry out her husband's desires, the question was if an "oral will" could be inferred.

Held that "oral will" could be inferred as by executing the deed, the widow had curtailed her rights, had acted against her own pecuniary interest which normally no one is expected to do and as no influence was proved, AIR 1931 PC 285 and AIR 1937 PC 174 and AIR 1939 All 348, Distinguished. (Para 24)

(B) Hindu Law — Adoption — Widow adopting child — Sole survivor's rights during his life, not curtailed by possibility of his wife adopting a son after his death — Doctrine of "relation-back" not applicable to dispositions, made during life time of sole survivor — Rights of adopted son, explained.

One's right to deal with one's family properties as the sole male member is absolute and unimpaired and cannot be curtailed by the possibility of a son being adopted to him by his widow, which may or may not happen. Where his widow adopts a son to him after his death, the adopted son cannot claim back properties disposed of by his deceased father before his death. The doctrine of "relation back" only establishes a line of succession and the dispositions made by the father cannot be disturbed by an adoptee who was never in existence as such when dispositions were made. What an adopted son is entitled to claim is only the properties of his adoptive father or the interest of his adoptive father in the properties as on the date of his death. AIR 1929 Mad 296 and AIR 1943 PC 196, Rel. on. (Para 36)

(C) Hindu Law — Adoption — Rights of adopted son — Person making a will as a sole survivor — Son adopted by his widow — Adopted son takes properties of his father subject to dispositions made by the adoptive father by his will — When there is adoption in testator's lifetime, the testator cannot bind the adopted son by disposing property by will.

It is competent for a sole surviving coparcener to dispose of properties by will, and the subsequently adopted son by his widow has to take the estate subject to the dispositions made by the will. But, in case the adoption is made before the dispositions take effect, i.e. before the death of the testator, then the adopted son's right comes into existence immediately on his adoption, and he being in existence, the dispositions made by

No. 44 of 62 was decreed *ex parte* for recovery of Rs. 2260/- against defendants 1 to 3 and dismissed against defendant 4. In execution of his money decree, Sanyasi (plaintiff) attached the disputed property. Defendant 4 filed an application under Order 21, Rule 58 urging that he had purchased the property from defendants 1 to 3 under Ex. 1 and that it was not liable to attachment and sale in execution of the decree (Ex. A) of the plaintiff against defendants 1 to 3 in T. S. No. 44 of 62. The learned Subordinate Judge by his order dated 20-2-65 held that Ex. 1 was a sale and not a mortgage. Accordingly he upheld the objection of defendant 4. Against this order the miscellaneous appeal has been filed.

3. In support of the appeal Mr. Misra contended that Ex. 1 was a mortgage by conditional sale executed by defendants 1 to 3 in favour of defendant 4, and, as such, the equity of redemption was liable to attachment and sale in execution of Sanyasi's money decree. Mr. Rath on the other hand contended that Ex. 1 was a sale with a condition to repurchase and not a mortgage by conditional sale. He took up another point which was not urged in the Court below that by virtue of the judgment and decree (Exs. 3 and 3a), defendant 4's title to the property as against defendants 1 to 3 was declared on the basis that Ex. 1 was an out and out sale. Defendants 1 to 3 having no further interest, the disputed property was not liable to attachment on 6-1-64 in execution of the decree in favour of Sanyasi in T. S. No. 44 of 62.

It is conceded by the learned Advocates for both parties that if Mr. Rath succeeds in the second point, it would not be necessary to examine whether Ex. 1 is a sale or mortgage.

4. It is, therefore, necessary to examine whether by the date of attachment on 6-1-64 defendants 1 to 3 had any subsisting title or possession in the disputed property.

Mr. Misra contended that T. S. 7 of 62 was purely one under Order 21, Rule 63 and that when during the pendency of the suit the execution case of Satyabadi Panda was satisfied on payment by defendants 1 to 3, the attachment was raised and, therefore, the suit under Order 21, Rule 63 was no longer maintainable. The argument is too widely stated and suffers from a fallacy.

5. There is no dispute that in a suit under Order 21, Rule 63, the judgment-debtors are not necessary parties. But if in fact the judgment-debtors are made parties and the suit is disposed of in their presence, they are bound by the decision in the suit and the decision would con-

stitute *res judicata* as against them in all subsequent litigations. If in T. S. 7 of 62 defendants 1 to 3 had taken an objection that the suit under Order 21, Rule 63 was no longer maintainable as the execution dues of Satyabadi Panda had been paid up and the attachment had been vacated, the trial Court would have examined the matter and might have dismissed the suit on the ground that there was no further cause of action. *D. Ramkishan v. Mst. Alakh Kuer*, AIR 1963 Pat 225 is one such case. Similarly law is well settled that an order on a claim petition filed under Order 21, Rule 58, or a decree in a suit filed under Order 21 Rule 63 does not extend beyond the execution of the decree which has given rise to those proceedings: See *K. Narasimhachariar v. R. Padayachi*, AIR 1945 Mad 333 (FB) & *S. Viswanadham v. K. Basavayya*, AIR 1959 Andh Pra 180. All these decisions cited by Mr. Misra are of no assistance to him in the present case.

T. S. 7 of 62 filed by defendant 4 was of a wider character. Though in that suit he could have merely challenged the order dismissing his claim petition under Order 21, Rule 58, he did not confine himself to a limited prayer. The suit was for declaration of title also. He made defendants 1 to 3 parties and further pursued that suit despite the fact that the original cause of action had disappeared namely, the attachment of the property was raised on payment of the decretal dues of Satyabadi Panda by defendants 1 to 3. If the suit was pursued for removal of the cloud on defendant 4's title based on the sale deed Ex. 1, it cannot be said to be not maintainable. The decree passed in such a suit is not a nullity as being without jurisdiction. Sanyasi has not also pleaded and proved in T. S. 44 of 62 that the decree was the outcome of fraud and collusion between defendant 4 on one hand and defendants 1 to 3 on the other.

The decree not being a nullity is binding on defendants 1 to 3. The effect of such a decree is that it was finally decided in that suit that Ex. 1 was a sale and defendant 4 had full title in the disputed property in which defendants 1 to 3 had no further right, title or interest. This being the position on 7-1-63, defendants 1 to 3 had no subsisting interest in the disputed property on 6-1-64, the date of attachment effected at the instance of plaintiff (Sanyasi). The objection of defendant 4 under Order 21, Rule 58 is bound to succeed on this ground. Though the learned Subordinate Judge did not deal with this aspect of the matter, his order can be affirmed on this ground.

6. On the aforesaid conclusion, it is not necessary to examine whether Ex. 1

is a sale or mortgage. In the result, the appeal fails and is dismissed; but in the circumstances, parties to bear their own costs throughout.

SSG/D.V.C.

Appeal dismissed.

AIR 1969 ORISSA 18 (V 56 C 10)

G. K. MISRA, J.

Sri Gopinath Deb and others, Appellants v. Jagannath Baral and others, Respondents.

Second Appeal No. 289 of 1964 D/- 13-8-1968 from order of Addl. Sub. J., Puri, D/- 8-2-1964.

(A) Hindu Law — Joint family property — Alienation — Sale of joint family property by coparcener — Title.

A sale deed executed by one of the coparceners in respect of the joint family property without the consent of other coparceners cannot convey any title to the vendee. (Para 1)

(B) Evidence Act (1872), S. 32(3) — Statement of person that he is separated from joint family — Probative value.

The statements of a particular person that he is separated from a joint family of which he was a coparcener and that he has no further interest in the joint property or claim to any assets left by his father would be statements made against the interest of such person, and after such person is dead, they would be relevant under Section 32(3). The assertion that there was separation not only in respect of himself but amongst all the coparceners would be admissible as a connected matter and an integral part of the same statement. It is not merely the precise fact which is against interest that is admissible, but all matters that are involved in it and knit up with the statement. AIR 1952 SC 72, Foll. (Para 4)

(C) Civil P. C. (1908), Ss. 103 and 100-101 — Finding of fact on the question of possession — Grounds for disturbance.

A finding of fact recorded by the lower court on the question of possession is normally binding in second appeal. But a finding of fact based on commission of error of fact and ignoring essential pieces of evidence is not binding on the High Court in second appeal. Under Section 103, the High Court may determine any issue of fact necessary for the disposal of the appeal if it has been wrongly determined by the lower appellate Court by reason of any illegality, commission, error or defect, as is referred to in sub-section (1) of Section 100. Commission of an error of record and overlooking important pieces of evidence amount to defect in procedure which produce an error

or defect in the decision of the case upon merits. Such finding of fact is not binding in second appeal. (Para 9)

Cases Referred: Chronological Pairs (1952) AIR 1952 SC 72 (V 39)=1951 SCR 603, Bhagwati Prasad v. Rameshwari Kuer 4

B. K. Pal, Bijoy Pal and K. Mohanty, for Appellants; B. Mohapatra and R. K. Mohapatra, for Respondents.

JUDGMENT: Hari Baral had three sons, Pira, Madhab and Luxman. Plaintiffs 1, 2 and 3 are the sons of Pira, Madhab and Luxman respectively. Plaintiffs 2 and 3 are natural born sons of plaintiff 1 (sic). The suit was for declaration of title, confirmation of possession, or, in the alternative, for recovery of possession on the following averments; Pira, Madhab and Luxman were members of an undivided joint family and so also the plaintiffs. The suit land appertains to Khata No. 271 of village Billipada and is their ancestral property. The three brothers were in joint possession as members of the undivided family. In 1953 the defendants threatened to forcibly cut and remove paddy from the disputed land raised by the plaintiffs. On an inquiry into the matter, the plaintiffs came to learn that Luxman had executed a registered sale deed (Ex. E) in respect of the suit property in favour of one Hari Das of Kundhelbentasa, Puri town, on 8-8-32, and that one Panchu Das, describing himself as the son of Hari Das, executed another sale deed (Ex. D) in respect of the very property to defendant 1 on 10-11-53. Both the registered documents were colourable and fraudulent transactions without receipt of consideration and were not for legal necessity. All through the property was in possession of Pira, Madhab and Luxman. The last two brothers died in 1944. The sale deed executed by Luxman in respect of the joint family property without the consent of other coparceners, cannot convey any title to the vendee.

Defendant-1 is the deity Sri Gopinath Deb. Defendants 2 to 4 are the Mariatdars of the deity. Ex. D has been purchased in the name of the deity through the Mariatdars defendants-2 to 4. The defence case is that Pira, Madhab and Luxman separated in mess in or about 1930. There was severance of joint status though there was no partition by metes and bounds. The three brothers, however, continued to cultivate their lands jointly and enjoyed the usufructs by dividing the same in three equal shares. Luxman sold the suit land under Ex. E to meet certain necessities of his own. Similarly Ex. D was for consideration, Hari Das remained in possession of the land, got his name mutated in the landlord's sherista and cultivated the land through bhag tenants.

After his death, his widow Chandramani and son Panchu Das remained in possession as owners. After the death of Chandramani, Panchu sold the disputed property to defendant 1 for a consideration of Rs. 375. Defendants 2 to 4 are in possession of the disputed land on behalf of the deity.

The trial Court dismissed the suit holding that Luxman was separate from his brothers and that he validly transferred the suit property. It, however, found that the plaintiffs failed to prove that they were in possession. In appeal, the lower appellate court reversed both the findings and decreed the suit. Defendants have filed the second appeal.

2. Before going into the question of title and possession on merit, it would be necessary to state certain facts regarding abatement of the first appeal and the second appeal. The suit was dismissed on 11-8-62. Title Appeal before the District Judge was filed on 26-9-62. Bholi Baral (defendant 3) died on 8-12-62 and his heirs were not substituted. The appeal was allowed on 8-2-64. Adhikari Baral (defendant 2) died on 7-3-64. Defendants filed the second appeal on 7-7-64 impleading all the four sons of Adhikari as legal representatives on filing an application under Chapter VI, Rule 3 of the Orissa High Court Rules. Admittedly Adhikari had two married daughters who were not impleaded as appellants in the second appeal. Defendants took a ground in the second appeal that plaintiff's appeal abated in the lower appellate Court for not substituting the legal representatives of Bholi Baral. Plaintiffs-respondents have filed an affidavit on 26-2-65 stating that the two daughters of Adhikari Baral had not been substituted and that the second appeal had abated. On 15-3-65 the defendants-appellants filed a rejoinder on affidavit stating that the two daughters were married away and were not residents of the village and not marfatdars of the deity (defendant-1).

Thus plaintiffs contend that the second appeal has abated while the defendants contend that the appeal before the first appellate Court had abated. In course of argument the learned advocates for both parties stated that there was no abatement of the first appeal or of the second appeal due to non-inclusion of some of the trustees as heirs when the deity was represented by the other trustees. Both of them did not press the question of abatement. In view of the fact that the learned advocates themselves do not press the question of abatement, either of the first appeal or of the second appeal, I do not express any view on the question of abatement. The appeal must accordingly be disposed of on the footing that there was abatement neither of the first appeal nor of the second appeal and this con-

clusion is reached not by expression of any view on the question of law arising in the facts and circumstances of this case.

3. The question for consideration in this appeal is whether the plaintiffs have title to the disputed land and possession within 12 years of the suit. The title of Haridas on the strength of Ex. E has been questioned on the only ground that at the time of transfer, Pira, Madhab and Luxman were members of an undivided joint family and Luxman had no right of transfer without the consent of the other coparceners. The finding of the lower appellate Court that there was no severance of joint status amongst the three brothers is a pure finding of fact not assailable in second appeal. This finding is based on the evidence of P. W. 1 (Plaintiff-1), P. W. 2 (widow of Luxman) and P. W. 3 (an outsider). D. Ws. 1 to 3 are utter strangers to the family of the plaintiffs and have no idea whether Pira, Madhab and Luxman were joint or separate. Mr. Pal assails this finding of fact mainly on the basis of Ex. C dated 15-4-36, a deposition of Madhab in Cr. Case No. 6 of 1936 in which he was the complainant. As would appear from the judgment (Ex. B) in that criminal case, the accused were bhag tenants of Haridas and trespassed into the land in possession of Madhab. They cut away paddy grown by the complainant from the southern portion of plot No. 1574. It would appear from the plaint schedule that a portion of plot No. 1574 is the suit land. In Ex. C Madhab stated thus—

"Myself and Jagannath live joint and Luxman lives separate."

On the basis of this statement Mr. Pal contends that there was severance of joint status in the family and the learned Sub-Judge having failed to consider the bearing of this document, his finding is contrary to law and is not binding on this Court in second appeal. This contention raises the questions whether Ex. C is admissible in evidence, and, if so, what is its probative value.

4. In *Bhagwati Prasad v. Dulhin Rameswari Kuer*, AIR 1952 SC 72 their Lordships held that statements of a particular person that he is separated from a joint family of which he was a coparcener and that he has no further interest in the joint property or claim to any assets left by his father would be statements made against the interest of such person, and after such person is dead, they would be relevant under S. 32(3), Evidence Act. The assertion that there was separation not only in respect of himself but amongst all the coparceners would be admissible as a connected matter and an integral part of the same statement. It is not merely the precise fact which is against

interest that is admissible, but all matters that are involved in it and knit up with the statement.

On the aforesaid position of law, the statement of Madhab in Ex. C that Luxman was separate from the (family?) is admissible. On such a statement Madhab would not be entitled to get the property of Luxman on his death by survivorship, but the property would be inherited by the widow of Luxman. It goes against Madhab's pecuniary and proprietary interest and is admissible under Section 32(3) of the Evidence Act.

Mr. Mohapatra, however, contends that the statement of Madhab in Ex. C has no probative value as it was a false statement made by him for success in the criminal case. In Ex. C Madhab made a further statement thus:

All the lands between Luxman and ourselves are divided. The share of Luxman in some places is to the north and in some places to the south. We have a registered deed of partition. I cannot say if the direction of the land assigned to Luxman is mentioned therein.

It is no party's case that there was partition by metes and bounds in the family evidenced by a registered partition deed. Clearly such a statement was false. The bhag tenants of Haridas were accused in the criminal case. If Madhab admitted that he was joint with Luxman, the accused could have been acquitted on the ground that the case involved a bona fide dispute. It was therefore in the interest of Madhab to assert that the land trespassed upon by the accused was in his possession and did not fall within the area transferred by Luxman under Ex. E. Mr. Mohapatra's contention has considerable force. Madhab had a motive to make a false statement that there was a registered partition deed. No reliance can be placed on Ex. C. The attack on Ex. C being the sole basis of Mr. Pal's contention challenging the finding of the learned Sub-Judge on the question of severance of joint status, the finding of fact cannot be assailed in second appeal.

5. As a result of the aforesaid discussion, the finding that Pira, Madhab and Luxman were members of an undivided joint family cannot be assailed. It follows as a corollary that Ex. E cannot transmit a valid title to Haridas.

6. The next question for consideration is whether the plaintiffs have successfully proved possession within 12 years of the suit. The learned Subordinate Judge recorded his ultimate finding thus:

The finding of possession though not so satisfactory on either side has to be accepted in the light of title to the property, as such it is found in favour of the plaintiffs.

Mr. Pal attacks this finding as being contrary to law on two grounds. Firstly,

if the evidence of possession for the plaintiffs was unsatisfactory, title cannot be resorted to buttress the case of possession in the facts and circumstances of this case. Secondly, the learned Sub-Judge failed to appreciate the import of the rent-receipts filed by the parties and did not give due weight to them and his finding is accordingly vitiated.

7. In order to appreciate the aforesaid contentions, it would be profitable to examine the relevant evidence on the question of possession. Plaintiff 1 is P. W. 1. P. W. 2 is the widow of Luxman. She does not say a word about possession. She said that she had not seen the properties of her husband and his brothers. P. W. 3 is alleged to be an independent witness. He could not give the area of the suit land nor its boundary. He does not know if there is any dispute between the parties regarding the suit land. He claims to have his own lands two kharis away from the suit land. When asked whether he could show the settlement Patta for his own land, he admitted that he had no Patta. Plaintiffs filed 12 rent-receipts (Exs. 2 to 2-K). Khata No. 271 has a total area of 10-39 acres and the rent payable is Rs. 24-13-. Exs. 2 to 2-K show that under them rent amounting to Rs. 8-4-4 pies was being paid in respect of one-third share of the whole. Luxman Baral paid under Exs. 2 to 2G while plaintiff 1 paid rent under Exs. 2-J to 2-K. As these rent-receipts do not show that the entire rent for the Khata was paid thereunder, they have no evidentiary value to prove that the rent for the suit land was being paid under those receipts.

These are all the evidence on behalf of the plaintiffs regarding possession. The learned Subordinate Judge without critically examining the evidence on the plaintiffs' side observed thus:

Apart from the party witnesses, namely, P. W. 1 and P. W. 2, the independent witness having lands near the suit lands, is examined, as P. W. 3 who speaks of plaintiffs' case and supports too.

It is clear that the learned subordinate Judge committed an error of record in saying that P. W. 2 was a witness to possession. He committed another error in not examining how far P. W. 3 was reliable. The trial Court had disbelieved P. W. 3. As has already been indicated P. W. 3 is a person having no idea of the suit land. Regarding rent-receipts for both sides, the learned Judge observed thus:

The rent-receipts are filed as per Ex. 2 series from 1936 to 1962 on plaintiffs' side and on defence side Ex. A series from 1947 upto 1960, for various years are filed. They don't lead to any satisfactory conclusion.

For reasons already discussed, the learned Judge was correct in saying that Ex.

2 series are not of any evidentiary value as they do not show that the rent for the suit land was paid under them. The only evidence of possession on behalf of the plaintiffs is that of plaintiff 1 alone. Even if the evidence on behalf of the defendants is unsatisfactory, plaintiffs' suit is bound to fail as the evidence on their behalf is worthless.

8. Defendants have examined three witnesses. They have filed rent-receipts Ex. A series. Exs. A-15 to A-17 dated 20-9-47, Exs. A-6 and A-7 dated 25-7-50 and Ex. A-8 dated 8-11-50 show that Haridas, the father of the defendants' vendee Panchu Das, paid rent in respect of O. 45.1/3 decimals in Khata No. 271 the exact area as purchased under Ex. E. Exs. A-3 to A-5 dated 27-4-52, Exs. A-1 and A-2 dated 14-11-52 and Ex. A dated 9-9-53 show that Panchu Das was paying rent for the suit land. Ex. A-14 dated 30-4-56, Ex. A-13, dated 31-3-57, Ex. A-9 dated 5-2-58, Ex. A-12 dated 9-2-59 and Ex. A-11 dated 19-1-60 show that defendants were paying rent under these receipts. These rent-receipts establish that for more than 12 years before the suit defendants and their predecessors-in-interest have been paying rent of the disputed land. The learned Subordinate Judge's observation that these rent-receipts do not lead to any satisfactory conclusion is not correct. As the learned Subordinate Judge has discarded the evidence of D. W. 3, who has got land near the suit land, I do not want to place reliance on his evidence purely on the question of assessment of evidence. The result is that there is evidence of plaintiff-1 asserting possession on behalf of the plaintiffs and the evidence of defendant-2 (D. W. 2) asserting possession of the defendants and their predecessors for more than 12 years. Though the rent-receipts by themselves cannot prove possession, they are not wholly irrelevant. They constitute some evidence of possession based on the theory that no person would go on paying rent for the land unless he is in possession of it. Weighing the evidence on either side, the evidence of D. W. 2, corroborated by the rent-receipts Ex. A series, is better than that of P. W. 1. Plaintiffs' suit therefore, fails. Even assuming that the evidence of possession is worthless on either side, plaintiffs' suit should equally fail.

9. The next question for consideration is whether the finding of fact recorded by the lower appellate Court on the question of possession should be disturbed in second appeal. As I have already indicated, it committed an error of record in relying on the evidence of P. W. 2 as if she deposed to the factum of possession. He accepted the evidence of P. W. 3 as an independent witness with-

out perusing his evidence that he had no idea of possession. He discarded the rent-receipts Ex. A series pertaining to the suit land as having no evidentiary value. A finding of fact thus based on commission of error of fact and ignoring essential pieces of evidence is not binding on this Court in second appeal. Under S. 103, C. P. C. the High Court may determine any issue of fact necessary for the disposal of the appeal if it has been wrongly determined by the lower appellate Court by reason of any illegality, commission, error or defect, as is referred to in subsection (1) of S. 100. Commission of an error of record and overlooking important pieces of evidence amount to defect in procedure which has produced an error or defect in the decision of the case upon merits. Such finding of fact is not binding in second appeal.

In conclusion, as the plaintiffs have failed to prove their possession within 12 years of the suit, the suit must fail.

10. In the result, the judgment of the lower appellate court is set aside and the plaintiffs' suit is dismissed. The second appeal is allowed with costs throughout. MVJ/D.V.C. Appeal allowed.

AIR 1969 ORISSA 21 (V 56 C 11)

G. K. MISRA, J.

Prabhad Dora, Appellant v. The State of Orissa and others, Respondents.

Misc. Appeal No. 89 of 1966, D/- 19-8-1968, from order of Dist. J. Ganjam, D/- 2-2-1966.

Civil P. C. (1908), Ss. 47, 9, 11 — Question of want of inherent jurisdiction — Question decided in suit or execution — Court holding that it had jurisdiction — Identical question cannot be raised inter partes.

If the Civil Court lacks inherent jurisdiction, the decree would be a nullity and can be questioned at the stage of execution. In such a case, the Executing Court can go behind the decree. But the position is different where the question of lack of inherent jurisdiction was specifically raised and negatived. The matter cannot be further allowed to be agitated. It must be treated inter partes that the Court passing the decree had inherent jurisdiction. AIR 1957 Madh Pra 71 (FB) and AIR 1958 Bom 30, Dist.

(Paras 4, 6)

Cases Referred: Chronological Paras
(1962) AIR 1962 SC 199 (V 49)=(1962)
2 SCR 747, Hiralal v. Kali Nath 6
(1958) AIR 1958 Bom 30 (V 45)=ILR
(1957) Bom 786, Bai Shakri v. Bapu
Singhji 5

- (1957) AIR 1957 Madh Pra 71 (V 44)=
1957 Jab LJ 426 (FB), Govinda Das
v. Parameswari Das 5
(1954) AIR 1954 SC 340 (V 41)=1955
SCR 117, Kiran Singh v. Chaman
Paswan 6
(1952) AIR 1952 Raj 62 (V 39)=1951
Raj LW 173, Naharsingh v. Pirthl-
singh 4
(1936) AIR 1936 Rang 87 (V 23)=ILR
14 Rang 94 (SB), Bank of Chetinaḍ
v. Chettiyar Firm 4

C. V. Murty, for Appellant; Standing
Counsel, for Respondent No. 1.

JUDGMENT: The Maharaja of Paralakhemudi filed O. S. No 727 of 1945 before the Rent Suit Collector under S. 77 of the Madras Estate Land Act for recovery of rent for Faslis 1351, 1352 and 1353 corresponding to calendar years 1942, 1943 and 1944. The rent fell due on 1-7-42, 1-7-43 and 1-7-44. The suit was dismissed on 23-9-49 on the ground that the lands were not part of the estate and the plaintiff was not the land-holder under the Madras Estate Land Act and that the Revenue Courts had no jurisdiction to entertain the suit Rent Appeal No. 18 of 1950 was dismissed on 3-2-56 by the Additional District Judge, Ganjam. He agreed with the reasons of the Rent Suit Collector.

The Maharaja accordingly took back the plaint and filed M. S. No 14 of 1956 on 23-2-56 before the Subordinate Judge, Berhampur in conformity with the view of the Additional District Judge that the Civil Court had jurisdiction. The suit was decreed on 30th of November, 1959. Therein the question of jurisdiction was again raised by the tenants (appellant and respondents Nos. 2 to 6). The learned Subordinate Judge held that the Civil Court had jurisdiction. Against this decree no appeal was filed and the matter became final and conclusive as between the parties. It is to be noted that the Maharaja assigned all his rights in respect of the disputed land to the State of Orissa and on the basis of the assignment the State of Orissa was impleaded as plaintiff in place of the Maharaja on 19-9-59. No objection was taken to this substitution in the suit itself and the matter stood concluded.

The State levied E. P. 23 of 1962 for execution of the decree. The tenants filed objection under Section 47, C. P. C., again challenging the decree as being without jurisdiction and nullity. The Subordinate Judge, Berhampur upheld this objection in M. J. C. No. 56 of 1963 and dismissed the execution application. In appeal, the learned District Judge held that the suit being for recovery of arrears of rent, prior to the coming into force of the O. T. P. and O. T. R Acts was cognizable in Civil Court. He accord-

ingly allowed the appeal. Against the appellate order, this miscellaneous appeal has been filed.

2. Mr. Murty contended that by virtue of Section 9(1)(b) proviso and Section 10(1) it is only the O. T. R. Collector who could take cognizance of the cases for recovery of rent and the Civil Court had no jurisdiction.

3. The two Sections, so far as relevant, run thus—

Section 9 (1) Any dispute between the tenant and the landlord as regards

(a) x x x x
(b) failure of the tenant to deliver to the landlord the rent accrued due within two months from the date on which it becomes payable; shall be decided by the Collector on the application of either of the parties:

Provided that such application shall be filed before the Collector in the prescribed manner within 60 days from the date on which the dispute arises or from date of the passing of this Act, whichever is later.

Section 10(1) Subject to the provisions of Section 9, all disputes arising between a landlord and a tenant shall be cognizable by a Civil Court.

The learned Standing Counsel on the other hand contends that the recovery of rent relates to the period from 1942 to 1944 long prior to the coming into force of the Orissa Tenants Protection Act, 1948 (Orissa Act III of 1948) and the Orissa Tenants Relief Act, 1955 (Orissa Act V of 1955) which came into force on 1-9-1947 and 1-7-1954 respectively and that there is no lack of inherent jurisdiction in the Civil Court in passing the decree. He also contends that the question of lack of inherent jurisdiction was specifically raised and negatived and the matter is barred by *res judicata*.

4. I would first examine the question whether the contention of Mr. Murty that the Civil Court lacks inherent jurisdiction to pass the decree under execution is barred by *res judicata*. There cannot be any dispute over the proposition that if the Civil Court lacks inherent jurisdiction, the decree would be a nullity and can be questioned at the stage of execution. In such a case, the Executing Court can go behind the decree. But the position is different where the question of lack of inherent jurisdiction was specifically raised and negatived. As would appear from the history of this litigation, the lack of inherent jurisdiction was specifically raised at two different stages. It was raised in the original rent suit and in the rent appeal before the Additional District Judge.

Defence contention was accepted that the Civil Court had jurisdiction and the Revenue Court had no jurisdiction. The

original Revenue Court delivered its judgment on 23-9-49 and by then the Orissa Tenants Protection Act had come into force. Similarly the Orissa Tenants Relief Act was in force during the pendency of the rent appeal, the judgment of which was delivered on 3-2-56. Both the Acts being in force, defendants resorted to the plea that only Civil Court had jurisdiction. Their contention was accepted. When the plaint was returned and filed before the Subordinate Judge, defendants took the contrary plea that the Civil Court had no jurisdiction. Their present plea on the basis of the aforesaid two sections of the Orissa Tenants Relief Act was available to them. The Civil Court negatived their objection and held that it had jurisdiction.

The matter was allowed to be final as no appeal was filed. Again the identical objection is being raised. The present objection is barred by res judicata. This conclusion is based mainly on the ground that whether the Court had inherent jurisdiction or not, the objection to jurisdiction having been specifically raised and decided the matter cannot be further allowed to be agitated. For the purpose of this case it must be treated inter partes that the Court passing the decree had inherent jurisdiction. See AIR 1936 Rang 87 (SB), Bank of Chetnad v. Chettiyar Firm and Nahar Singh v. Pirthisingh, AIR 1952 Raj 62.

5. Mr. Murty placed reliance on Govinda Das v. Parameswari Das, AIR 1957 Madh Pra 71 (FB) and Bai Shakri v. Bapu Singhji, AIR 1958 Bom 30. These cases do not take any contrary view. They are distinguishable on facts. The facts in Madhya Pradesh case were that the decree was passed by a Court having no jurisdiction and was as such a nullity. The decree-holder started two executions. In the first execution, the judgment-debtor raised objection that the decree was without jurisdiction. The decree-holder allowed that execution to go by default and no decision on the objection was taken. In the second execution, the judgment-debtor took the same objection and the execution was dismissed on the finding that the decree was a nullity. This is a case in which at no earlier stage there was a decision that the Court had inherent jurisdiction. This case does not go against the principle that once there is a decision that the Court had inherent jurisdiction, it cannot subsequently be questioned.

The facts in Bombay case were that in the written statement the defendant took plea that in the absence of a certificate under Section 86, C. P. C., the Court had no jurisdiction to pass a decree. The defendant did not, however, appear at the hearing of the suit and a decree was passed ex parte. In the execution the

judgment-debtor took the objection that the decree was not executable in the absence of the certificate. The execution was accordingly dismissed. The second execution was filed after the decree-holder obtained a certificate to execute the decree. The judgment-debtor took the objection that the decree was without jurisdiction and the contention was upheld. It is clear from the facts of this case that in the first execution itself the objection regarding lack of inherent jurisdiction had been upheld and the conclusion in the second execution was consistent with that in the first execution and therefore the question of res judicata did not arise. It is, therefore, no authority against the proposition that once the question of absence of inherent jurisdiction was determined in favour of the plaintiff or the decree-holder, the matter cannot be reagitated.

6. The legal position may be summed up thus: The validity of a decree can be challenged in execution on the ground that the Court which passed the decree lacked inherent jurisdiction—See Kiran Singh v. Chaman Paswan, AIR 1954 SC 340 and Hira Lal v. Kali Nath, AIR 1962 SC 199. If, however, the question of absence of inherent jurisdiction was decided either in the suit or in the execution and it was held that the Court had inherent jurisdiction, the identical question cannot be subsequently raised inter partes, even if a different view is taken by another Judge that the Court had no inherent jurisdiction. It is barred by res judicata.

7. In this view of the matter, it is unnecessary to examine the other contention of Mr. Murty whether the Subordinate Judge had jurisdiction to pass a decree in view of the provisions of Section 9(1)(b) Proviso and Section 10(1) of the Orissa Tenants Relief Act.

8. In the result, the appeal fails and is dismissed with costs.

SSG/D.V.C. Appeal dismissed.

AIR 1969 ORISSA 23 (V 56 C 12)

G. K. MISRA, J.

Karam Singh and others, Petitioners v. State, Opposite Party.

Criminal Revns. Nos. 158, 174 and 183 of 1966, D/- 25-7-1967, from order of Addl. S. J., Sambalpur, D/- 19-2-1966.

(A) Penal Code (1860), S. 148 — Conviction based on circumstantial evidence — Validity — Chain of circumstances must be complete — Falsity of defence plea would not establish prosecution case.

Accused was convicted under Ss. 148 and 332/149 I. P. C. The allegations were

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that there was a communal disturbance and accused were members of a mob who refused to disperse which resulted in a firing by police and then some of the members of the mob fired back at police party and caused hurt to police constables. The defence was that the accused was arrested before firing. There was no evidence to show that accused was in the mob. Nor was there any definite evidence about the weapon in possession of accused. It was however contended on behalf of prosecution that though ordinarily the arrest of the accused while he was running away after the police firing would not by itself be conclusive that he was a member of the mob, the circumstances under which the mob collected and the accused was found running away at a place in close proximity of the mob immediately after firing led to the irresistible conclusion that he was a member of the mob knowing fully well the common object of the unlawful assembly which was to commit mischief by setting fire to the house of Muslims and causing hurt to them.

Held that the charge against the accused was not proved beyond a reasonable doubt. A conviction on circumstantial evidence was well founded provided the chain was complete. There ought to be no missing link so as to create a reasonable doubt against the charge being brought home to the accused. Though the plea of the accused that he was arrested before the firing was a false one the falsity of the defence plea would not establish the prosecution case unless it was otherwise proved beyond reasonable doubt. Accused was entitled to an acquittal under Section 148 I. P. C.

(Paras 3, 4, 5, 6 and 8)

(B) Criminal P. C. (1898), Ss. 403 and 423 — Conviction on same charges barred in second trial once the accused is acquitted in first — If object of evidence in second trial is to corroborate charge in respect of offence which is subject matter of trial no question of disputing previous finding arises — Charges under Section 148 I. P. C. and S. 27 Arms Act — Acquittal for offence under S. 148 — Conviction under S. 27 Arms Act cannot be maintained.

If in a previous trial a competent court records a finding accepting the innocence or guilt of the accused in respect of an offence and the very question comes up again as an issue in a second trial of the accused for a different offence, the court must proceed with the subsequent case accepting the previous finding of innocence or guilt as final and cannot allow evidence to dispute it. The position is, however, different if the object of the evidence given at the second trial is merely to corroborate the charge in respect of the offence which is the subject matter of

that trial; and there is no question of disputing any previous finding in favour of the accused. The fact that the same evidence was disbelieved at the previous trial for a different offence cannot bar such evidence.

The accused was charged under S. 148 I. P. C. having been armed with deadly weapons amongst others, a gun and it was the prosecution case that only one gun was used by members of unlawful assembly. The accused was further charged under first part of S. 27 Arms Act. The resulting position meant that the accused was present in the mob and used the gun for firing shots. He was acquitted under S. 148 I. P. C. on the finding that he was not a member of mob and did not fire the gun. The finding was not challenged in appeal and was thus final.

Held that accused could not be convicted under S. 27 Arms Act. AIR 1965 SC 87, Rel. on. AIR 1956 SC 415, Foll. and (1950) AC 458, Rel. on.

(Paras 13 & 17)

Cases Referred: Chronological Paras (1965) AIR 1965 SC 87 (V 52)=1965 (1)

Cri LJ 120, Manipur Administration v. Bira Singh 13

(1964) 1964 (1) Cri LJ 733=(1964) 1 SCR 852, Sekender Sheikh v. State of West Bengal 14

(1956) AIR 1956 SC 415 (V 43)=1956 Cri LJ 815, Pritam Singh v. State of Punjab 13, 17

(1950) 1950 AC 458=66 TLR (Pt. 2) 254, Sambasivam v. Public Prosecutor Federation of Malaya 13

(1946) AIR 1946 PC 16 (V 33)=47 Cri LJ 489, Malak Khan v. Emperor 14

Criminal Revn. No. 158 of 1966. S. Mohanty and M. Patnaik, for Petitioner; Standing Counsel, for Opposite Party.

Criminal Revn. No. 174 of 1966. N. Mukherjee and A. S. Khan, for Petitioner; Standing Counsel, for Opposite Party.

Criminal Revn. No. 183 of 1966. Govind Das and D. P. Mohanty, for Petitioner; Standing Counsel, for Opposite Party.

ORDER: Prosecution case is that on 22nd of March, 1964 there was communal disturbance at Rajgangpur in the district of Sundargarh. The S. D. O., Sundargarh (P. W. 21) promulgated an order under Section 144 Cr. P. C. and imposed curfew prohibiting the inhabitants of Rajgangpur from holding any meeting or from coming out of their houses. In defiance of the order, a mob of about 3000 persons armed with deadly weapons started proceeding towards the Musalman Pada of Rajgangpur giving slogans that they would assault and kill the Muslims. P. W. 21,

the local police and Orissa Military Police stationed themselves at a paddy field in between the Musalman Pada and the advancing mob. An order was proclaimed by the S. D. O. directing the mob to disperse. The mob took a defiant attitude and continued to advance. The S. D. O. accordingly ordered opening of fire. After the fire was opened, the mob dispersed and the rioters started running away in different directions. Police chased the rioters and apprehended large number of persons including Karam Singh (petitioner in CrI. Rev. 158/66) and Mahabir (petitioner in CrI. Rev. 174/66). Todiram (petitioner in CrI. Rev. 183/66) had a gun and was in the front of the mob. He fired two shots towards the police party. One of these spent up cartridges fired from the gun of Todiram was recovered from the place of occurrence. Karam Singh and Mahabir were arrested by the military police while they were running away. Todiram ran away and would not be arrested at the spot but was subsequently arrested. Prosecution case regarding the offence under Section 332/149 I. P. C. is that while the mob was running away after the firing some of the members of the mob caused hurt to the constables (P. Ws. 24 and 25). The defence of the three petitioners was that they were not members of the unlawful assembly.

The learned Courts below convicted Todiram under Section 27 of the Arms Act and sentenced him to undergo R. I. for two years. Karam Singh and Mahabir were convicted under Section 148 I. P. C. and under Section 332/149 I. P. C. Each of them was sentenced to undergo R. I. for one year under Section 148 I. P. C. and no separate sentence was imposed under Section 332/149 I. P. C. The three petitioners along with 42 others were jointly tried by the learned Assistant Sessions Judge. The cases of the three petitioners would be separately dealt with.

2. Criminal Revision No. 158 of 1966: Karam Singh is admittedly a resident of Balangir and had gone to Rajgangpur on private business. His plea was that he was arrested by the Orissa Military Police on suspicion while he was returning from Gurudwar where he had gone as it was a Sunday. He was detained by the police some time before the firing took place and after the firing he was brought to the spot from where he was taken to the Thana. Both the courts below have rejected the defence plea, that the petitioner was arrested before the police firing. After having heard Mr. Mohanty at length I am satisfied that the conclusion of the courts below is correct. It is unnecessary to re-examine the evidence on this point which has been carefully sifted.

3. It is the common case of the parties that none of the prosecution witnesses has seen Karam Singh as a member of the mob. P. W. 29 deposed that accused Karam Singh held either a lathi or a spear. The witness is not sure about the weapon which Karam Singh held. There is no other corroborating evidence on the point. The weapon has also not been seized. I do not accordingly place reliance on this part of the prosecution case that Karam Singh carried any weapon. The only evidence against the petitioner is that he was arrested at a distance of about 30 feet where dead bodies were lying while he was running away after the firing. The conviction of the petitioner has been based entirely on circumstantial evidence. A conviction on circumstantial evidence is well founded provided the chain is complete. There should be no missing link so as to create a reasonable doubt against the charge being brought home to the accused.

4. Mr. Mohapatra for the State contends that though ordinarily the arrest of the petitioner while he was running away after the police firing may not by itself be conclusive that he was a member of the mob, the circumstances under which the mob collected and the petitioner was found running away at a place in close proximity of the mob immediately after firing leads to the irresistible conclusion that he was a member of the mob knowing fully well the common object of the unlawful assembly which was to commit mischief by setting fire to the houses of Muslims and causing hurt to them. The circumstances stressed in this regard are that the atmosphere was surcharged with communal hatred, the S. D. O. had promulgated orders under S. 144 Cr. P. C., curfew had been imposed and that the members of the mob were shouting slogans for killing the Muslims and for setting fire to their houses.

5. Though the contention so advanced cannot be said to be without force, I am not satisfied that the charge against the petitioner has been established beyond reasonable doubt. It is to be remembered that the mob was not static but was gradually swelling. About 400 persons assembled at the spot and other people were gradually coming towards it. The order of the S. D. O. asking the mob to disperse was not promulgated through loud speakers. As there is no evidence that the petitioner was a member of the mob and of the exact place where he was, it is difficult to say that he heard the order of the S. D. O. or the slogans of the mob. The mob which was originally 400 gradually swelled up to 3000. At what particular point of time the petitioner came near the mob is difficult to say. It would be laying down a dangerous proposition that the entire 3000

people were members of the unlawful assembly and all are liable to be convicted under Section 148 I. P. C. The mere fact that the petitioner was arrested soon after the firing and in close proximity of the mob is by itself not a safe guide for the conclusion that he was a member of the mob. The circumstance that the petitioner ran away after the firing is innocuous. When a firing takes place even innocent by-standers run away in fear of their lives.

6. Doubtless the petitioner's plea that he was arrested before the firing is a false one. But the falsity of the defence plea would not establish the prosecution case unless it is otherwise proved beyond reasonable doubt. Petitioner is entitled to an acquittal under S. 148, I. P. C.

7. Mr. Mohapatra concedes that the conviction under Section 332/149 I. P. C. cannot be supported. Doubtless P. Ws. 24 and 25 were injured by some of the rioters while the constables were chasing them, but there is absolutely no prosecution evidence that either petitioner caused the hurt or that he shared the common object of the rioters who caused the hurt. The concession is well founded. The petitioner is thus entitled to an acquittal under Section 332/149 I. P. C.

8. In the result, the order of conviction and sentence passed by the learned courts below against petitioner Karam Singh is set aside and the criminal revision is allowed. He be set at liberty forthwith.

9. Criminal Revision No. 174 of 1966:

Mr. Mohapatra concedes that the evidence against Mahabir is much weaker than the evidence against Karam Singh. The evidence against both is almost similar. For reasons given in the case of Karam Singh, the order of conviction and sentence passed against Mahabir is set aside and the criminal revision is allowed. He be set at liberty forthwith.

10. Criminal Revision No. 183 of 1966:

Prosecution case is that Todiram fired two shots from his gun as a member of the mob. His defence is that he was not a member of the mob. He was present in the shed inside the factory premises where he served as a Mahut (elephant's man) employed by the Orissa Cement Limited. The empty cartridges shot from his gun are generally collected by children and the spent-up cartridges recovered from the spot might be of those cartridges. The trial Court did not accept the prosecution story regarding the presence of the petitioner in the mob. It, however, accepted the opinion of the Ballistic Expert (P. W. 18) that the spent-up cartridges recovered from the spot had been fired from the gun of the petitioner by some member of the unlawful assembly, and accordingly convicted the petitioners

under Section 27 of the Arms Act, 1959. In course of discussion the trial Court disbelieved the identification by the S.D. O. (P. W. 21) that the petitioner was a member of the mob. The appellate court, however, accepted the evidence of P. W. 19 (not noticed by the trial court) and of P. W. 21 and held that the petitioner was a member of the mob and fired two shots at the police party at the time of occurrence.

11. Mr. Das assailed the findings of the courts below that the petitioner fired two shots towards the police party as a member of the mob. He also contended that spent-up cartridges recovered from the spot were not shot from petitioner's gun and the evidence of the Ballistic Expert was not acceptable. I do not find much force in the criticisms of Mr. Das. P. Ws. 19 and 21 clearly connect the petitioner with the firing of the gun as a member of the mob. Doubtless the occurrence was on 22-3-64 and the gun was seized on 31-3-64. The Ballistic Expert opined that the two spent-up cartridges, recovered from the spot, were shot from the petitioner's gun. The Expert was cross-examined at length, but nothing substantial was elicited with reference to literature on the subject of arms to discredit his testimony. The factual aspect of his argument must, therefore, be rejected.

12. It is necessary to examine another contention, not raised by Mr. Das, which directly arises in this case. The petitioner was charged under S. 148, I. P. C. as a member of the unlawful assembly and was separately charged under S. 27 of the Arms Act as having used the gun himself for firing two shots. He was acquitted by the trial Court of the offence under Section 148, I. P. C. on the clear finding that he was not a member of the mob. No appeal was filed against the order of acquittal. The finding is, therefore, conclusive. Under section 27 of the Arms Act, the petitioner was not charged with intent to enable another person to use his gun for any unlawful purpose, but was charged for having used it himself. If the petitioner is convicted under Section 27 of the Arms Act, on the charge as framed, an express finding is necessary that he was a member of the mob. Thus there would be two inconsistent findings. For the purpose of Section 148, I. P. C. the petitioner has been found not to be a member of the mob. Under Section 27 of the Arms Act, he is held to be a member of the very mob and to have used the gun. The question posed is whether the petitioner could be convicted under Section 27 of the Arms Act after he was acquitted of the charge under Section 148, I. P. C. The case was adjourned from time to time to give full opportunity to the learned advocates to present this

pect of the matter. Mr. Srikanth Mohanty, who does not appear for the petitioner, was good enough to make a thorough preparation and to present the correct legal position.

13. It is necessary to clarify the law to avoid confusion of thought. In this connexion, two distinct matters are to be kept in view. If in a previous trial a competent court records a finding accepting the innocence or guilt of the accused in respect of an offence and the very question comes up again as an issue in a second trial of the accused for a different offence, the court must proceed with the subsequent case accepting the previous finding of innocence or guilt as final and cannot allow evidence to dispute it. Such a case is directly covered by the rule laid down in *Pritam Singh v. State of Punjab*, AIR 1956 SC 415 which was followed in *Manipur Administration v. Bira Singh*, AIR 1965 SC 87. The juristic theory behind this rule was lucidly exposed by Lord MacDermott in *Sambasivam v. Public Prosecutor, Federation of Malaya*, 1950 AC 458. His Lordship observed thus:

The effect of a verdict of acquittal pronounced by a competent court on a lawful charge and after a lawful trial is not completely stated by saying that the person acquitted cannot be tried again for the same offence. 'To that it must be added that the verdict is binding and conclusive in all subsequent proceedings between the parties to the adjudication'. The underlined (here into ' ') sentence embodies the quintessence of the dictum.

In AIR 1956 SC 415, the facts were almost identical with those of the present case. There the accused was prosecuted for murder. Prosecution case was that the accused had shot a person dead with an unlicensed revolver in his possession and subsequently recovered from him by the police. Before the trial for murder and immediately after recovery of the weapon, in question, the accused had been separately tried and acquitted of offence under Section 19(f) of the Arms Act. Their Lordships of the Supreme Court held that the acquittal fully established the innocence of the accused on the question of possession and it was binding on all subsequent proceedings between the accused and the prosecution and hence it was not open to the court to canvass in a trial for murder the correctness of that finding and come to a different conclusion.

14. The position is, however, different if the object of the evidence given at the second trial is merely to corroborate the charge in respect of the offence which is the subject-matter of that trial; and there is no question of disputing any previous finding in favour of the accused. The

fact that the same evidence was disbelieved at the previous trial for a different offence cannot bar such evidence. These types of cases come within the ambit of *Malak Khan v. Emperor*, AIR 1946 PC 16 which was followed in *Sekender Sheikh v. State of West Bengal*, (1964) 1 SCR 852=(1964 (1) Cri LJ 733).

The facts of the Privy Council case may be noticed. There was a trial for murder and robbery. The accused was convicted of murder but acquitted of robbery. An appeal was preferred against the conviction of murder. Their Lordships held that the evidence which had been disbelieved by the trial Court on the charge of robbery, could be accepted as corroborative evidence of the charge of murder. *Sekender Sheikh's* case on which reliance was placed by Mr. Mohapatra comes in the same category. The accused was charged under Sections 467 and 109 I. P. C. and under Section 82(c) of the Registration Act. The Sessions Judge acquitted the accused of the charge under Section 82(c) of the Registration Act. In the trial for the offences under the Indian Penal Code, the Jury gave a verdict of guilty and the Sessions Judge made a reference under Section 307, Cr. P. C. The High Court convicted the accused under Sections 467 and 109, I. P. C. It was contended that as the offences under Sections 467 I. P. C. and 82(c), Registration Act formed part of the same transaction and the prosecution case for the former offence was substantially founded on the same evidence, which was not accepted by the trial court when acquitting the accused of the latter offence, the High Court could not act upon that evidence to record an order of conviction on the charge for the offence of forging a valuable security.

The Supreme Court negated this contention. Forging a valuable security and presenting of that valuable security for registration are two distinct offences. The conviction under Section 467, I. P. C. and abetment thereof upon evidence which corroborated the story of the prosecution in support of both could not be excluded merely because that finding was not accepted by the Sessions Court in considering the charge against them for false personation for procuring registration.

15. The question for consideration is in what class the present case falls. In order to appreciate this contention, it is necessary to extract the charges under Sections 148, I. P. C. and 27 of the Arms Act.

Charge under Section 148, I. P. C.

That you Todiram Mahawat on or about the 22nd day of March, 1964 at Rajgangpur at 2.30 p.m. were member of an unlawful assembly and did in prosecution of the common object of such assembly viz., in committing mischief by setting fire to

the houses of Muslims, causing them hurt, commit the offence of rioting and at that time were armed with deadly weapons to wit spears, swords, lathies, bows, arrows and gun and thereby committed the offence punishable under S. 148, I. P. C. The positive case of the prosecution is that only one gun was used by the members of the unlawful assembly.

Charge under S. 27 of the Arms Act:

That you Todiram Mahawat on or about the 22-3-1964 at 2.30 p.m. at Rajgangpur used a D. B. B. L. 12 bore gun for unlawful purpose to wit, in firing the shots out of the same at the Magistrate and O. M. P. Force who were on duty viz. dispersing an unlawful assembly and thereby committed an offence punishable under Section 27, Arms Act.

16. Section 27 of the Arms Act runs thus:

Whoever has in his possession any arms or ammunition with intent to use the same for any unlawful purpose or to enable any other person to use the same for any unlawful purpose shall, whether such unlawful purpose has been carried into effect, or not, be punishable with imprisonment for a term which may extend to seven years, or with fine, or with both.

It is to be noted that Section 27 is in two parts — first part speaks of using the arms himself while the second part relates to enabling some other person using the arms. In this case, the charge under Section 27 confined itself to the first part. There is no charge under the second part.

17. The charge under the first part, in the context of the facts of this case, means that the petitioner was present in the mob and used the gun for firing two shots. He was acquitted of the charge under Section 148, I. P. C. on the finding that he was not a member of the mob. That finding is final and conclusive and cannot be reopened, on the authority of AIR 1936 SC 415, for the conviction under Section 27 of the Arms Act. The finding that the petitioner was not present in the mob postulates a further conclusion that he could not have used the gun as a member of the unlawful assembly. The result may be unfortunate; but in law the petitioner cannot be convicted under the first part of Section 27 of the Arms Act. The petitioner had been wrongly acquitted of the charge under Section 148, I. P. C. In the absence of an appeal against the order of acquittal, that wrong finding cannot be set aside and is to be taken as conclusive. The petitioner, therefore, is entitled to acquittal.

18. In the result, the order of conviction and sentence passed against the petitioner is set aside and the criminal revision is allowed. He be set at liberty forthwith.

19. To sum up, all the criminal revisions are allowed.

GGM/D.V.C.

Petitions allowed.

AIR 1969 ORISSA 28 (V 56 C 13)

G. K. MISRA, J.

Dinamani Dass and others, Petitioners v. Bimbadhar Padhan and others, Opposite Parties.

Civil Revision No. 210 of 1966, D-1 31-7-1968.

(A) Civil P. C. (1908), S. 115 — Amendment of preliminary decree in pursuance of order directing fresh drawal of the decree — Revision against order incomplete.

An order directing fresh drawal of preliminary decree, is only revisable as no appeal lies against such order; but once the amended preliminary decree is passed on the basis of such order High Court should not exercise its revisional powers as a second appeal lies to the High Court after the first appeal is disposed of by the District Judge. (Para 4)

(B) Civil P. C. (1908), S. 115 — Exercise of power under is discretionary.

It is well settled that the exercise of powers under section 115 is not as a matter of right. It is discretionary with the High Court as the word used is "may". Even where the Court acts contrary to law on a question which impinges on the question of jurisdiction the High Court is not bound to interfere if the conduct and the act of the petitioner do not arouse its conscience. (Para 4)

B. K. Roy, P. N. Patnaik and B. H. Mohanty, for Petitioners; R. N. Misra, R. C. Patnaik, R. K. Mohanty and P. K. Sengupta, for Opposite Parties.

ORDER: On 17th of March, 1949 a preliminary decree for foreclosure was passed directing the defendants to pay Rs. 1220 with interest at the rate of 9 per cent from the date of the suit bond together with an additional sum of Rs. 80 within a period of six months from the date of the preliminary decree. In default of such payment the preliminary decree directed that the plaintiffs were entitled to apply for a final decree that the defendants were debarred from redeeming the hypothecated property. This decree was ultimately confirmed in second appeal No. 25 of 1950 on 26-11-51. There were some interim steps taken by the defendants which need not be mentioned. The decree was made final on 18th of November, 1953. On 22nd February 1956 the plaintiffs decree-holders filed Execution Case No. 59 of 1956 for delivery of possession of the mortgaged property. An objection under Section 47, C. P. C. was filed by the judgment-debtors that both

the preliminary and final decrees were not drawn in proper form and that there was no direction in the final decree for delivery of possession. The objection was dismissed on 19-4-56. In appeal the District Judge upheld the objection and directed to amend the preliminary and final decrees and to draw them up in proper form in the suit itself. The trial court suo motu amended the preliminary decree on 4-12-56 without making any provision for a grace period and without notice to the defendants. He also amended the final decree on 22-12-56 without notice. The decree-holders themselves filed an application for amendment of the preliminary and final decrees. The preliminary decree was amended on 11-5-57 and the final decree on 28-6-57 without notice to the defendants. The plaintiffs levied execution in Execution Case No. 253 of 1957 on 5-8-57. The judgment-debtors again filed their objection. The executing court upheld their objection. An appeal at the instance of the decree-holders was dismissed but there was a direction that the preliminary decree as well as the final decree were to be amended. On 13-12-64 the decree-holders again filed an application for amendment of the preliminary decree. It was amended on 13-9-65 without notice to the defendants. On the objection of the defendants that the amendment was allowed without notice to them and without hearing the matter was heard. On 28-4-66 the Subordinate Judge, Kendrapara passed an order directing fresh drawal of the preliminary and final decrees. Against this order, the civil revision has been filed.

2. Mr. Ray for the defendants-petitioners raises some interesting arguments. He contends that all that were being directed by the court from time to time was for amendment of the preliminary decree and the final decree. In the preliminary decree, a period of grace is to be given and on non-compliance thereof, a final decree is to be passed as directed in the preliminary decree. As the final decree was passed on 18-11-53, a further period of grace cannot be given after it is amended in 1966.

3. For the reasons to be stated hereunder, the civil revision is bound to be dismissed and I do not express any opinion on the aforesaid argument of Mr. Ray.

4. It is to be noted that the impugned order was passed on 28-4-66 and in accordance with that order the amended preliminary decree was passed on 12-5-66. The civil revision was filed on 22-7-66. A preliminary objection was accordingly raised by Mr. Misra that when the civil revision was filed after the preliminary decree was passed, it is not maintainable.

Section 115 of the Code of Civil Procedure runs thus—

"The High Court may call for the record of any case which has been decided by any court subordinate to such High Court and in which no appeal lies thereto, and if such subordinate court appears—

(a) to have exercised a jurisdiction not vested in it by law, or

(b) to have failed to exercise a jurisdiction so vested, or

(c) to have acted in the exercise of its jurisdiction illegally or with material irregularity,

the High Court may make such order in the case as it thinks fit".

It is to be noted that one important limitation has been put on the powers of the High Court under S. 115 if an appeal lies to the High Court. Doubtless, so far the impugned order dated 28-4-66 is concerned, no appeal lies and it is only revisable but once the amended preliminary decree was passed on 12-5-66 on the basis of the impugned order, a second appeal lies to the High Court after the first appeal is disposed of by the District Judge. It is now well settled that the expression, "in which no appeal lies thereto" takes within its sweep both the first appeal as well as the second appeal. A second appeal lies to the High Court from the amended preliminary decree. The High Court should not, therefore, exercise its revisional powers under S. 115, C. P. C.

There is another hurdle on the part of the judgment-debtors. It is well settled that the exercise of powers under S. 115 is not as a matter of right. It is discretionary with the High Court as the word used is "may". Even where the Court acts contrary to law on a question which impinges on the question of jurisdiction the High Court is not bound to interfere if the conduct and the act of the petitioner do not arouse its conscience. In this case the decree was originally passed in 1949. The defendants-judgment-debtors have not come forward to make any payment in satisfaction of the decree and have been taking objection after objection to the execution. It may be that their objections are sound in law. This is a matter which is neither here nor there and on which I have already said not to express any opinion. But when it comes to the question of arousing conscience of the Court for interference in civil revision, different considerations altogether arise when no appeal was filed. On this ground also, this is not a fit case for interference.

5. For the aforesaid reasons, I decline to interfere in civil revision which is accordingly dismissed but in the circumstances, the parties to bear their own costs.

CWM/D.V.C.

Revision dismissed.

AIR 1969 ORISSA 30 (V 56 C 14)

S. BARMAN, C. J. AND S. K. RAY, J.
Sribatsha Kanugo and others, Petitioners v. Board of Secondary Education and others, Opposite Parties.

O. J. C. No. 261 of 1967, D/- 12-8-1968.

(A) Constitution of India, Arts. 226, 367, 31 — Word "person" — Managing Committee of School is a "person" — Application under Art. 226 can be filed by the Managing Committee claiming fundamental right to property.

In view of the clear provisions of Article 367(1), the definition of 'person' as given in S. 3(42) of the General Clauses Act will apply to the Managing Committee of a school. Therefore, the Managing Committee of a school as a person can apply under Art. 226 of the Constitution on the ground that it has a fundamental right to property guaranteed under Article 31(1) of the Constitution which provides that no person shall be deprived of his property except by the authority of law as claimed in the petition. (Para 5)

(B) Education — Orissa Education Code, Article 41 — Code has no statutory force — Articles are mere administrative instructions — Dissolution of Managing Committee of School — Not valid — Can be ignored by Committee — Newly constituted Managing Committee cannot claim any rights on the basis of the order of dissolution.

The Orissa Education Code has no statutory force. The so-called Articles in the Code are not framed either under any statutory enactment or under any provision of the Constitution. They are merely in the nature of administrative instructions for the guidance of the Department and are purported to have been issued under the executive power of the State. Hence an order of the Inspector of Schools for dissolution and reconstitution of the Managing Committee under Art. 41 cannot confer any right on the newly constituted Managing Committee, and they cannot claim any rights on the basis of the impugned order passed under Article 41. Therefore, no claim before a Court of law can be founded by any body like the newly constituted Managing Committee relying on the impugned order of dissolution and reconstitution passed under Article 41. AIR 1967 SC 1753, Rel on.

(Para 6)

The Inspector of Schools has no authority to interfere with a private school. It is open to the Managing Committee sought to be replaced not to respect the order of dissolution and it is open to them to carry on the management of the school in the way they desire O. J. C. No. 383 of 1966 D/- 10-11-1967 (Ori.), Foll.

(Para 7)

JL/JL/ES38/68

Cases Referred: Chronological Paras
(1967) AIR 1967 SC 1753 (V 54)=(1967)
3 SCR 636, Fernandez, G. J. v.
State of Mysore
(1967) O. J. C. No. 383 of 1966 D/-
10-11-1967 (Ori.), Chakradhar Samal
v. Inspector of Schools, Cuttack
Circle

B. Mohapatra, N. C. Patnalk and R. K. Mohapatra, for Petitioners; Advocate-General and M. Mahanti and A. K. Tripathy, for Opposite Parties.

BARMAN, C. J.: In this writ petition the petitioners, being the Managing Committee of the Nizam High English School, a private educational institution, in village Ameipal, its President, Secretary and one of the members, challenge the order dated August 9/10, 1967 of the Inspector of Schools, Cuttack Circle, Cuttack, purporting to act under Article 41 of the Orissa Education Code by which he dissolved the existing Managing Committee of the School and reconstituted a new Managing Committee on the grounds mentioned in the petition.

2. It is said that there was no High English School in the locality of the petitioners till the year 1962. There was a general public demand for such a school and accordingly in pursuance of a unanimous resolution by the local public a Managing Committee was formed with petitioner No. 1 as the President, petitioner No. 2 as the Secretary and other members including petitioner No. 3, to raise funds and to manage the proposed High English School in the village Ameipal. They are stated to have donated land by a registered document on February 19, 1962. There were also other donations for the School, all by registered documents as stated in the petition. The Managing Committee is said to have held the lands donated as trustees for the benefit of the school, for construction of the School building. It is said that through the efforts of the local public, the foundation-stone was laid for construction of the school building on the land. In 1963 the School was given recognition and was permitted by the Inspector of Schools to open Class VIII and thereafter in 1965 the Inspector of Schools again granted recognition and permitted the opening of Classes IX to XI. In due course, the students of the School were admitted for the High School Certificate Examination of the years 1965-66 and 1966-67 according to the provisions of the Orissa Secondary Education Act, 1963. The School was also given annual grants.

3. As it appears from the records there were some alleged disputes and differences between the villagers of Ameipal and those of Thikiri regarding the school as a result of which there was an enquiry by the Inspector of Schools. Ultimately, the Inspector of Schools by the

impugned order dated August 9, 1967 dissolved the Managing Committee and constituted a new Managing Committee. The relevant portion of the impugned order of the Inspector of Schools is this:

"On receipt of information and also enquiry I am satisfied that there are disputes between the public and the Managing Committee and also amongst the members themselves of the Managing Committee of the Nigam High School, Ameipal in the district of Cuttack, which stand in the way of smooth management of the School. I, the Inspector of Schools, Cuttack Circle, Cuttack, acting under Article 41 of the Orissa Education Code, with the concurrence of the District Magistrate, Cuttack, do hereby dissolve the existing Managing Committee of Nigam High School, Ameipal and reconstitute a new Managing Committee for the said High School with the following members

xx xx xx

Sd. C. S. Murty

Inspector of Schools,
Cuttack Circle, Cuttack.

The Secretary of the School is requested to hand over charge of the School to the newly elected Secretary of the reconstituted Managing Committee forthwith, under report to the undersigned.

Sd. Illegible

Inspector of Schools
9-8-67."

4. The main grounds on which the petitioners challenge the impugned order of the Inspector of Schools dissolving the old Managing Committee & directing its Secretary to hand over charge of the school to the newly elected Secretary of the reconstituted Managing Committee, are set out in paragraphs 18, 19 and 20 of the petition as quoted below:

"18. That the petitioners beg to submit that the petitioners have acquired the proprietary right in respect of the building, and other immovable and movable properties of the school which has legally vested in them and they are in peaceful and undisturbed possession of the same.

19. That the provisions of the Orissa Education Code have no greater sanction than an administrative order, instruction and rule and is not based on any statutory authority or other authority which could give it the force of law and in the circumstances the action of the opposite party No. 2 in pursuance of the provisions of the Orissa Education Code cannot deprive the petitioners of their right in the properties as aforesaid.

20. That the impugned order dated 10-8-67 passed by the opposite party No. 2 which threatens the invasion of the fundamental rights of the petitioners and the Managing Committee is clearly hit by

the provisions of Article 31 of the Constitution as it involves deprivation of the property without the authority of law."

5. The maintainability of the writ petition — challenging the impugned order of dissolution and direction to the Secretary to hand over charge to the Secretary of the new Managing Committee as invading the fundamental right of the petitioners guaranteed under Article 31 of the Constitution — was questioned on the ground that the Managing Committee is neither a 'person' nor a 'citizen' who can claim fundamental right under the Constitution. In support of this contention, the contesting opposite parties relied on the definition of 'person' as given in Section 2(1)(b) of the Citizenship Act, 1955 providing that in the said Act unless the context otherwise requires, a "person" does not include any company or association or body of individuals, whether incorporated or not. In other words, the point of the said opposite parties is that the Managing Committee not being a person or citizen, can claim no fundamental right under the Constitution. There was a lengthy argument urged on behalf of both sides in support of their respective contentions. In our opinion, the objection to the maintainability of the writ petition, raised by the said opposite parties loses its force in view of Article 367(1) of the Constitution which provides that unless the context otherwise requires, the General Clauses Act, 1897 shall, subject to any adaptations or modifications that may be made thereunder under Article 372, apply for the interpretation of the Constitution as it applies for the interpretation of an Act of the Legislature of the Dominion of India. Section 3(42) of the General Clauses Act is this.

"3. In this Act and, in all Central Acts and Regulations made after the commencement of this Act, unless there is anything repugnant in the subject-matter or context xx xx z

(42) 'person' shall include any company or association or body of individuals, whether incorporated or not."

Therefore, in view of the clear provisions of Article 367(1) of the Constitution, the definition of 'person' as given in Section 3(42) of the General Clauses Act will apply and the maintainability of the writ petition filed by the petitioners cannot be challenged on the ground that the said Managing Committee not being a 'person' cannot claim a fundamental right under the Constitution. Therefore, the Managing Committee as a person can apply under Article 226 of the Constitution on the ground that it has a fundamental right to property guaranteed under Article 31(1) of the Constitution which provides that no person shall be deprived of his property except by the authority of law as

claimed in the petition. Therefore, the objection to maintainability of the writ petition is not tenable.

6. Now, coming to merits, Article 41 of the Orissa Education Code, under which the Inspector of Schools, by the impugned order, purported to dissolve the existing Managing Committee and re-constitute a new Managing Committee is this:

"41. Consultation with Revenue Commissioner or District Magistrate:—Managing Committee or Advisory Committee of a school and the local public, or among the members of themselves (sic) of the Managing Committee or Advisory committee, the Inspector of Schools should obtain the opinion of the Dist. Magistrate before giving his decision. The Inspector of Schools may reconstitute the Managing or Advisory Committee if, after consulting the District Magistrate, he considers it necessary to do so."

(G. O. No. 5737-E, dated the 17th July, 1954)

It is now the settled position in law that the Orissa Education Code has no statutory force. The so-called Articles in the Code are not framed either under any statutory enactment or under any provision of the Constitution. They are merely in the nature of administrative instructions for the guidance of the Department and are purported to have been issued under the executive power of the State. As they have no statutory force, the purported order of the Inspector of Schools for dissolution and reconstitution of the Managing Committee under Article 41 cannot confer any right on the newly constituted Managing Committee, and they cannot claim any rights on the basis of the impugned order passed under Article 41 which is a mere administrative instruction. We are, therefore, of opinion that no claim before a Court of law can be founded by any body — like the newly constituted Managing Committee the contesting opposite parties herein — relying on the impugned order of dissolution and reconstitution passed under the aforesaid Article 41 of the Orissa Education Code which is merely an administrative instruction and not a statutory rule. This view is supported by the decision of the Supreme Court in *G. J. Fernandez v. State of Mysore*, AIR 1967 SC 1753, 1756.

7. That apart, in a recent similar case of this Court *Chakradhar Samal v. Inspector of Schools, Cuttack Circle*, O. J. C. No. 383 of 1966 D/- 10-11-1967 (Ori.), this very Bench held that an order of dissolution passed by the Inspector of Schools under Article 41 of the Orissa Education Code cannot stand. The reasoning which weighed with us was that the Inspector of Schools had no authority to interfere with a private school; that it is open to

the Managing Committee sought to be replaced not to respect the order of dissolution and it is open to them to carry on the management of the school in the way they desire.

8. In the view we have taken, as aforesaid, both on the point of maintainability and on merits, it is unnecessary to deal in detail with the question as to whether the impugned order offends Art. 31 of the Constitution. Accordingly, the impugned order dated August 9/10, 1968 is quashed. The writ petition is allowed, but there will be no order as to costs.

9. RAY, J.: I agree.

MVJ/D.V.C.

Petition allowed.

AIR 1969 ORISSA 32 (V 56 C 15)

G. K. MISRA, J.

Paramananda Ash, Appellant v. Bhagabati Del, Respondent.

M. A. No. 90 of 1967, D/- 13-8-1968, from decision of Dist. J., Cuttack, D/- 30-6-1967.

Civil P. C. (1908), S. 47, O. 21 R. 2 — Agreement against execution — Question whether agreement is bar to execution — Agreement not superseding decree — Executing Court can decide the effect of agreement under S. 47 subject to O. 21 R. 2. AIR 1961 All 1 (FB), Diss from.

Where the parties have entered into an agreement against the execution of the decree the question whether such an agreement is a bar to the execution, depends upon the nature of the agreement and the intention of the parties. If by the agreement, the decree is superseded and abandoned and an altogether new contract is entered into, the contract would constitute the basis of subsequent suit. On the other hand, if the agreement does not supersede the decree, the Executing Court can inquire into the effect of the agreement and decide the matter under Section 47, C. P. C. subject to the provisions of Order 21, Rule 2, C. P. C., where such an agreement amounts to adjustment of the decree. AIR 1939 PC 80, Rel. on.

(Para 3)

Where under the terms of agreement it was not intended to supersede the decree, but unequivocal terms were embodied in the agreement that in case of default on the part of the judgment-debtor, either to vacate possession or to pay arrears of rent, the decree would be executable and the possession and arrears were to be recovered only through execution proceedings, the agreement did not stand as a bar to execution and no separate suit on its basis was maintainable. The decree as modified was executable. AIR 1961 All 1 (FB) Diss. from AIR 1961 Punj 439 Foll.

(Paras 4, 6)

benamidar of the property this also would bring the case within the ambit of this provision but in this case, she admittedly was residing in the house, which lends support to her claim. In my opinion however, the word 'interest' contemplated in clause 2 is not any kind of interest but interest in the nature of title. If it were otherwise, even a lessee in possession might well claim the release of the property from attachment which obviously could not be the intention of the legislature. The word 'some' no doubt occurs here which might be taken to widen the scope of the word 'interest'. But 'some' here can reasonably be taken to mean the quantum and not nature of the interest which can only imply a right independent of the right to it of the person proceeded against in the criminal Court.

In the instant case, I have already found on the evidence that the house was built by A. P. Sinha and the lady could not claim it to be her personal property. She might be living in the house as wife of A. P. Sinha, but this would not be in derogation of the interest of A. P. Sinha but only as a dependent as a Hindu wife of her husband. As to her name being entered in the Municipal papers, I have already held, that this was material but from the evidence on record it was clear that the house was built by A. P. Sinha out of his own money and although the name of his wife stood in the Municipal papers. It could not be inferred that she spent any money of her own which would make it her personal property as she pleaded. In the circumstances, therefore, she cannot be taken in the eye of law to have any independent interest, of her own which would bring her claim within the ambit of clause 2 of Section 5 of the Ordinance. In my opinion, therefore, the learned District Judge was right in coming to the conclusion that the house on the Ratu Road standing on plots nos. 1148 and 1149, the subject matter of the proceedings could not be held to be the personal property of the appellant and as such she had no locus standi to raise objection under section 5 of the Ordinance.

6. The result is that there is no merit in the appeal which is hereby dismissed with costs.

7. B. D. SINGH, J. :— I agree.

GDR/D.V.C.

Appeal dismissed.

AIR 1969 PATNA 33 (V 56 C 12)

RAJ KISHORE PRASAD, J.

Sarjug Singh and others, Appellants v. Gulabo Kuer, Respondent.

A. F. O. O. No. 322 of 1966, D/- 23-4-1968, from order of Dist. J., Muzaffarpur, D/- 25-7-1966.

(A) Lunacy Act (1912), S. 83 — Who can appeal.

Any person, who is aggrieved by any order passed under Chapter V of the Act by a District Judge has the right to appeal against such order to the High Court under S. 83. No doubt, the Lunatic is the most aggrieved person, but he being a lunatic, is not capable of understanding the legal implication of the order under appeal and, therefore, he is not expected to file an appeal. (Para 8)

(B) Lunacy Act (1912), S. 62 — Application under — Need not be accompanied either by affidavit or medical certificate: AIR 1920 All 80, Dissent. from.

Section 62 does not require an application under S. 62 to be accompanied either by an affidavit or a medical certificate. Certainly if it is supported by a medical certificate and by an affidavit by the applicant then the application will have great weight, but for the omission of the applicant to file an affidavit or a medical certificate along with the application the application cannot be said to be not maintainable: AIR 1920 All 80, Dissent. from. (Para 9)

(C) Lunacy Act (1912), Ss. 3(5), 65(2) — Lunatic — Meaning of — Distinction between lunacy as understood in the Act and mere weakness of intellect — Procedure laid down must be strictly followed.

The Court in assuming jurisdiction under the Lunacy Act, must first of all, keep in view the distinction between mere weakness of intellect and 'lunatic' as understood in the Act. It is, therefore, the duty of the Court, before proceeding further, to determine judicially whether the person alleged to be incapable of managing himself or his affairs, is really a 'lunatic' in this sense. The legislature has, therefore, laid down an elaborate procedure for conducting an enquiry into this matter and this procedure must be strictly followed. The court cannot and ought not to deal light-heartedly with this important question and it should not consider itself relieved of its responsibility by the mere circumstance that some or all of the relatives of the persons concerned have declared that he is lunatic. It may be that these relatives honestly, but mistakenly believe him to be of unsound mind, whereas in reality he is not so; or it may be that while disagreeing among themselves in respect of certain other

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matters, they all have evil designs on his property and have made common cause to deprive him of his possession or management. The interest of the persons, alleged to be of unsound mind, therefore, ought to be zealously protected against any attempt of designing people, acting innocently but mistakenly to place either their persons or their property in restraint.

S. 3(5) of the Act defines 'lunatic' as an idiot or a person of unsound mind; but the said words have not been defined and both these terms indicate an abnormal state of mind as distinguished from weakness of mind or senility following old age and that a man of weak mental strength cannot be called an idiot or a man of unsound mind; and the Act is not intended to protect dull-witted people but only those who suffer from a mental disorder or derangement of the mind.

'Unsoundness of mind' implies some unusual feature of the mind as has tended to make it different from the normal and has in effect impaired the man's capacity to look after his affairs in a manner in which another person without such mental irregularity would be able to do in the matter of his own. The idea suggests some derangement of the mind, whatever be its degree, and it is not to be confused with or taken as analogous to a mere mental weakness or lack of intelligence. A man may find it difficult to answer questions of particular class but if he intelligently answers questions of various other sorts concerning himself, his family and property, he cannot be classed with men of unsound mind being unable to manage their affairs. If a man is able to understand and answer questions on various matters except those relating to arithmetical calculations, he cannot be regarded as mentally unsound, although he would be held as having a weak or undeveloped mind.

'Unsoundness of mind' or as it is some times styled lunacy or insanity, may be shortly defined as a defect of reason consisting either in its total or partial absence or in its perturbation. The perturbation or absence of reason which constitutes insanity is an abnormal state of the mind of a man judged by a standard which recognises a normal standard or rationality and pronounces that man to be insane. Sanity exists when the brain and the nervous system are in such a condition that the mental functions of feeling and knowing, emotion, and of willing can be performed in their regular and usual manner. Insanity means a state in which one or more of the above named mental functions is or are performed in an abnormal way or not performed at all by reason of some disease of the brain or nervous system.

The question therefore, whether any man is of 'unsound mind' can only be decided by reference to the ordinary standard of human intelligence; and when a case comes before a Court it is the duty of the Court to decide the question of mental capacity, and expert evidence does not relieve it from the obligation to form an independent opinion. A person who is not sufficiently intelligent to manage his own affairs, is not necessarily of unsound mind. 'Unsoundness of mind' can be defined on certain states of the mind and on the outward conduct of the person due to his particular mental condition. It should have some connection with the derangement of mind which may be said to be a state of disordered mind. If the mind is not in any way deranged, but is merely weak or undeveloped, it cannot be said to be an unsound mind.

No person can have direct experience of the mind of another, proper test of insanity is conduct. The proper test for insanity is not the beliefs that the person concerned may entertain but the conduct exhibited by that person. Under S. 65(2) of the Act, therefore there must be a finding that the alleged lunatic is of unsound mind and incapable of managing himself and his affairs and the High Court has power to interfere under S. 83 of the Act to correct a wrong finding under S. 65(2) of the Act. (Para 17)

(D) Lunacy Act (1912), Ss. 18(1), 62 — Omission to give medical certificate in Form III of Schedule I — Effect.

Section 18 occurs under Chapter II, which deals with 'Reception of the Lunatic'. Powers have been given to a magistrate, within the local limits of whose jurisdiction, the alleged lunatic resides to entertain an application for reception order. Even assuming that Section 18 applies to a proceeding to direct inquisition under section 62 of Chapter V also, the omission to give the medical certificate in Form III of Schedule I contemplated by Section 18(1) of the Act does not render the medical certificate valueless and on account of that omission, it cannot be thrown out. (Para 23)

(E) Lunacy Act (1912), S. 83 — Order passed by Court about property in hands of manager after death of lunatic — Order is appealable under S. 83.

The manager appointed under the Lunacy Act of the properties of the lunatic can continue only so long as the lunatic is alive. When the lunatic dies the lunacy proceeding comes to an end but the Court must pass some order about the property in the hands of the manager. Such an order of the Court will be referable to its jurisdiction exercised over the property of the lunatic under Chapter V of the Act and, therefore, the order must be deemed to be an order under

that Chapter, and, an appeal against such an order would lie under Section 83 of the Act. AIR 1949 Nag 108, Rel. on.

(Para 25)

Cases Referred: Chronological Paras

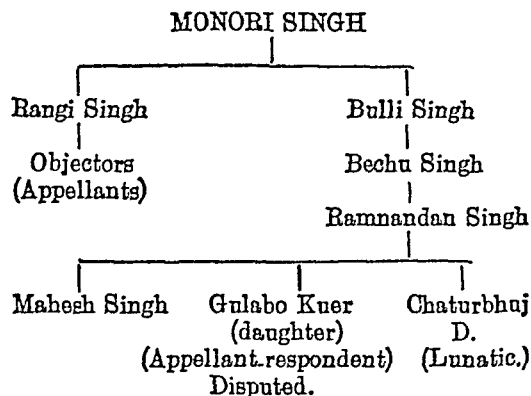
- (1957) AIR 1957 Andh Pra 938 (V 44) = ILR (1955) Andh 568, Ganga Bhavanamma v. Somaraju 13
- (1949) AIR 1949 All 449 (V 36) = ILR (1950) All 396, Joshi Ram Krishan v. Mt. Rukmini Bai 8, 14
- (1949) AIR 1949 Nag 108 (V 36) = ILR (1948) Nag 465, Bhaoorao v. Chandrabhagabai 24
- (1935) AIR 1935 Pat 423 (V 22) = 16 Pat LT 874, Sonabati Debi v. Narayan Chandra Upadhyaya 11
- (1934) AIR 1934 Nag 27 (V 21) = 30 Nag LR 224, Mahipati v. Mt. Changuna 16
- (1930) AIR 1930 Lah 289 (V 17) = 31 Pun LR 98, Mt. Tekka Devi v. Gopal Das 12, 13, 14, 21
- (1920) AIR 1920 All 80 (V 7) = ILR 40 All 504, Mahomed Yaqub v. Nazir Ahmad 9
- (1905) 1905 AC 343 = 74 LJ PC 70, In re John McLaughlin 12
- (1876) 4 Ch. D 301 = 35 LJ 828, In re E. S. 12

Mangal Prasad Mishra, for Appellants; Shiva Nandan Ray, Arun Bihari Mathur and Parmeshwar Prasad Sinha, for Respondent.

RAJ KISHORE PRASAD J. :— The objectors have appealed, under section 83 of the Indian Lunacy Act, 1912. (Act IV of 1912) hereinafter referred to as the 'Act' from the order dated 25-7-1966 passed by the learned District Judge, Muzaffarpur, under Section 65, Clause (2) of the Act, declaring that Chaturbhuj Singh was a lunatic within the meaning of Section 3(5) of the Act, and, as such, the applicant-respondent, Gulabo Kuer, who was his own sister, had the right to file the application under Section 62 of the Act and the lunatic being incapable to manage his properties and to take care of himself, his sister, the applicant-respondent, Gulabo Kuer, should be appointed guardian of the person and manager of the properties of the lunatic.

2. It may be mentioned at this very stage that the lunatic, Chaturbhuj Singh, died after the above order, during the pendency of the present appeal, and therefore, the learned District Judge, on 3-1-1967 dropped the lunacy proceeding and the applicant-respondent who was appointed guardian of the person and properties of the lunatic was discharged.

3. The following genealogy will be useful in understanding the relationship of the parties :—



The above genealogy is admitted by the objectors; and the only dispute was that Gulabo Kuer was not the daughter of Ramnandan Singh and the own sister of Chaturbhuj Singh but she was the daughter of one Surajnandan of the objectors' branch. The Court below, however, has found on the evidence, that Gulabo Kuer was the daughter of Ramnandan Singh and the own sister of Chaturbhuj, whose other brother Mahesh Singh predeceased him. This finding has been challenged before this Court but on the evidence it must be held that Gulabo Kuer, applicant-respondent, is the own sister of Chaturbhuj Singh.

4. In 1953, Sarjug Singh and his brother Parsuram Singh and their first cousin, Bindeshwari Singh, who are the objectors-appellants, belonging to the branch of Rangi Singh, took a deed of gift, Ext. A from Chaturbhuj Singh in respect of some properties which are mentioned in the application under section 62 of the Act. Subsequently a titled suit Title Suit No. 135 of 1953 was instituted on 17-11-1953 by Surajnandan Singh of objectors' branch. To that suit the present appellants were defendants and Chaturbhuj was also a party. In that suit Surajnandan Singh asked for being given a share in several properties including the properties covered by the gift Ext. A which was executed by Chaturbhuj in favour of the appellants. The suit was dismissed on 25-12-1955. Thereafter Surajnandan Singh, it was alleged by the appellants, set up Gulabo Kuer, respondent, who was alleged to be his daughter and she filed Guardianship Case No 64 of 1961 on 20-9-1961. The said guardianship case was dismissed on 30-3-1962 on which date the present application under section 62 of the Act was filed by Gulabo Kuer, in which she stated she is the full sister of Chaturbhuj Singh but the latter is deaf, dumb and idiot and incapable of managing his affairs and incapable of looking up himself and his safety since his birth and he was looked after by his mother after the death of Ramnandan Singh, his father. She further alleged that

after the death of the mother of Chaturbhuj, she herself used to reside in her Naihar and she took care of Chaturbhuj Singh as well as of his properties. It was further said that a fraudulent deed of gift was taken by the objectors appellants, from Chaturbhuj Singh and the life of Chaturbhuj Singh was in constant danger, and, therefore, it was necessary to start inquisition proceeding under the Act for the purpose of ascertaining whether Chaturbhuj Singh was an idiot and incapable of managing himself and his properties. She also said at present the said lunatic was in the custody of the objectors and therefore, it was prayed that the court may be pleased to direct an inquisition for the purpose of ascertaining whether Chaturbhuj is of unsound mind and incapable of managing himself and his affairs.

5. The First Additional District Judge, before whom the proceeding was pending, directed the alleged lunatic Chaturbhuj to be produced and ultimately he was produced on 6-1-1964 and then the learned Judge directed the alleged lunatic to be sent to the jail for medical observation for ten days by the Civil Surgeon, Muzaffarpur, who was asked to send a report to him as regards the mental capacity of the man. The Civil Surgeon, who was in this case examined as A. W. 5, submitted his report on 23-1-1964, which was subsequently marked as Ext. 1. It further appears from the order sheet of the case that on 24-3-1964 the learned Additional District Judge, who had then seized of the case, called the alleged lunatic, Chaturbhuj Singh, in his Chambers for a few minutes and asked him his name and called him three times but he neither spoke anything nor looked towards him, but kept looking at the man who had brought him into his Chambers with his Chaprasi. Subsequently, the case was heard and witnesses were examined on both sides with the result that the learned District Judge passed the order under appeal, as stated above.

6. It was contended by Mr. Mangal Prasad Mishra, who appeared for the appellants, that the order under appeal is wrong because on the evidence Chaturbhuj, could not be declared lunatic. He further submitted that the application filed by Gulabo Kuer under Section 62 of the Act should have been supported by an affidavit but it was not so done and, therefore, on this ground also the application should have been disallowed. It was further urged that the report, Ext. 1 of the Civil Surgeon was not in Form III of Schedule I of the Act, as required by Section 18(1) of the Act, and, therefore, it should have been ignored. It was also argued that in the report, Ext. 1 the Civil Surgeon has definitely stated that Cha-

turbhuj was never excited or violent during observation, which clearly shows that Chaturbhuj was not a lunatic.

7. Mr. Shiva Nandan Ray, who appeared for the respondent took a preliminary objection that the appeal not having been filed by the lunatic, who was really aggrieved by the order under appeal was not maintainable at the instance of the objector who could not be said to be aggrieved by it. On merit he supported the order under appeal.

8. As regards the preliminary objection, I think it has no force. Appeal lies to the High Court under Section 83 of the Act, which is to the following effect:

"83 An appeal shall lie to the High Court from any order made by a District Court under this Chapter."

Chapter V deals with proceedings in lunacy outside Presidency Towns. It contains Section 62 to Section 83. The order under appeal was passed under Section 65(2) of the Act and, therefore, an appeal against an order under Section 65(2) will lie to the High Court. Section 83 does not speak or specify the person or persons who can appeal under Section 83 from such an order. Section 83 is in general terms conferring the right of appeal from any order passed by a District Court, which, in the recent case, in view of Sec. 2(2) of the Act, which defines "District Court" is the District Judge of the district. When the person who is to appeal under Section 83 is not specifically mentioned therein, it means that any person, who is a party to the Lunacy Case and who is aggrieved by any order passed under Chapter V of the Act, is entitled to appeal. It is true that in *Joshi Ram Krishan v. Mt. Rukmini Bai*, AIR 1949 All 449=ILR (1950) All 396 relied upon by Mr. Ray, the appellant was the lunatic himself; but that does not mean that only the lunatic has the right to appeal under Section 83 of the Act. In my opinion, any person, who is aggrieved by any order passed under Chapter V of the Act by a District Judge has the right to appeal against such order to the High Court under Section 83. No doubt, the lunatic is the most aggrieved person, but he being a lunatic, is not capable of understanding the legal implication of the order under appeal and, therefore, he is not expected to file an appeal. Objectors were interested in getting Chaturbhuj Singh declared not lunatic, because they had earlier got a gift executed in their favour by Chaturbhuj Singh. It is obvious, therefore, that the objectors also aggrieved by the order under appeal and as such, they had the right to appeal under Section 83 of the Act, I, therefore, hold that the appeal by the objectors appellants is maintainable.

9. It is true that in *Mahomed Yaqub v. Nazir Ahmad*, AIR 1920 All 80=ILR

40 All 504 it was held by a Division Bench that ordinarily an application for an inquisition should be supported by affidavit or by the applicant tendering himself for examination to the Judge on oath in support of the allegations in his application and further that the application ought to be supported by some medical evidence in the nature of a certificate of some doctor who has had a reasonable opportunity of seeing the condition of the alleged invalid. But on reading Section 62 of the Act, it appears that it does not require an application under Section 62 to be accompanied either by an affidavit or a medical certificate. Certainly if it is supported by a medical certificate and by an affidavit by the applicant then the application will have great weight; but for the omission of the applicant to file an affidavit or a medical certificate along with the application the application cannot be said to be not maintainable. Section 62 says *inter alia* that "...the District Court may upon application by order direct an inquisition for the purpose of ascertaining whether such person is of unsound mind and incapable of managing himself and his affairs". In the instant case, the application was made by the respondent, who on the finding of the learned District Judge, was the own sister of the lunatic. Later on she was examined as a witness, A. W. 1 and she pledged her oath in support of her statement in her application under Section 62 of the Act. Furthermore, at the instance of the District Judge, the alleged lunatic was kept under observation by the Civil Surgeon of the district and he submitted his report to the effect that Chaturbhuj Singh, who was kept under observation by him for ten days, is deaf and dumb and feeble minded; but he follows the daily routine of life as usual and can understand and obey simple things by gesture (like standing, sitting, going to kitchen for food, etc.) made to him. The Civil Surgeon also said as said above, that he was never excited or violent during observation. In the case, just mentioned, it was also held that in conducting an application for an inquisition under the Lunacy Act there ought to be a careful and thorough preliminary enquiry and the judge ought to satisfy himself that there is real ground for an inquisition and he should seek some personal interview with the alleged insane to satisfy himself that there is real ground for supposing that there is something abnormal in the mental condition of the person which might bring him within the Lunacy Act. In the instant case, at the initial stage, as mentioned already the Additional District Judge on 24-3-1964 had personal interview with the alleged insane in his Chambers in order to satisfy himself if there is a real

ground for supposing that there is something abnormal in the mental condition of Chaturbhuj Singh which might bring him within the Lunacy Act. He noticed abnormalities in him which he recorded in his ordersheet of 24-3-1964. It may be mentioned that the objectors-appellants were asked to produce Chaturbhuj Singh in court but they avoided to do so on some ground or other for a long time and then ultimately he was produced on 24-3-1964. Preliminary enquiry was, therefore, made before ordering an inquisition. In this view of the matter, it cannot be said that the application made by the respondent under Section 62 of the Act was not maintainable.

10. As regards the question as to whether the finding of the learned District Judge that Chaturbhuj Singh was a lunatic was correct or not, Mr. Mishra placed number of authorities in support of his contention that on the medical report, as it is, Chaturbhuj Singh could not be said to be a lunatic within the meaning of Section 3(5) of the Act. Before, dealing with the cases cited, it would be useful first to see the definition of the word, "lunatic" as given in Section 3(5) of the Act, which is as below:

"3. In this Act, unless there is anything repugnant in the subject or context.

** ** **

(5) "Lunatic" means an idiot or person of unsound mind."

The word 'idiot' has not been defined in the Act, and, therefore for a proper understanding of the word "idiot" one has to look to the cases cited on behalf of both the parties for seeking guidance.

11. In *Sonabati Devi v. Narayan Chandra Upadhyaya*, AIR 1935 Pat 423, Courtney Terrell, C. J. who delivered the judgment of the court and with whom Agarwala J. agreed held that the proper test of insanity is not the beliefs that the person concerned may entertain but the conduct exhibited by that person. His Lordship, at page 424, observed:

"Now no person can have direct experience of the mind of another and the proper test of insanity is conduct. A person might conceivably have all kinds of mental unsoundness; he might have all kinds of delusions, but if his conduct remains normal, there would be no power under the Lunacy Act to deal with him because the law of Lunacy deals with conduct and the proper test for insanity is not the beliefs that the person concerned may entertain but the conduct exhibited by that person."

12. In *Mt. Teka Devi v. Gopal Das*, AIR 1930 Lah 289 Mr. Justice Tek Chand J., sitting singly, held that it is only with lunatics as defined in Section 3(5) that the Act is concerned and that the Court

must come to an independent decision as to whether the person alleged to be incapable of managing himself or his affairs is really a "lunatic" and the procedure laid down by the legislature for conducting an enquiry into the matter must be strictly followed. The following observation of his Lordship, at page 291, can appropriately be read here:—

"Now in assuming jurisdiction under the Lunacy Act, the court must, first of all, keep in view the distinction between mere weakness of intellect and 'lunatic' as understood in the Act. In S. 3(5) a 'lunatic' is defined as meaning an 'idiot or a person of unsound mind' and it is hardly necessary to point out that it is only with lunatics as defined above, that the Act is concerned. It is, therefore, the duty of the Court, before proceeding further, to determine judicially whether the person, alleged to be incapable of managing himself or his affairs, is really a 'lunatic' in this sense. Secondly it must be remembered that this finding has got very far reaching consequences and must be given after very great care and deliberation. It may have the immediate effect of putting a human being under restraint. It might deprive him for a time, or for ever of the possession and management of his property. It will be *prima facie* evidence of his 'lunacy' and may be read in proof of it in other proceedings. The legislature has, therefore, laid down an elaborate procedure for conducting an enquiry into this matter and this procedure must be strictly followed. The Court cannot and ought not to deal light-heartedly with this important question, and it should not consider itself relieved of its responsibility by the mere circumstance that some or all of the relatives of the person concerned have declared that he is 'lunatic'. It may be that these relatives honestly but mistakenly believe him to be of unsound mind, whereas in reality he is not so; or it may be, that while disagreeing among themselves in respect of certain other matters, they all have evil designs on his property and have made common cause to deprive him of its possession or management. There might be cases in which a person may, as remarked by Lord Justice James in *In re E. S.* (1876) 4 Ch. D 301 (a supposed lunatic) require protection against his relative quite as much as against other persons. Every Court exercising jurisdiction in lunacy cannot, therefore, be too cautious in this matter, and it must bear in mind the weighty observations of Lord Davey, who observed while delivering the judgment of their Lordships of the Judicial Committee in *In re John McLaughlin*, 1905 AC 343, that:

"the interest of the person alleged to be of unsound mind . . . ought to be zealously protected against any attempt of

designing people, acting innocently but mistakenly to place either their persons or their property in restraint."

13. In *Ganga Bhavanamma v. Somaraju*, AIR 1957 Andh Pra 938, Subba Rao, C. J. as he then was who delivered the judgment of the court on behalf of self and on behalf of Satyanarayana Raju, J. followed the observation of Tek Chand J. in AIR 1930 Lah 289 referred to above, and held that though Section 3(5) of the Act defines 'lunatic' as an idiot or a person of unsound mind, the said words have not been defined but both these terms indicate an abnormal state of mind as distinguished from weakness of mind or senility following old age and that a man of weak mental strength cannot be called an idiot or a man of unsound mind; and the Act is not intended to protect dull-witted people but only those who suffer from a mental disorder or derangement of the mind and, referred to Halsbury's Laws of England Second Edition, Vol. 21, which was relied upon in this Court also by Mr. Ray, which will be referred to hereinafter.

14. In AIR 1949 All 449 a Division Bench presided over by Raghubar Dayal, J. as he then was, and Mushtaq Ahmad, J. considered the effect of an order under section 65(2) of the Act. The main judgment of the Court was delivered by Mushtaq Ahmad, J. with whom Raghubar Dayal J. also agreed, but added a few words of his own separately. There the appellant was the lunatic himself, who had been held to be of unsound mind and incapable of managing his affairs within the meaning of Section 65(2) of the Act. In that case, what is meant by 'unsoundness of mind' has been explained, which would be clear from the placitum (b) which is below in extenso:

"Unsoundness of mind implies some unusual feature of the mind as has tended to make it different from the normal and has in effect impaired the man's capacity to look after his affairs in a manner in which another person without such mental irregularity would be able to do in the matter of his own. The idea suggests some derangement of the mind, whatever be its degree, and it is not to be confused with or taken as analogous to a mere mental weakness or lack of intelligence. A man may find it difficult to answer questions of particular class if he intelligently answers questions of various other sorts concerning himself, his family and property, he cannot be classed with men of unsound mind being unable to manage their affairs. If a man is able to understand and answer questions on various matters except those relating to arithmetical calculations, he cannot be regarded as mentally unsound, although he would be held as having a weak or undeveloped mind."

In this case also the observation quoted above of Mr. Justice Tek Chand in AIR 1930 Lah 289 was read with approval. His Lordship Mr. Justice Raghubar Dayal in his separate but concurrent judgment, held that a person with undeveloped mind or with feeble mind is not necessarily a person of unsound mind and further observed at page 455, as below:

"I should think that unsoundness of mind can be said to be dependent on certain states of the mind and on the outward conduct of the person due to his particular mental condition. It should have some connection with the derangement of mind which may be said to be a state of a disordered mind. If the mind is not in any way deranged, but is merely weak or undeveloped, it cannot be said to be an unsound mind."

15. In Halsbury's Laws of England, Second Edition, Vol. 21 Part II, Section 1, paragraph 471 page 272 which deals with "Persons of unsound mind" the said expression has been defined to the following effect:—

"Unsoundness of mind, or as it is sometimes styled lunacy or insanity, may be shortly defined as a defect of reason, consisting either in its total or partial absence or in its perturbation. The perturbation or absence of reason which constitutes insanity is an abnormal state of the mind of a man judged by a standard which recognises a normal standard of rationality and pronounces that man to be insane. Sanity exists when the brain and the nervous system are in such a condition that the mental functions of feeling and knowing, emotion, and of willing, can be performed in their regular and usual manner. Insanity means a state in which one or more of the above named mental functions is or are performed in an abnormal way or not performed at all by reason of some disease of the brain or nervous system. The question whether any man is of unsound mind can only be decided by reference to the ordinary standard of human intelligence; and when a case comes before a court it is the duty of the court to decide the question of mental capacity, and expert evidence does not relieve it from the obligation to form an independent opinion."

16. In Mahipati v. Mt. Changuna, AIR 1934 Nag 27, Pollock A. J. C. sitting singly, held that a person who is not sufficiently intelligent to manage his own affairs is not necessarily of unsound mind and under Section 65 there must be a finding that the alleged lunatic is of unsound mind and incapable of managing himself and his affairs and the High Court has power to interfere to correct a wrong finding under Section 65(2) of the Act.

17. The principles which can be extracted from the above decisions may be summed up thus:—

The Court in assuming jurisdiction under the Lunacy Act, must first of all, keep in view the distinction between mere weakness of intellect and 'lunatic' as understood in the Act. It is, therefore, the duty of the Court, before proceeding further, to determine judicially whether the person alleged to be incapable of managing himself or his affairs, is really a 'lunatic' in this sense. The legislature has, therefore, laid down an elaborate procedure for conducting an enquiry into this matter and this procedure must be strictly followed. The Court cannot, and ought not to deal light-heartedly with this important question and it should not consider itself relieved of its responsibility by the mere circumstance that some or all of the relatives of the persons concerned have declared that he is lunatic. It may be that these relatives honestly, but mistakenly believe him to be of unsound mind, whereas in reality he is not so; or it may be that while disagreeing among themselves in respect of certain other matters, they all have evil designs on his property and have made common cause to deprive him of his possession or management. The interest of the persons, alleged to be of unsound mind, therefore ought to be zealously protected against any attempt of designing people, acting innocently but mistakenly to place either their persons or their property in restraint.

Section 3(5) of the Act defines 'lunatic' as an idiot or a person of unsound mind; but the said words have not been defined and both these terms indicate an abnormal state of mind as distinguished from weakness of mind or senility following old age and that a man of weak mental strength cannot be called an idiot or a man of unsound mind; and the Act is not intended to protect dull-witted people but only those who suffer from a mental disorder or derangement of the mind.

'Unsoundness of mind' implies some unusual feature of the mind as has tended to make it different from the normal and has in effect impaired the man's capacity to look after his affairs in a manner in which another person without such mental irregularity would be able to do in the matter of his own. The idea suggests some derangement of the mind, whatever be its degree, and it is not to be confused with or taken as analogous to a mere mental weakness or lack of intelligence. A man may find it difficult to answer questions of particular class but if he intelligently answers questions of various other sorts concerning himself, his family and property, he cannot be classed with men of unsound mind being unable to manage their affairs. If a man is able to understand and answer questions on various matters except those relating to

arithmetical calculations, he cannot be regarded as mentally unsound, although he would be held as having a weak or undeveloped mind.

'Unsoundness of mind' or as it is sometimes styled lunacy or insanity, may be shortly defined as a defect of reason consisting either in its total or partial absence or in its perturbation. The perturbation or absence of reason which constitutes insanity is an abnormal state of the mind of a man judged by a standard which recognises a normal standard or rationality and pronounces that man to be insane. Sanity exists when the brain and the nervous system are in such a condition that the mental functions of feeling and knowing emotion and of willing can be performed in their regular and usual manner. Insanity means a state in which one or more of the above named mental functions is or are performed in an abnormal way or not performed at all by reason of some disease of the brain or nervous system.

The question therefore, whether any man is of unsound mind, can only be decided by reference to the ordinary standard of human intelligence; and when a case comes before a Court it is the duty of the Court to decide the question of mental capacity, and expert evidence does not relieve it from the obligation to form an independent opinion. A person who is not sufficiently intelligent to manage his own affairs, is not necessarily of unsound mind. 'Unsoundness of mind' can be defined on certain states of the mind and on the outward conduct of the person due to his particular mental condition. It should have some connection with the derangement of mind which may be said to be a state of disordered mind. If the mind is not in any way deranged, but is merely weak or undeveloped, it cannot be said to be an unsound mind.

No person can have direct experience of the mind of another, proper test of insanity is conduct. The proper test for insanity is not the beliefs that the person concerned may entertain but the conduct exhibited by that person. Under Section 65(2) of the Act, therefore, there must be a finding that the alleged lunatic is of unsound mind and incapable of managing himself and his affairs and the High Court has power to interfere under Section 83 of the Act to correct a wrong finding under Section 65(2) of the Act.

18. In the light of the above principles, therefore, let us see how far the finding of the learned District Judge holding that Chaturbhuj was a 'lunatic' within the meaning of Section 3(5) of the Act was justified and legal. The materials on the record, which will be referred to hereinafter, in my opinion, prove beyond any reasonable doubt that Chaturbhuj was a 'lunatic' as understood in the Act.

19. The learned Additional District Judge, as mentioned earlier also in paragraph 9 of this judgment, examined Chaturbhuj Singh and had him produced before him in his Chambers for some personal interview and what might be called a mild type of examination by putting questions to him. He put questions to him to which Chaturbhuj kept quiet and indifferent. As will appear from order no. 44 recorded later on 24-3-1964 that the learned Additional District Judge called the alleged lunatic Chaturbhuj Singh for a few minutes and asked him his name and called him three times but he neither spoke anything nor looked towards him, but kept looking at the man who had brought him into his Chambers with his Chaprasi. This conduct exhibited by Chaturbhuj Singh surely indicated an abnormal state of mind and some unusual feature of the mind as distinguished from weakness of mind or from a man of weak mental strength. This conduct of Chaturbhuj Singh *prima facie* showed that he was suffering from some mental disorder or derangement of the mind and this impaired his capacity to look after himself and his affairs in a manner in which another person without such mental irregularity would be able to do in the matter of his own. The inability of Chaturbhuj to understand and answer simple questions, like asking his name, and his inability to look at the Judge when called three times, were clear enough to indicate that Chaturbhuj was of unsound mind. After this preliminary enquiry by the Additional District Judge, he directed the inquisition in question.

20. Thereafter the Civil Surgeon, who submitted his report, Ext. 1 and who was examined as A. W. 5 no doubt, mentioned that Chaturbhuj, who was kept under observation in the jail by him for ten days, is deaf and dumb by birth and feeble minded but he followed the daily routine of life as usual and can understand and obey simple things by gesture (like standing, sitting, going to kitchen for food, etc.) made to him and that he was never excited or violent during observation, stated in his evidence that Chaturbhuj was incapable of looking after his properties and that he was a born idiot. It is true that the Civil Surgeon admitted that he had not specifically mentioned in his report that Chaturbhuj was a born idiot, but he gave reasons which led him to the conclusion that Chaturbhuj was a born idiot. The Civil Surgeon stated that an idiot has no initiative of any kind except for the vegetable life. He further stated that he spent about two hours on the daily observation of Chaturbhuj Singh and denied the suggestion that his report was wrong. Much emphasis, however, was laid on the last statement of the Civil

Surgeon in his report, Ext. 1 that he did not find him excited or violent during observation, and relying on it, it was contended that Chaturbhuj was not a lunatic at all. The fact that Chaturbhuj did not become excited or violent during observation by the Civil Surgeon only indicates that Chaturbhuj was not a lunatic of violent type. Derangement of the mind may be of different degrees. The outward conduct of Chaturbhuj Singh, referred to above, was sufficient to show that he was a lunatic of a mild and quiet type, but nevertheless the above unusual feature of the mind implied unsoundness of his mind and not a weak or undeveloped mind. The learned District Judge, therefore, after taking into consideration the opinion of the learned Additional District Judge, above mentioned who had personal interview with Chaturbhuj Singh and after a consideration of the evidence of the Civil Surgeon, A. W. 5 accepted the evidence of the applicant-respondent, A. W. 1 who was the own sister of Chaturbhuj and, her witnesses, A. Ws. 2 to 4 who were all of village Kamalpura where Chaturbhuj Singh resided and came to the conclusion that he had no hesitation to hold that Chaturbhuj Singh was an idiot and, as such, a lunatic as contemplated by the Act.

21. It is true, as observed by Tek Chand, J. in AIR 1930 Lah 289, that the finding of the District Judge, who is to determine judicially whether Chaturbhuj Singh alleged to be incapable of managing himself or his affairs, was really lunatic has got very far reaching consequences but in this case, the learned District Judge has kept in view the duty of the Court to determine judicially as required by Section 65(2) of the Act. I am, therefore, unable to accede to the contention of the appellants that judicial determination by the learned District Judge of the lunacy of Chaturbhuj was not correct.

22. It may be mentioned here that the objectors were most interested in getting Chaturbhuj Singh declared not lunatic and in getting the application of the respondent under Section 62 of the Act rejected, because they had earlier, as mentioned before, taken a deed of gift from this lunatic Chaturbhuj Singh. The learned District Judge has observed that from the endorsement made by the Sub-Registrar on the deed of gift, Ext. A it appears that the admission of the execution was indicated probably by signs and gestures. In these circumstances, the validity of Ext. A would be in dispute and for this reason the objectors are very much interested in order to get Ext. A upheld and declared valid to see that Chaturbhuj was not declared lunatic. On the finding of the learned District Judge, the deed of gift, Ext. A would now be

ineffective to give any title to the appellants to the properties covered by the deed of gift, Ext. A. I therefore, hold that the finding of the learned District Judge that Chaturbhuj was an idiot and as such a 'lunatic' under the Act and as such incapable to looking after himself and his affairs is justified and legal and accordingly I affirm it.

23. I may also deal with the contention of the appellants that as the medical certificate is not in Form III of Schedule I of the Act, as required by Sec. 18(1) of the Act, it is of no value. It was contended on behalf of the respondent, that Section 18 of the Act, does not apply to a case where a proceeding for inquisition has been instituted against the lunatic under Section 62 of the Act by any person who is authorised under Section 63 of the Act to make that application, Section 18 occurs under Chapter II, which deals with 'Reception of the Lunatic'. Powers have been given to a Magistrate, within the local limits of whose jurisdiction, the alleged lunatic resides to entertain an application for reception order. Even assuming that Section 18 applies to a proceeding to direct inquisition under Section 62 of Chapter V also, the omission to give the medical certificate in Form III of Schedule I contemplated by Section 18(1) of the Act does not, in my opinion, render the medical certificate valueless and on account of that omission, it cannot be thrown out. But, in the instant case, the proceeding was started under Chapter V which deals with proceedings in lunacy outside Presidency Towns and with inquisition. The learned District Judge, it was conceded, had the power to send the lunatic for observation to jail and to call for a report from the Civil Surgeon of the district. For this reason, the report of the Civil Surgeon A. W. 5, cannot be said to be illegal or contrary to law, simply because it is not in accordance with Section 18 of the Act which only deals with medical certificate. The learned District Judge, has, therefore, rightly relied on the medical certificate, Ext. 1 of the Civil Surgeon, A. W. 5. The objection, therefore, has no force.

24. The next question to be considered is, what is the effect of the death of the lunatic, Chaturbhuj Singh, after the order under appeal had been passed during the pendency of the appeal in this court? This question came up for consideration before a Divisional Bench of the Nagpur High Court in Bhaoorao v. Chandrabhagabai, ILR (1948) Nag 465 = AIR 1949 Nag 108, which was presided over by Mr. Justice Pollock and Mr. Justice Hidayatullah, as he then was. The judgment of the Court was delivered by Hidayatullah, J. as he then was and before their Lordships also, as here, it

was contended by the respondent that the appeal should be dismissed. In rejecting that contention, his Lordship Hidayatullah, J. at page 467 (of ILR) = (at p. 109 of AIR) observed:—

"There is no provision in Chapter V of the Indian Lunacy Act for the removal of a guardian or manager of a lunatic when the lunatic dies. In this respect the provisions of the Lunacy Act resemble those of the Guardians and Wards Act. But a manager can continue only so long as lunatic is alive. When the lunatic dies the lunacy jurisdiction comes to an end and the court must pass some order about the property in the hands of the manager. If the title to the property be in dispute the Court may either decide the issue or ask the manager to file an interpleader suit. But which ever course is followed, the order of the Court will be referable to the jurisdiction exercised over the property of the lunatic under Chapter V and the order must be deemed to be an order under that Chapter. Under Section 83 of the Indian Lunacy Act an appeal lies against an order made under Chapter V of the Act."

25. The principle, therefore, which would apply here is as below:

The manager appointed under the Lunacy Act of the properties of the lunatic can continue only so long as the lunatic is alive. When the lunatic dies the lunacy proceeding comes to an end but the Court must pass some order about the property in the hands of the manager. Such an order of the Court will be referable to its jurisdiction exercised over the property of the lunatic under Chapter V of the Act and, therefore, the order must be deemed to be an order under that Chapter, and, an appeal against such an order would lie under Section 83 of the Act.

26. In view of the above, I think that the appeal cannot be dismissed on the mere ground that the lunatic has died during the pendency of this appeal. The order which has been passed by the learned District Judge, on 3-1-1967, as will appear from Order No. 108 is that the respondent was discharged and the proceeding was dropped. This order, in my opinion, is correct and legal. I, therefore, affirm the order of the District Judge to the effect that the respondent is discharged from the guardianship of the lunatic as the lunatic has died and with his death the lunacy proceeding has come to an end.

27. It follows, therefore, that the appeal fails, and is dismissed and the judgment of the court below is affirmed, but, in the circumstances of the case, there will be no order for costs of this Court.
RSK/D.V.C. Appeal dismissed.

AIR 1969 PATNA 42 (V 56 C 13)

N. L. UNTWALIA AND
S. WASIUDDIN, JJ.

Basta Colla Colliery Co. (P) Ltd., Petitioner v. State of Bihar, Opposite Party.

Tax Case No. 24 of 1965, D/- 4-7-1968.

Sales Tax — Central Sales Tax Act (1956), S. 8(1)(4) — Central Sales Tax (Bihar) Rules (1957), Rr. 9(2)(a) and 9-B(3)(a) — Claim to be taxed at concessional rate — Filing of declaration in Form 'C' and certificates in Form 'D' — Rr. 9(2)(a) and 9-B(3)(a) imposing rigid time-limit are ultra vires rule making power of State Government. AIR 1963 Mad 125 & AIR 1962 Mad 410, Diss.

It is manifest that the requirements of rules 9(2)(a) and 9-B(3)(a) of the Central Sales Tax (Bihar) Rules, 1957, for attachment of the declarations and the certificates with the returns imposes a time-limit or fixes the period within which such declarations and certificates have got to be filed.

Section 8(4) of the Central Act did not authorise the framing of rules and prescribing of any rigid time-limit. Hence, in absence of any specific and clear provision either in sub-section (3) or sub-section (4) of Section 13 of the Central Act, the State Government was not authorised to frame the rule to bring home the rigour of time-limit for the submission of the declarations and the certificates. In that view of the matter, the declarations and the certificates in Forms C and D as required by the Central Sales Tax (Bihar) Rules could be furnished after the filing of the returns and none of the authorities, the assessing, the Deputy Commissioner or the Board, was right in its view of limiting the time for the filing of the declarations and the certificates with the return. The requirement of the rules 9(2)(a) and 9-B(3)(a) in so far as it imposes a time-limit by necessary implication is ultra vires the rule making power of the State Government. AIR 1963 Mad 125 & AIR 1962 Mad 410, Dissented from. Case law discussed. (Para 9)

The assessee, undoubtedly, could be and ought to be given an opportunity to furnish to the assessing authority the declarations and certificates in the prescribed forms after the filing of the returns and before the passing of the assessment order. It could also be given an opportunity to furnish them even after the passing of the order if the appellate authority or the revisional authority could be satisfied that sufficient cause had been made out for giving such an opportunity. (Para 15)

Where, however, the assessee did not file before the assessing authority the declarations and the certificates which had

been received by him before the date of assessment and no grounds were disclosed before the authority as to why they were not filed:

Held, that the assessee could not be given an opportunity to furnish the declarations and certificates after passing of the assessment order. (Para 16)

Cases Referred: Chronological Paras

- (1968) AIR 1968 Mad 311 (V 55)=
 (1967) 20 STC 388, Tirukoilur Oil Mills v. State of Madras 13
 (1968) 1968-21 STC 120 (Mad). Gordon Woodreffe and Co. (Madras) Private Ltd. v. State of Madras 13
 (1967) AIR 1967 SC 1823 (V 54)=
 (1967) 20 STC 367, Sales Tax Officer Ponkunnam v. K. I. Abraham 13
 (1965) AIR 1965 All 483 (V 52)=
 (1965) 16 STC 21, Murli Dhar v. Sales Tax Officer, Agra 13
 (1964) AIR 1964 Ker 131 (V 51)=
 (1964) 15 STC 110 (FB), Abraham v. Sales Tax Officer, Ponkunnam 13
 (1963) AIR 1963 Mad 125 (V 50)=
 (1962) 13 STC 680, Deputy Commr. (Commercial Taxes) v. Parokutti Hajee Sons 5, 13
 (1962) AIR 1962 Mad 410 (V 49)=
 (1962) 13 STC 686, Deputy Commr. of Commercial Taxes v. Manohar Brothers 5, 13
 Tarkeshwar Prasad and Rameshwar Prasad II, for Petitioner; S. Sarwar Ali, for Opposite Party.

ORDER :— As directed by the High Court under Section 33(3) of the Bihar Sales Tax Act, 1959 (Bihar Act 1959) read with section 9(3) of the Central Sales Tax Act, 1956 (Central Act 74 of 1956) and Rule 12 of the Central Sales Tax (Bihar) Rules, 1957, the Commercial Taxes Tribunal, Bihar, has stated a case and referred to this Court the following question of law:—

"Whether in the facts and circumstances of this case the denial of concessional rate of tax under section 8 of the Central Sales Tax Act, 1956, on sales covered by declarations of C form and D form, if filed before the appellate authority is valid in law."

2. After stating the facts, it will be necessary to reframe the question of law to bring out the real controversy and points for determination in the case. We shall reframe it and answer it accordingly.

3. Messrs. Basta Colla Colliery Co. (P) Ltd., the assessee in this case, submitted returns to the proper assessing authority disclosing its gross turnover on account of inter-State sales as follows:—

Quarter ending	Turnovers
30-6-59	Rs. 6,35,160.30 N. P.
30-9-59	Rs. 7,88,916.11 N. P.
31-12-59	Rs. 8,09,108.14 N. P.
31-3-60	Rs. 10,11,550.11 N. P.
	Rs. 32,44,734.66 N. P.

The dealer was served with a notice to produce its account books in support of the returns submitted by it. The dealer's representative appeared on 31-10-60 before the Assessing authority but the examination could not be finalised on that date. The case was adjourned to 23-11-60. On that date, the dealer filed an application for time. The case was adjourned several times. Finally, on 10-5-61 it was taken up when the dealer appeared and produced its account books for the year 1958-59 in another case for which the date was also fixed in respect of this period, but it did not produce the account books for the year 1959-60, the period in question. It was stated by the dealer's representative that the account books were in audit. The time-petition was rejected and separate assessments were passed in the two separate cases, one under the Bihar Act (19 of 1959) and the other under the Central Act (74 of 1956). We are concerned in this case with the assessment under the Central Act. In this case, the assessing authority did not enhance the turnover of the dealer in respect of the inter-State sales, but rejected its claim to be taxed at the concessional rate of one per cent under Sec. 8(1) of the Central Act (74 of 1956), on the total turnover of Rs. 22,15,253.64 P. on account of the sales said to have been made to the Govt. and to registered dealers in the four quarters of 1959-60. The claim was rejected on the ground, to put it in the words of the assessing authority, that "the Central Sales Tax Act, 1956, clearly forbade application of concessional rate on any part of the dealer's turnover in respect of which declarations and certificates are not filed in the prescribed manner. The dealer was required to attach all the declarations in Form 'C' and certificates in Form 'D' in respect of his entire claim with the quarterly returns submitted by him. But he has conspicuously failed to submit them as yet."

4. The assessee went up in appeal under Section 30 of the Bihar Act (19 of 1959) before the Deputy Commissioner. It appears, before the Deputy Commissioner, the declarations and certificates were filed in respect of the sales of about rupees ten lacs, but even before the Deputy Commissioner declarations and certificates in respect of the sales of about rupees twelve lacs were not filed. The Deputy Commissioner dismissed the appeal. It is said that he had allowed the appeal filed from the ex parte order of assessment in respect of the imposition of tax under the Bihar Sales Tax Act and remanded the case to the assessing authority. But that as it may, the appeal in this case was dismissed by the Deputy Commissioner on the ground that the dealer had failed to file the declarations and certificates along with the

returns and since they were not filed in the prescribed form and in the prescribed manner, it lost the benefit of concessional rate of tax. While saying so, the Deputy Commissioner added—"It is significant to point out that 'he did not care to file these declarations and certificates even after the expiry of the year under assessment but before the completion of assessment'. Lastly, he said—"I do not think it is open to this court to excuse the delay in submission of the declarations and certificates."

5. The dealer went up in revision before the Board under Section 31 of the Bihar Act (19 of 1959). The Board has dismissed the revision holding on the basis of two decisions of the Madras High Court in *Deputy Commissioner (Commercial Taxes) v. Parokutti Hajee Sons*, (1962) 13 STC 680—(AIR 1963 Mad 125) and *Deputy Commissioner of Commercial Taxes v. Manohar Brothers*, (1962) 13 STC 686—(AIR 1962 Mad 410), that non-observance of the rules by the assessee in the matter of production of declarations in Form C and the certificates in Form D which inevitably deprive it of the benefit of concessional tax under Section 8 (1) of the Central Act. Reading the order of the Board, passed in revision, as a whole, it is clear that it also rejected the argument put forward on behalf of the assessee that opportunity ought to have been given and ought to be given to it for production of the declarations and the certificates even after the passing of the assessment order either by the Deputy Commissioner or by the Board not only by taking the view that the Deputy Commissioner or the Board had no such power but also on the ground that no case had been made out for giving such fresh opportunity or opportunities to the assessee.

6. The assessee's application under Section 33(1) of the Bihar Act (19 of 1959) filed before the Board eventually came to be disposed of by the Commercial Taxes Tribunal, Bihar. It was rejected by it. On being directed by the High Court, the Tribunal has now stated the case on the question of law mentioned above.

7. In our opinion, from the order of the Board passed in revision, the points which fall for determination are these—

(i) Whether rules 9(2)(a) and 9-B(3)(a) of the Central Sales Tax (Bihar) Rules, 1957, requiring the registered dealer who claims to have made sales to another registered dealer or to Govt. to attach and file the declarations in Form C and the certificates in Form D with his return in Form I, is constitutionally valid?

(ii) If not, when the declarations and certificates should have been filed?

(iii) Whether the appellate authority or the revisional authority had, in the circumstances, power to accept the declara-

tions and certificates if filed after the passing of the assessment order?

(iv) Whether on the facts and in the circumstances of this case the Board has committed any error of law in refusing to give such an opportunity to the assessee for the filing of the declarations and certificates at a late stage?

8. To bring about the real controversy and the points which do arise for determination in this case, we propose to reframe the question of law in the manner indicated below. We would add here that the learned counsel for the parties had no objection to the reframing of the question in that manner.

Question of law as reframed:

Whether on the facts and in the circumstances of this case the assessee could be and ought to have been given an opportunity to furnish to the assessing authority declarations and certificates in the prescribed forms under Section 8(4) of the Central Sales Tax Act 19 of 1956 after the filing of the returns or the passing of the assessment order, to enable it to be taxed at the concessional rate under section 8(1) on the turnover of Rs. 22,15,253.64 P. or any portion thereof?

9. It will be useful here first to read the relevant provisions of the Acts and the Rules. Section 8(1) of the Central Act (74 of 1956) says:—

"8. Rates of tax on sales in the course of inter-State trade or commerce. — (1) Every dealer, who in the course of inter-State trade or commerce —

(a) sells to the Government any goods;

or
(b) sells to a registered dealer other than the Government goods of the description referred to in sub-section (3); shall be liable to pay tax under this Act, which shall be one per cent of his turnover."

But the liability to the Central Tax under the said provision of law at one per cent of his turnover in respect of the sales enumerated in clauses (a) and (b) of Section 8(1) is conditioned upon the fulfilment of the requirement under section 8(4) which provides:—

"8(4) The provisions of sub-section (1) shall not apply to any sale in the course of inter-State trade or commerce unless the dealer selling the goods furnishes to the prescribed authority in the prescribed manner —

(a) a declaration duly filled and signed by the registered dealer to whom the goods are sold containing the prescribed particulars in a prescribed form obtained from the prescribed authority; or

(b) if the goods are sold to the Government, not being a registered dealer, a certificate in the prescribed form duly filled and signed by a duly authorised officer of the Government."

The thirteenth section of the Central Act confers the rule making power on the Central Govt. as also on the State Government. Sub-section (3) of the said section confers the general power on the State Govt. to make rules not inconsistent with the provisions of the Act and the rules made by the Central Govt. under sub-section (1) to carry out the purposes of the Act. Without prejudice to the powers conferred by sub-section (3), it is provided in sub-section (4) of Section 13 that the State Government may make rules for all or any of the following purposes, namely:—

(g) the time within which, the manner in which and the authorities to whom any change in the ownership of any business or in the name, place or nature of any business carried on by any dealer shall be furnished."

Rules have been framed by the State of Bihar under sub-sections (3) and (4) of Section 13 of the Central Act, called the Central Sales Tax (Bihar) Rules, 1957. Rule 9(2)(a) of the said Rules requires —

"(2)(a). A registered dealer who claims to have made sale to another registered dealer shall, in respect of such claim, attach to his return in Form I the portion marked 'original' of the declaration received by him from the purchasing dealer."

Rule 9-B(3) makes a similar provision requiring the registered dealer to attach to his return in Form I the portion marked 'original' of the certificate received by him from the officer of the Government in respect of the sales made to it. Rule 8(1) of the Rules aforesaid says:—

"8. Returns:— (1) Every registered dealer shall furnish to the Assistant Commissioner, Superintendent or Assistant Superintendent quarterly returns in Form I, and also an annual return, in the same Form, on the basis of the quarterly returns for the year. Such return shall be furnished in the manner and by the date prescribed in respect of returns under the Bihar Sales Tax Act, 1947 (Bihar Act XIX of 1947) and the rules framed thereunder."

Sub-section (1) of Section 14 of the Bihar Act (19 of 1959) runs thus:—

"14. Returns:— (1) Every registered dealer shall furnish such returns within such period and to such authority as may be prescribed;

Provided that the prescribed authority may require any dealer by notice in writing, to furnish such returns within such period as may be fixed by the said authority."

Sub-section (3) of the 14th Section empowers the prescribed authority to extend the period for submission of the return only if the period has been fixed

by the notice issued under the proviso to sub-section (1) and not where the registered dealer is required to furnish, ordinarily and generally as is the case, voluntarily returns within such period as may be prescribed. The rules framed under the Bihar Act are called the Bihar Sales Tax Rules, 1959. Rule 10 of these Rules requires every registered dealer, unless otherwise required under the proviso to sub-section (1) of Section 14, to furnish to the prescribed authority quarterly returns and also an annual return in Form XII. Sub-rule (2) of this rule says that the returns under sub-rule (1) have to be filed within one calendar month of the expiry of the period to which the returns relate. In other words, the quarterly returns or the annual return, as the case may be, have got to be filed within a fixed period of time, i. e., one calendar month of the expiry of the quarter or the year.

That being so, it is manifest that the requirement of Rr. 9(2)(a) and 9-B(3) (a) of the Central Sales Tax (Bihar) Rules, 1957, for attachment of the declarations and the certificates with the returns imposes a time-limit or fixes the period within which such declarations and certificates have got to be filed. The Central Act did not empower the Government to frame a rule fixing a rigid time for the purpose of furnishing declarations and certificates to carry out the purposes of the Act in accordance with sub-section (4) of Section 8 of the Central Act. The expression "in the prescribed manner" was not wide enough to embrace within its ambit the power to prescribe the time-limit for furnishing the declarations and the certificates. As argued by the learned Additional Government Pleader, the requirement of filing such declarations and certificates with the return per se is undoubtedly prescribing the manner to file them. But since the returns, as discussed above, have got to be filed within the rigid time-limit of one calendar month of the expiry of the period to which it relates, the requirement of furnishing the declarations and the certificates a fortiori imports that time-limit.

Section 8(4) of the Central Act did not authorise the framing of rules and prescribing of any rigid time-limit. Hence, in absence of any specific and clear provision either in sub-section (3) or sub-section (4) of Section 13 of the Central Act, the State Government was not authorised to frame the rule to bring home the rigour of time-limit for the submission of the declarations and the certificates. In contrast, the language of clause (g) of sub-section (4) of Sec. 13, extracted above, is noteworthy, where the two phrases, viz., "the time within which" and "the manner in which", have

been used to empower the State Government to frame the rules distinctly for the two purposes, as the latter phrase was not enough to cover the former. In that view of the matter, we would hold that the declarations and the certificates in Forms C and D as required by the Central Sales Tax (Bihar) Rules could be furnished after the filing of the returns and none of the authorities, the assessing, the Deputy Commissioner or the Board, was right in its view of limiting the time for the filing of the declarations and the certificates with the return. The requirement of the rules 9 (2) (a) and 9-B(3)(a) in so far as it imposes a time-limit by necessary implication is ultra vires the rule making power of the State Government.

10. It may, however, be stated here that it appears from the order of the Board that the Bihar Government had issued a circular order No. C. S. T. 38/61-9808, dated the 28th July, 1961, taking note of delays in assessee's obtaining the required declarations and that they should be given reasonable opportunity for submitting the C and D Forms before the actual completion of the assessment. Although in July 1961 the issuing of such a circular was against the requirement of the Central Sales Tax (Bihar) Rules, on a correct position of law as discussed by us, the instruction was quite reasonable and fair. It may also be added that that rule now stands amended retrospectively with effect from the 4th December, 1961. I may only quote one of the amended rules, Rule 9 (2)(a) which now reads as follows:—

"9(2)(a) A registered dealer who claims to have made a sale to another registered dealer shall, in respect of such claim, attach to his return in Form I the portion marked 'original' of the declaration received by him from the purchasing dealer or shall submit the said declaration at any time before final assessment, if the assessing authority so permits;

Explanation :— For the purposes of this clause, the expression "final assessment" shall be deemed to include any fresh assessment made by the assessing authority as a result of such direction by the appellate authority.

11. It is, however, obvious that the required declarations and certificates, generally and ordinarily, have got and should be furnished before the assessment is made by the assessing authority. After all, the assessing authority has got to be satisfied about the claim of the assessee to give him the benefit of the concessional tax in accordance with section 8(1) of the Central Act. There is no time-limit fixed by the law for the passing of the assessment order in respect of

any period in relation to which return has been filed. That being so, it is manifest that the declarations and the certificates when required to be filed before the completion of the assessment are not bringing about the imposition of any time-limit, but are necessary to be so filed in order to enable the authority to complete the assessment and to allow or reject the claim of the assessee for imposition of a concessional rate of Central Sales Tax.

12. If, however, the assessee is not able, for sufficient cause, to furnish the requisite declarations and the certificates in Forms C and D before the passing of the assessment order before the assessing authority, he may prefer an appeal to the appellate authority which exercising the powers under section 30(5) of the Bihar Act (19 of 1959), will be competent to set aside the assessment and direct the assessing authority which made the assessment to pass a fresh order after further enquiry on giving a fresh opportunity to the assessee to furnish the declarations and the certificates. Similar will be the power of the revisional authority under Section 31 of the Bihar Act. In our opinion, therefore, to the extent views have been expressed by the Deputy Commissioner or the Board against the ones we have taken, they are wrong.

13. The view taken by the Madras High Court in the two decisions mentioned in the judgment of the Board, viz., (1962) 13 STC 680 = (AIR 1963 Mad 125) & (1962) 13 STC 686 = (AIR 1962 Mad 410) is, we say so with respect, not good law. The point has been well considered, and if we may say so with respect, proper law has been enunciated by the Full Bench of the Kerala High Court in *Abraham v. Sales Tax Officer, Ponkunnam*, (1964) 15 STC 110 = (AIR 1964 Ker 131) (FB). To the same effect is the view taken by a learned single Judge of the Allahabad High Court in *Murli Dhar Dharampal Daresi v. Sales Tax Officer, Agra*, (1965) 16 STC 21 = (AIR 1965 All 483), following the Full Bench decision of the Kerala High Court. The Kerala decision has been upheld by the Supreme Court in *Sales Tax Officer, Ponkunnam v. K. I. Abraham*, (1967) 20 STC 367 = (AIR 1967 SC 1823). After the Full Bench decision of the Kerala High Court, the Madras High Court has also revised its opinion and fallen in line with the view expressed by the Kerala High Court in two decisions in the *Tirukoilur Oil Mills v. State of Madras* (1967) 20 STC 388 = (AIR 1968 Mad 311) and *Gordon Woodreffe and Co (Madras) Private Ltd v. State of Madras*, (1968) 21 STC 120 (Mad).

In the Kerala case which went upto the Supreme Court, Rule 6 of the Central Sales Tax (Kerala) Rules, 1957, required

the dealer to submit a return of all his transactions in Form II together with the connected declaration forms so as to reach the assessing authority on or before the 20th of each month showing the turnover for the preceding month. To this requirement of the main sub-rule (1) of Rule 6, a proviso was inserted by a notification dated the 3rd January, 1958; but the Government in its wisdom thought that that proviso which enabled the dealer in cases of delayed receipt of declaration forms to submit them at any time before the assessment is made, was giving them too wide a gap of time. Therefore, it was sought to be curtailed by insertion of a second proviso by notification dated the 26th April 1960, stating in the second proviso that the delay in submitting the declaration forms shall not exceed three months from the date of sale in question. But then it was found that any declaration forms by various dealers could not be filed within the time limited by the second proviso as the time had already expired and, therefore, a third proviso was added by notification dated the 16th January, 1961, saying that all declarations pending submission by the dealers on the 2nd May, 1960, shall be submitted not later than the 16th February, 1961. The assessee in Abraham's case of the Kerala High Court had submitted his declarations not by the 16th February, 1961, but by the 8th March, 1961, before the completion of the assessment. The question before the Kerala High Court arose under the circumstances stated above. It was answered in favour of the assessee by holding that the time-limit fixed by the third proviso was ultra vires the rule making power of the State Government. The Supreme Court affirmed his view and Ramaswamy, J., speaking for the Court, said — "It follows therefore that 'the assessee was not bound to furnish declarations in Form 'C' before February 16, 1961, in the present case.'"

His Lordship was pleased to observe further:—

"In the absence of any such time-limit it was the duty of the assessee to furnish the declarations in Form 'C' within a reasonable time, and in the present case it is the admitted position that the assessee did furnish the declarations on March 8, 1961, before the order of assessment was made by the Sales Tax Officer. We are accordingly of the opinion that the assessee has furnished the declarations in Form 'C' in the present case within a reasonable time and there has been a compliance with the requirements of Section 8(4)(a) of the Act."

14. It is no doubt true that in Abraham's case the time-limit fixed for the filing of the declarations and the certi-

ficates in pursuance of the fixation of the time for the filing of the returns in sub-rule (1) of Rule 6 of the Kerala Rules did not fall for consideration of the Supreme Court. But, on a parity of reasoning we do not find any escape from the position that the time-limit fixed under the Bihar Rules in the garb of prescribing the manner of filing the declarations and certificates along with the returns is not valid. The argument of the learned Additional Government Pleader to the contrary is not sound and must be rejected. The Madras High Court in the latter cases referred to above have taken the identical view under similar circumstances.

15. On a careful consideration of the matter, therefore, we are of the opinion that the assessee, undoubtedly, could be and ought to have been given an opportunity to furnish to the assessing authority the declarations and certificates in the prescribed forms after the filing of the returns and before the passing of the assessment order. It could also be given an opportunity to furnish them even after the passing of the order if the appellate authority or the revisional authority could be satisfied that sufficient cause had been made out for giving such an opportunity. The difficulty, however, in the way of the assessee in this case is that whether in a particular state of facts and circumstances a case has been made out for the grant of such an opportunity by the appellate authority or the revisional authority is a question of fact. In a given circumstance, one authority may take one view and the other authority may record or take another view, yet the question remains, generally and ordinarily, a question of fact. It has been held in numerous decisions including a recent one by the Supreme Court that what is sufficient cause is a question of fact.

16. In the instant case although the assessing officer felt obliged to stick to the letter of the rule, he, however, was conscious of the fact that the assessee had not submitted the declarations and the certificates even on the 10th May, 1961, when he was going to make the assessment. To the same effect was the fact noted by the Deputy Commissioner in his appellate order although at the end he committed an error of law in saying that it was not open to him to excuse the delay in submission of the declarations and the certificates. The Board, however, discussed the question of fact elaborately with reference to the case of the assessee at the various stages. It gave several reasons for coming to the conclusion that the assessing authority had given the assessee sufficient opportunity to submit the declarations and the certificates before making the assessment.

In the order of revision, the Board has pointed out that the declarations and the certificates covering the full amount had not been filed before the Deputy Commissioner as was apparent from the statement filed before the Board. Even the declarations and the certificates which covered the sales of about rupees ten lacs, which had been received by the assessee before the date of assessment, were not filed before the assessing authority.

No ground was disclosed before the assessing authority as to why they were not filed. The contention of the assessee that they were not so filed because they were before the auditors was rejected by the Board on the ground that the duplicate copies could have been sent to the auditors and the originals could be filed before the assessing authority. It may be stated here that the declarations and the certificates are prepared in triplicate. The original and the duplicates are given to the dealer who sells the commodity and the triplicate is retained by the purchaser who gives the declaration or the certificate. It is no doubt true that at one place in its order the Board observed that it was unnecessary to go into the question whether the assessee had sufficient cause for non-compliance with the prescribed rules in view of the decisions of the Madras High Court, which, as we have said above with respect, are not good laws. In the alternative, reading the order of the Board as a whole, it is clear to us that it did consider as to whether this was a case where fresh opportunities should have been and could be given either by the Deputy Commissioner or by the Board for production of the required certificates and declarations in the case. It did not feel satisfied to say so. In our opinion, there is no error of law in this regard in the order of the Board and, therefore, the last part of the question which we have framed has got to be answered against the assessee. As a matter of law, we cannot hold that, on the facts and in the circumstances of this case, the assessee ought to have been given an opportunity to furnish to the assessing authority declarations and certificates in the prescribed forms after the passing of the assessment order in question.

17. Lastly, it was submitted by Mr. Tarkeshwar Prasad, learned Counsel for the assessee, that in any view of the matter in regard to the sales of rupees ten lacs, in respect of which the declarations and the certificates had been filed before the Deputy Commissioner, the Board ought to have directed him to accept them, or the assessing authority to accept them, and make a fresh assessment. We are not prepared to accept this argument because according to the

order of the Board, as we read it, no case in its opinion was made for acceptance of any declaration or certificate filed after the order of assessment was made by the assessing authority.

18. For the reasons stated above, we answer the question of law refrained by us partly in favour of the assessee but finally and effectually against it in the manner indicated above. In the circumstances, there will be no order as to costs.

MVJ/D.V.C.

Answer accordingly.

AIR 1969 PATNA 48 (V 56 C 14)

N. L. UNTWALLA AND

S. WASIUDDIN, JJ.

State of Bihar and another, Petitioners v. Smt. Bimla Kumari and others, Respondents.

Civil Writ Jurisdiction Case No. 318 of 1967, D/- 9-8-1968.

(A) Chotanagpur Encumbered Estates Act (6 of 1876), S. 12A(1)(a) and (3) — Khorposh grant is alienation of property within meaning of S. 12A(1)(a) — Such grant is void under S. 12A(3) if it is made without previous sanction of Commissioner: Decision of Misra, J. in Compensation Appeal No. 1 of 1964 (Pat), Reversed; AIR 1932 Pat 337, Foll.; AIR 1936 P. C. 46, Ref. (Paras 9 and 11)

(B) Tenancy Laws — Bihar Land Reforms Act (30 of 1950), S. 20 — Principles of section not attracted to case of person in whose favour Khorposh grant is made: Decision of Misra, J. in Compensation Appeal No. 1 of 1964 (Pat), Reversed.

The principles of S. 20 cannot be attracted to the case of a person in whose favour a khorposh grant has been made, as S. 20 provides for separate treatment of proprietor and tenure-holder in case of a member of a joint Hindu family having or entitled to a share in an estate or tenure as if there were a partition on the date of vesting, and, not in the case of a person in whose favour a khorposh grant had been made and an interest had been created, if created validly. If the grant is valid the grantee in his own right will be treated as an intermediary and the compensation assessment roll will have to be prepared in his name. Decision of Misra, J. in Compensation Appeal No. 1 of 1964 (Pat), Reversed.

(Para 11)

(C) Tenancy Laws — Bihar Land Reforms Act (30 of 1950), S. 24(6) — Section does not apply to case of khorposh grant.

(Para 11)

HL/KL/D684/68

Cases Referred: Chronological Paras
 (1936) AIR 1936 PC 46 (V 23)=ILR 15
 Pat 203, Bindeswari Charan
 Singh v. Bageshwari Charan
 Singh 10
 (1932) AIR 1932 Pat 337 (V 19)=
 ILR 12 Pat 147, Bageshwari
 Charan Singh v. Bindeshwari
 Charan Singh 10

S. Sarwar Ali, for Petitioners; Raghu-
 nath Jha, Shok Haran Singh and Yadu-
 nath Saran Singh, for Respondents.

UNTWALIA, J. :— The State of Bihar and the Land Reforms Deputy Collector, Hazaribagh, the two petitioners in this application, filed under Articles 226 and 227 of the Constitution of India, have obtained a rule from this Court against the four respondents to show cause why the decision of the Hon'ble Mr. Justice Misra, as he then was, acting as a Judge nominated by the State Government for the purpose of the appeal under Section 27 of the Bihar Land Reforms Act, 1950 (Bihar Act XXX of 1950) given in Compensation Appeal No. 1 of 1964, be not set aside by an appropriate writ or order. The learned Additional Government Pleader has appeared in support of the rule, and Mr. Raghunath Jha has shown cause on behalf of the respondent.

2. The facts, which may be conveniently stated from the order of the learned Judge, are these. One Dhruv Narain Singh was the holder of an impartible estate known as Dandi-kalan estate. He had three sons; the eldest one was Gajendra Narain Singh and the names of the other two are Narendra Narain Singh and Rajendra Narain Singh. On the death of Dhruv Narain Singh, Gajendra Narain Singh became the holder of the impartible estate. He had two sons, Chandra Mauleswar Narain Singh and Narmadeshwar Narain Singh. Out of the two, the former was elder. Chandra Mauleswar Narain Singh is dead, and his widow is Bimla Kumari; and, he died leaving three sons, namely, Dharendra Narain Singh, Sachindra Narain Singh and Upendra Narain Singh. When Chandra Mauleswar Narain Singh became the holder of the impartible estate in the year 1929, as it appears from the copy of the petition dated the 9th August, 1929, filed by the widowed mother of Chandra Mauleswar Narain Singh, which is to be found at page 17 in the paper book of the compensation appeal, the estate was applied to be taken for the purpose of management under Section 2 of the Chotanagpur Encumbered Estates Act, 1876 (Act 6 of 1876). The estate was accordingly, taken over on the 13th May, 1930. It was released on the 22nd November, 1946, in favour of Chandra Mauleswar Narain Singh the then holder of the estate, who was the same person as the holder of the

estate when the application under Section 2 of Act 6 of 1876 was made.

In less than a year after the release of the estate, Chandra Mauleswar Narain Singh executed on the 28th Sep. 1947, Khorposh grants in favour of his wife, Smt. Bimla Kumari, his uncles, Narendra Narain Singh and Rajendra Narain Singh and his brother, Narmadeshwar Narain Singh. The estate vested in the State of Bihar under Section 3 of the Bihar Act XXX of 1950 on the 22nd January, 1953. Chandra Mauleswar Narain Singh died sometime in the year 1954 leaving behind his widow Shrimati Bimla Kumari. Narendra Narain Singh also died and his widow is Srimati Brinda Kumari.

3. Shrimati Bimla Kumari made an application in the proceedings for assessment of compensation under Bihar Act XXX of 1950 claiming that the villages described in Schedule A of her petition had been granted to her in khorposh by her husband. The other persons also in whose favour the khorposh grants had been made filed similar applications. The learned Compensation Officer, however, refused to accede to the prayer made on behalf of Bimla Kumari and others to have their shares in the Dandi Kalan estate assessed separately on the ground that the grants in their favour were hit by Section 12A of Act 6 of 1876. Shrimati Bimla Kumari filed an appeal from the Order of the Compensation Officer before the learned Judge nominated under section 27 of the Bihar Land Reforms Act.

4. The learned Judge has taken the view that the Khorposh grants are not hit by Sec. 12A of Act 6 of 1876 and that the interests of all the holders of khorposh grants must be treated as independent estates and their valuation for the purpose of compensation should be assessed as such. A direction has also been given to the learned Compensation Officer by the learned Judge to keep in view the principle of Section 20 of the Bihar Land Reforms Act. The decision of the learned Judge is attacked on behalf of the petitioners as being erroneous in law on its face.

5. Sub-sections (1) to (3) of Section 12A of Act 6 of 1876 read thus:

"(1) When the possession and enjoyment of property is restored, under the circumstances mentioned in the first or the third clause of section 12, to the person who was the holder of such property when the application under Section 2 was made, such person shall not be competent, without the previous sanction of the Commissioner,—

(a) to alienate such property, or any part thereof, in any way, or

(b) to create any charge thereon extending beyond his lifetime.

(2) If the Commissioner refuses to sanction any such alienation or charge, an appeal shall lie to the Board of Revenue, whose decision shall be final.

(3) Every alienation and charge made or attempted in contravention of sub-section (1) shall be void."

Sub-sections (4) and (5) make provision of re-application of the provisions of the Act when it is proved to the satisfaction of the Deputy Commissioner that the holder of the estate in whose favour it was released has made or attempted to make any alienation or charge in contravention of sub-sec. (1). The learned Judge has taken the view that Khorposh grant is not tantamount to any alienation within the meaning of clause (a) of sub-section (1) of Section 12A, making it void if the grant has been made without the previous sanction of the Commissioner.

6. According to the Webster's Third New International Dictionary, the word 'alienate' means 'to convey or transfer to another (as title, property or right)'. The question is whether to give property in khorposh grant is to alienate it.

7. To understand the nature of khorposh grant, it is necessary to appreciate the nature and character of an impartible property. It has been stated at page 568 paragraph 587, of Mulla's Hindu Law, Thirteenth Edition, that "an impartible estate is not held in coparcenary though it may be joint family property In the case of an impartible estate, the right to partition and the right of joint enjoyment are from the very nature of the property incapable of existence, and there is no coparcenary to this extent. No coparcener, therefore, can prevent alienations of the estate by the holder for the time being either by gift or by will, nor is he entitled to maintenance out of the estate. But as regards future rights, that is, the right to survivorship, the property is to be treated as coparcenary property, so that on the death intestate of the last holder, it will devolve by survivorship according to the rules stated in S. 591 below." Then, at page 569, paragraph 589, it has said:

"No coparcener has any present rights in an impartible estate. Apart, therefore, from custom and relationship to the holder, the junior members of the family have no right to maintenance out of such estate.

In sub-paragraph (2) of paragraph 589, at page 570, occurs the passage which has been quoted in the judgment of the learned Judge and this runs as follows:—

"Where an impartible estate is held as ancestral or joint family property, the sons of the holder thereof are entitled, by custom, to maintenance out of the

estate. This custom has so often been judicially recognized that it is not necessary to prove it in each case. But where the impartible property is the self-acquired property of the holder, his son is not entitled to maintenance out of it."

8. In the instant case, no khorposh grant was made in favour of any son of the holder of the estate. The grants were all made in favour of other relations, namely, the wife, the uncles and the brother of Chandra Mauleswar Narain Singh. Undoubtedly, the estate was ancestral and was not his self-acquired property. Even in regard to the sons, who are entitled by custom, which is established by several decisions, to maintenance, a khorposh grant may be made in satisfaction of their right of maintenance, nonetheless the grant will be an alienation of property within the meaning of clause (a) of sub-section (1) of Section 12A, as a right to maintenance does not necessarily mean a right to the ownership or a limited ownership in the property itself. The person, who is entitled to get maintenance or who can get a maintenance, can get it from the usufruct of the property. A grant of the property itself or a portion of it is not essential to discharge the claim of maintenance. If in lieu of maintenance, the property itself is transferred by a khorposh grant, it is undoubtedly a transfer of the property and transfer of almost the full ownership as if by a gift except with this distinction that a property transferred by gift cannot come back to the grantor or his successor, while on failure of the line of succession in the family of the grantee, the property granted by a khorposh grant can come back to the parent estate. But alienation does not necessarily or always mean transfer of full ownership. Even transfer of a bundle of rights in the properties, as by mortgage, lease, etc. undoubtedly is an alienation within the meaning of Section 12A of Act 6 of 1876. The holder of an impartible estate may be under a legal obligation or a moral one to maintain the other members of the family; but he is not under a compulsion to transfer the property in order to discharge that obligation. The transfer or the alienation may be for the purpose of discharging the obligation, yet it is a transfer or an alienation of the property.

9. The view which I have expressed above finds ample support from the schedule and the other provisions of the Act itself, namely, the Chotanagpur Encumbered Estates Act. The preamble of the Act says that it is being enacted because "it is expedient to provide for the relief of holders of land in Chotanagpur who may be in debt, and whose immovable property may be subject to

mortgages, charges and liens." The effect of the order of vesting of management of the property in an officer appointed by the Commissioner under Section 2 of the Act is mentioned in Section 3, one of which is:

"Cessation of power to alienate. Thirdly, so long as such management continues,

(a) the holder of the said immovable property and his heir shall be incompetent to mortgage, charge, lease or alienate their immovable property or any part thereof, or to grant valid receipts for the rents and profits arising or accruing therefrom."

I shall now refer to section 9 of the Act 6 of 1876 to show that so long as the estate is under the management of the manager, the holder of the estate cannot alienate the property in any manner, such as, by mortgage, charge or lease as expressly mentioned in clause (a), quoted above, or by sale, gift or by maintenance grants or in any other way. Had that not been so, section 9 could not invest the Manager with the power to inquire into consideration for leases or maintenance grants made within three years immediately preceding the publication of the order mentioned in section 2 and to set aside the leases or grants under certain circumstances. The expression 'maintenance grant' expressly occurs in Section 9. It is manifest, therefore, that so long the estate remains under the management of the manager, the holder of the estate cannot alienate it or any part of it even by a maintenance grant. That being so, I do not see why the expression "to alienate . . . in any way" occurring in clause (a) of sub-section (1) of section 12A should not be interpreted to mean that the disability to make alienation of any kind including the maintenance or the khorposh grant continues even after the estate has been released. The disability is of a limited kind and attaches to that person and that person only who was the holder of the property when it was sought to be taken under the management and who remains the holder of the property when it is released under the circumstances mentioned in the first or the third clause of Section 12, as undoubtedly the release was in this case.

The disability is not absolute. The alienation can be made with the previous sanction of the Commissioner. If the Khorposh grant is within a reasonable limit permissible by law, it is manifest that the Commissioner will accord his sanction. If he does not do so, a right of appeal to the Board of Revenue has been provided under sub-section (2) of Section 12A. Sanction may, however, be refused if it is found that the khor-

posh grant is of an amount of property which, in proportion to the total corpus of the estate, is unreasonable or is a device to partition the estate or is being made with some other motive to encumber the estate. Since such questions are inherent in an enquiry which may be made by the Commissioner while giving the sanction to alienate the property by a khorposh grant and since sanction may not be accorded if due to one reason or other, as mentioned above, the khorposh grant is not legitimate, bona fide or within reasonable limits, it follows that even the maintenance grant was not permitted to be made by the holder of the estate without the previous sanction of the Commissioner. I, therefore, see no reason to exclude the transfer of property by a khorposh grant from the expression "to alienate . . . in any way" occurring in clause (a) of sub-section (1) of Section 12A of Act 6 of 1876.

10. I have not endeavoured to rest my judgment on the authority of the decision in *Bageshwari Charan Singh v. Bindeshwari Charan Singh*, AIR 1932 Pat 337 by James and Agarwala, JJ. The decision in that case rested chiefly on two points: (1) that the prohibition of alienation within the meaning of Section 12A embraced within its ambit the transfer of property by a Khorposh grant, and (2) that the decision in a previous suit did not operate as *res judicata* on this question. The case went up to the Privy Council in *Bindeshwari Charan Singh v. Bageshwari Charan Singh*, AIR 1936 PC 46. The Privy Council upset the decision of the Patna High Court holding that the decision in the previous suit taking the view that the grant was not hit by the provision of law contained in Section 12A of Act 6 of 1876 operated as *res judicata*. The issue in regard to the grant, which was the subject matter of the previous suit, could not be retried. Lord Thankerton, who delivered the judgment of the Board, as I read the judgment of his Lordship, did not even by implication say any word to show that the view of Agarwala, J., as he then was, in the Patna decision that a Khorposh grant, if made without the previous sanction of the Commissioner, was hit by the provisions of section 12A of Act 6 of 1876 was either erroneous or correct. The point was not gone into at all in the judgment of the Privy Council. Yet, I do not propose to take the view that the decision of the Patna High Court on the said question has got the force of a binding authority and the learned Judge committed an error in saying to the contrary in that regard, to justify the quashing of his order by grant of a writ of certiorari.

On examining some of the reasons of Agarwala, J. in *Bageshwari Charan*

Singh's case, AIR 1932 Pat 337, I find myself in respectful agreement with the view expressed by him. His Lordship has pointed out at page 340, column 1, that one of the objects and reasons of Bengal Act III of 1909 which introduced section 12A in the present Act 6 of 1876 was to prevent disqualified proprietors from making extravagant khorposh grants. Apart from the said reason as also some others given by Agarwala, J., with whom I respectfully agree, I have ventured to give my own reasons for taking the view that a khorposh grant also entails the consequence of being void under sub-sec. (3) of Section 12A of Act 6 of 1876 if it has been made without the previous sanction of the Commissioner. I do not see any escape from this position. With very great respect, I venture to say that the reasons given by the learned Judge in support of the view expressed by him are erroneous on their face. An estate may be wasted by unreasonable khorposh grant, or, if such grant is made with ulterior motives. The fact that, in this particular case, the grant was not attacked as such is of no consequence for interpretation of Section 12A of Act 6 of 1876. The fact that no outsider is brought as a transferee or an alienee by a khorposh grant as the grantee must be a family member is again, in my opinion, not relevant to the issue. To say even, in regard to the right of the sons to get a grant, that the grant is merely in favour of a member of the family who has already got a vested right to be supported out of the estate and who has his right only concretised in the form of a grant made to him is not correct. Even if the grant is in favour of the son, I do not feel persuaded to subscribe to this view.

It may be stated here that out of the four respondents in this case, three of them, namely, respondents 1, 2 and 4 are the grantees themselves and respondent no. 3 is the widow of one of the grantees. I am of the view that as in the case of alienation by mortgage, lease, sale or gift, so in the case of a khorposh grant, the estate does not necessarily result in its waste. It all depends upon the particular facts of the alienation sought to be made as to whether it is with a view to waste or will result in the waste of the estate. The estate can be wasted by all kinds of alienations, enumerated above, including the khorposh grant; and that is the reason that a safety valve has been provided in section 12A of Act 6 of 1876 for the protection of the estate by making it incumbent for the holder of the estate of the kind mentioned in that section to alienate the estate or any part of it in any way with the previous sanction of the Commissioner. If the Commissioner thinks

that the proposed alienation is not with a view to waste or will not result in the waste of the estate, obviously he will accord the sanction; but if he comes to a contrary conclusion, he is bound to withhold it. I, therefore, see no reason to exclude the khorposh grant from the ambit of the safety valve provided in Section 12A of Act 6 of 1876. In my opinion, the decision of the learned Judge is contrary to law and suffers from an infirmity of the kind which would justify its quashing by grant of a writ of certiorari.

11. In the view I have expressed above affirming the one taken by the learned Compensation Officer that the Khorposh grants in this case made without the previous sanction of the Commissioner are void, the question of a direction to the said Officer to keep in view the principle of section 20 of Bihar Act XXX of 1950 becomes redundant. I may also add that even apart from the said view, the principles of Section 20 cannot be attracted to the case of a person in whose favour a khorposh grant has been made, as section 20 of the Bihar Act XXX of 1950 provides for separate treatment of proprietor and tenure-holder in case of a member of a joint Hindu family having or entitled to a share in an estate or tenure as if there were a partition on the date of vesting, and, not in the case of a person in whose favour a khorposh grant had been made and an interest had been created, if created validly. If the grant is not invalid, the grantee in his own right will be treated as an intermediary and the compensation assessment roll will have to be prepared in his name. Our attention in this connection was also drawn to sub-section (6) of Section 24 of the Bihar Land Reforms Act. But, in my opinion, that section also does not apply to a case of a khorposh grant as it applies in terms to a person who is in receipt of a monetary allowance in lieu of maintenance which is a charge on the estate or tenure and not otherwise. By a khorposh grant, the property itself is transferred in lieu of maintenance, and, it is not made subject to any charge for payment of maintenance.

12. For the reasons stated above, I am constrained, although with utmost respect, to set aside the decision of the learned Judge by grant of a writ of certiorari; but there will be no order as to cost.

13. WASIUDDIN, J. :— I agree.
JHS/D.V.C. Order accordingly.

AIR 1969 PATNA 53 (V 56 C 15)

N. L. UNTWALIA AND
S. WASIUDDIN, JJ.

Tata Iron & Steel Co. Ltd., Appellant
v. Sudhir Chandra Sarkar, Respondent.

A. F. O. D. Nos. 444 of 1963 and 554
of 1964, D/- 6-8-1968, from order of
Sub J., Jamshedpur, D/- 17-5-1963 and
10-9-1964, respectively.

(A) Industrial Employment (Standing
Orders) Act (1946) Preamble and S. 7 —
Works Standing Orders of Tisco Ltd. —
Standing Orders although primarily govern
service conditions of workmen, are
not inapplicable to employees who claim
to be governed by them. (Para 11)

(B) Industrial Disputes Act (1947), Sch.
III Item 5 — Retiring Gratuity Rules of
Tisco company became an implied condition
of service of all employees of
Tisco Ltd. — But Gratuity cannot be
claimed as of right.

Provisions of Rr. 6, 7, 10 of the Retiring
Gratuity Rules of Tata Iron & Steel Co.
show that until and unless the company
has decided to pay the gratuity money,
in accordance with rule 7 or otherwise,
the mere fact of the employee becoming
eligible to get it under rule 6 does not
create any right for the payment of gratuity
under the rules by enforcement
of such a claim in a Civil Court. The
matter of payment of gratuity is at the
absolute discretion of the Company and
the employee, howsoever unfortunate
the position may be under the modern
stage of the society, is not entitled to
claim it as a matter of right. Even though
payment of gratuity under the rules
is an implied condition of service, yet
the condition is further conditioned by
the provisions made in the rules and is
subject to them. (Para 16)

(C) Civil P. C. (1908) Preamble — Pre-
cedent — Right of employee under Retir-
ing Gratuity Rules of employer company
— Interpretation of rules involved —
Cases decided under Industrial Disputes
Act are not a safe guide. (Para 15)

(D) Industrial Disputes Act (1947), Sch.
III Item 5 and S. 15 — Retiring Gratuity
is no longer a gratuitous payment but
only an earned money — Where rules
do not enable employee to claim gratuity
as of right, civil courts cannot enforce
such claim — Tribunals can do so. (1884)
ILR 6 All 173 & (1884) ILR 6 All 634 &
AIR 1924 Bom 88 & AIR 1943 Bom 453 &
AIR 1932 Pat 311 and AIR 1933 Cal 409,
held no longer good law.

If an industrial dispute raised by em-
ployees claiming gratuity according to
the rules which do not enable the em-
ployee to claim gratuity as of right goes
before the Tribunal under the Central
Act 14 of 1947, the Tribunal may be in

a position to award the gratuity as a
matter of right even under such rules.
But a Civil Court cannot do so. The rea-
son is that an Industrial Tribunal decid-
ing a dispute under Central Act 14 of
1947, can create new rights and bring
about industrial truce by awarding such
sums as ought to be granted. But the
Civil Court is unable to do so. Payment
of gratuity money can, no longer, be
called a gratuitous payment or payment
as a matter of reward or boon. It may be
called an earned money or a money
which the workman is entitled to get as
a matter of right on fulfilment of the
conditions. But the law of contract or the
law of master and servant which is the
only law to be enforced in a civil Court
cannot justify an interpretation of such
Gratuity Rules in such a way as to en-
title employees to claim gratuity as of
right.

Held on facts that no right was
created in favour of a retiring employee
to claim the retiring benefit of gratuity
as a matter of right. AIR 1949 FC 111 &
AIR 1950 SC 188 & AIR 1950 Cal 232
Rel. on; (1884) ILR 6 All 634 & (1884)
ILR 6 All 173 & AIR 1924 Bom 88 &
AIR 1943 Bom 453 & AIR 1932 Pat 311
& AIR 1933 Cal 409 held no longer good
law. AIR 1962 Madh Pra 361 & AIR
1960 SC 251 & AIR 1960 SC 833 & AIR
1962 SC 673 & AIR 1965 SC 839 & AIR
1966 SC 305 & AIR 1968 SC 413, Dist.
(Paras 16 and 19)

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 In A. F. O. D. No. 444 of 1963: Lalnarayan Sinha and L. K. Chaudhary, for Appellant; B. C. Ghose, S. K. Majumdar, S. K. Chattopadhyaya and P. K. Sinha, for Respondent.
 In F. A. No. 554 of 1964. G. C. Mukherji and N. N. Roy, for Appellant; Lalnarayan Sinha and L. K. Chaudhary, for Respondent.

UNTWALLA, J. :— These two appeals have been heard together as the identical question involved in them is whether an employee of the Tata Iron and Steel Co. Ltd. for the sake of brevity referred to as Tisco Ltd. or the Company, is entitled, as a matter of right to get gratuity on his retirement from service. I shall refer separately to the facts of the two cases, which are also similar, and then proceed to discuss and decide the common question which falls for determination in these appeals.

F. A. 444/63.

2. Tisco Ltd. Is the appellant in this appeal. The suit of the employee for gratuity and interest has been decreed by the court below against the appellant which was defendant no. 1 Tata Industries Private Ltd. The Managing Agents

of Tisco Ltd. was impleaded as defendant no. 2 in the action. T. V. S. Ratnam, defendant No. 3 was the Head of the Department in which the plaintiff respondent was working at the time of his retirement. The suit has been dismissed against defendants 2 and 3.

3. The plaintiff's case is that he was a permanent uncovenanted employee under Tisco Ltd. and during the relevant period in July and August 1959 was acting as a General Foreman, Furnaces, in New S. M. S. No. 3 Department although at that time he was holding a substantive post of a Foreman, Furnaces in the said Department. He served as an uncovenanted employee of Tisco Ltd. Jamshedpur, from 31-12-29 to 31-8-59 in various capacities, and at the time of retirement from service of the Company, he was drawing a basic monthly salary of Rs. 936. Under the service conditions of the defendant Company, besides the salary, the plaintiff was entitled to several kinds of bonus and other perquisites, benefit of leave, benefit of provident fund and the retiring gratuity. The plaintiff during the period of about 30 years of service rendered valuable and faithful service to the company to its utmost satisfaction and without any blemish or fault. The plaintiff had his due promotions, etc.

In recognition of the services, the Company also sent him abroad at its expense for specialised training for a period of a month. The plaintiff's case further is that in accordance with the Standing orders in force in the Company he submitted his letter of resignation dated 27-7-59 to defendant no. 5, the Superintendent of the Department giving one month's notice therein, as required under the Standing orders. The resignation was unconditionally accepted by defendant no. 3 on behalf of defendant no. 1 by his letter dated 27-8-59, and the plaintiff was released from service with effect from 1-9-59. The Company had its provident fund and gratuity as retiring benefits for its uncovenanted employees and they were operated by separate rules framed for the purpose as amended from time to time. The gratuity scheme was brought about with effect from 1-4-37.

Relevant rules were framed and brought into force in pursuance of a resolution of the Board of Directors of the Company passed on 6-1-37. The scheme was given retrospective effect in computing the period of continuous service. The said rules and benefits were made applicable to all employees who were in service at that time, and the benefits were given to all who retired thereafter. On retirement from service, the company has paid to the plaintiff his provident fund dues, both his own contribution and the

Company's contribution together with accretions thereto. But no application for the retiring gratuity was drawn up by defendant no. 3 and no gratuity was sanctioned or paid to the plaintiff by the Company or its Managing Agents. Non-payment of the gratuity without any rhyme or reason or without any blemish or fault on the part of plaintiff is arbitrary, illegal, unjust and vindictive and the defendants are jointly and severally liable to the plaintiff for payment of the same.

It is also pleaded in the plaint that the plaintiff submitted his letter of resignation of 27-7-59 personally to defendant no. 3. In that letter, he had made a request to the effect that as he had earned leave to his credit, he may be granted leave from 28-7-59 till 31-8-59. Defendant no. 3 verbally told the plaintiff that the leave would be granted and resignation would be accepted in due course. Accordingly, the plaintiff stayed away from the works on 28-7-59 when to his great surprise he received a confidential letter from the superintendent (defendant no. 3) in the afternoon of that day requesting him to submit his explanation on or before 30-7-59 for staying away from works from the morning of 28-7-59 without obtaining proper sanction. A reply was sent to the letter on 29-7-59. Enquiry was held in the office of the Chief Personnel Manager on 31-7-59. Thereafter the Superintendent (defendant no. 3) by his letter dated 3-8-59 warned the plaintiff for his shortcoming for keeping away from the works on 28-7-59 and requested him to join duty immediately as the leave asked for by him on 27-7-59 had not been granted to him due to shortage of officials. The plaintiff complied with the directions of the Superintendent and joined his duties. By letter dated 7-8-59, however, defendant no. 3 informed the plaintiff that he could avail of his leave from 8-8-59 to 31-8-59. Subsequently, by letter dated 27-8-59 defendant No. 3 informed the plaintiff that his resignation had been accepted and he had been released with effect from 1-9-59. The plaintiff pressed for his claim of gratuity which came to the tune of Rs. 14,040 and ultimately, while pressing his claim through lawyer's notice, also intimated to the Company that it will be liable to pay interest on the said amount.

4. The pleas taken by the defendants in their written statement, inter alia, are that the plaintiff was not entitled as a matter of right, to the benefit of leave according to the rules or to retiring gratuity under the service conditions. It was not correct to say that the service of the plaintiff was without any blemish or fault before he resigned as he was found guilty of misconduct under the works

standing orders of the defendant Company which apply to all employees of defendant no. 1. The letter of resignation dated 27-7-59 giving one month's notice was handed over by the plaintiff to defendant no. 3 at about 7 P. M. of a sudden and it was accepted in due course but not unconditionally.

With respect to gratuity as retiring benefit, there is a set of rules but the rules do not provide that gratuity is payable as of right to all employees after completion of 15 years' service with the Company. The gratuity is payable at the absolute discretion of the Company irrespective of the fact whether the plaintiff has or has not performed all or any of the conditions stated in the rules and, no employee, howsoever otherwise eligible, is entitled as of right to any payment under the Gratuity Rules. The omission on the part of defendant no. 3 in not drawing up the gratuity application or non-payment of gratuity was not wrongful, arbitrary, vexatious or malicious. The further plea is that on 27-7-59 at 7 p. m. when the plaintiff submitted his letter of resignation, he was acting in the place of the General Foreman who was on leave and he was also looking after the work of the Assistant Superintendent of the Department who had suddenly been taken ill. In the absence of his two superiors, whose work he was looking after, it was not possible to grant leave to the plaintiff and the leave asked for was accordingly refused to him. In spite of this refusal, the plaintiff stayed away from the work from the 28th July, 1959.

Accordingly a charge sheet was issued to him asking him to show cause why disciplinary action should not be taken against him for staying away from work in dereliction of his duty and in defiance of the superior's orders expressly asking him not to proceed on leave. Explanation was submitted and enquiry was held in the Chief Personnel Manager's office on 31-7-59, as a result of which the plaintiff was found guilty of gross misconduct in that he wilfully disobeyed the superior's order. The Management, however, did not take any strong disciplinary action against the plaintiff. He resumed his duty on the 4th August, 1959 and was subsequently granted leave from 8th August on which day the Assistant Superintendent of the Department resumed duty.

5. Sri Arabinda Mukherji, the learned Subordinate Judge, who tried and decreed the suit against defendant no. 1 did not think it necessary to go into the question and, in my opinion, rightly as to whether the plaintiff's conduct in absenting from duty from 28-7-59 was justified or not. The admitted fact is that he was not dismissed from service for the

alleged misconduct but was allowed to retire unconditionally on his resignation. He, however, held, relying upon the decisions in *Indian Hume Pipe Co. Ltd. v. The Workmen*, AIR 1960 SC 251, *The Garment Cleaning Works v. The Workmen*, AIR 1962 SC 673 and *Tirjugi Sitaram v. Badlu Prasad Bheruprasad*, AIR 1962 Madh Pra 361 and on interpretation of the relevant rules framed by the Company, that the plaintiff is entitled to claim the gratuity money as a matter of right.

6. The letter of resignation dated 27-7-59 is not an exhibit in the case but it is annexure A to the plaint, and there is no doubt that by the same letter the plaintiff asked for leave from the 28th July till 31st August, 1959. The letter dated 28-7-59, Ext. 4(ka), was sent to the plaintiff as is the evidence of D. W. 1 T. V. S. Ratnam on the advice of some superior officer and probably in the afternoon, Ext. 4(kha) dated 29-7-59 is the explanation submitted by the plaintiff. Since the facts are not in dispute, or in any event some of the disputed ones are not necessary to be decided, it is needless to refer to other exhibits. I would, however, like to refer to the evidence of Sudhir Chandra Sarkar, the plaintiff, who examined himself as P. W. 2. His statement in examination-in-chief is that as a condition of his service he was to take among other facilities and emoluments, the retiring gratuity money as one of the benefits of the service condition and that he was entitled to the gratuity money according to the rules and conditions of service he was in. In cross-examination he stated that there is a set of rules regarding granting of gratuity money to the employees and his claim is based on those rules. He further said that the gratuity rules will show that the payment of gratuity is a condition of the service. There does not seem to be any denial of this fact. Reading the pleadings and the evidence of the parties in this case, I have no difficulty in arriving at the conclusion that the service conditions of the plaintiff were governed by the Works Standing orders and that it was an implied condition of service that he could get gratuity in accordance with the Retiring Gratuity Rules, 1937 framed by the Company. The Works Standing orders are Ext. C in the case and the Retiring Gratuity Rules, as they stood at the relevant time are Ext. D.

F. A. 554 of 1964.

7. The relevant facts to be stated from the plaintiff's case in this appeal are these. The plaintiff worked in various capacities in the different departments of Tisco Ltd. which is the sole defendant in this suit, from February, 1940

to August 1960 as an uncovenanted employee. At the time of his retirement, he was working as Assistant Chief Project Engineer (Electrical) and was drawing a salary of Rs. 1,000 per month. His service was regulated by the Service Standing Orders, and he had the benefits under the Provident Fund and the Retiring Gratuity Rules, 1937 besides all kinds of bonus, leave, etc. The plaintiff rendered most valuable and faithful services to the company to its utmost satisfaction during the course of his 20 years' service. On the 16th June, 1960 the plaintiff submitted his letter of resignation from service of the defendant Company with effect from 1st August, 1960. It was accepted unconditionally on or about the 4th of August, 1960 with effect from the 15th of August 1960. The plaintiff claims in clear terms that under the Retiring Gratuity Rules of 1937 he is entitled to be paid retiring gratuity equal to half month's salary or wages for every completed year of continuous service. The same was not paid in spite of demands. Finally it was refused. The plaintiff sent solicitor's notice to the defendant Company demanding payment of his gratuity dues and also claimed interest thereon. The total amount of claim in this suit is Rs. 11,550, gratuity money Rs. 10,000 and interest Rs. 1,550.

8. In the written statement, the defendant Company has not denied that the service of the plaintiff was governed by the Standing orders but asserts that the plaintiff is not entitled to any gratuity under those orders; the rules for gratuity are altogether different. The Retiring Gratuity Rules of the Company "constitute a part of the terms and conditions of service between the company and the employee and the employee cannot legally claim anything against such terms and conditions." In this case, there is no dispute or complication of any fact at all. The only witness examined in the case is the plaintiff himself (P. W. 1). His definite evidence is that he is entitled to get retiring gratuity under the rules. From the pleadings and the evidence in this case also, there is no difficulty in arriving at the conclusion that the service conditions of the plaintiff were governed by the Works Standing orders and he could get gratuity on his retirement under the Retiring Gratuity Rules, 1937. The Works Standing orders do not seem to have been exhibited in this suit. But at the time of the hearing of the appeals they were referred to in both the cases, and as already stated, they are Ext. C in the other case. The Retiring Gratuity Rules, 1937 as they stood before the amendment brought about in 1955, were marked Ext. A in this case but the Rules as they stood on the relevant date, were marked Ext. A/1.

Exts. D of the other case and A/1 of this case are identical.

9. Sri Ramavatar Lal Das, the learned subordinate Judge, who tried and dismissed this suit, came to the conclusion that the Gratuity Rules, 1937 constituted the terms and conditions of the service between the defendant and the plaintiff. But distinguishing the three authorities, 2 of the Supreme Court and one of the Madhya Pradesh High Court — the very same authorities which were relied upon by the other learned Subordinate Judge in the other suit, and on interpretation of the same Rules, he came to the conclusion that the plaintiff is not entitled to any retiring gratuity benefit, it is almost an *ex gratia* payment depending on the will and pleasure of the employer and it is in the nature of gift to be made by the employer as it likes. The suit has been dismissed, and the plaintiff employee has come up in appeal.

10. I may state at the outset that in neither of the cases it was claimed in the Court below that the plaintiff is a workman within the meaning of clause (s) of Section 2 of the Industrial Disputes Act, 1947 (Central Act 14 of 1947). Some vague attempt was made here on behalf of both of them that they were such workmen. But, as was observed by the Supreme Court in some cases which will be referred to hereinafter whether a particular employee is a workman within the meaning of the provision of law aforesaid is a question of fact. No facts were pleaded to assert that either of the two plaintiffs was workman. No claim was made by either of them in his evidence that he was such a workman. I shall, therefore, proceed upon the footing that both the plaintiffs were employees of Tisco Ltd. but it has not been asserted or proved that they were workmen within the meaning of clause (s) of Section 2 of Act, 14 of 1947. This fact by itself, however, in my opinion, will not make any difference in the final conclusion at which I shall arrive in both the cases.

11. The Works Standing Orders which are Ext. C in the suit giving rise to First Appeal 444/63, as stated in them at the beginning, came into force in accordance with Section 7 of the Industrial Employment (Standing Orders) Act, 1946 (Central Act, 20 of 1946). On reading the preamble of this Act and the various provisions contained therein, it would seem that Mr. Lalnarayan Sinha the learned Advocate General, who argued the appeals on behalf of Tisco Ltd. was right in his submission that the Standing Orders made in accordance with Central Act 20 of 1946 are primarily made for governing the service conditions of the workmen and the employer as defined in

that Act. It would be noticed that the definition of 'workman' in clause (1) of Section 2 of this Act is identical to that given in clause (s) of Section 2 of Central Act 14 of 1947. On being framed in accordance with the provisions of Act 20 of 1946, the Standing Orders came into operation under Section 7 and are binding on the employer and the workmen. Nonetheless, there is nothing in the Industrial Employment (Standing Orders) Act (sic) to all its employees. The Standing orders themselves clearly state that they

"will apply to all employees at the Works of the Company at Jamshedpur including the Agrico and Chemi. Co. department and to employees in offices forming part of one or other department of the Works unless specifically otherwise stated or except in so far as employees under contract of employment with the Company may be governed by special contract rules. Subject as aforesaid the orders will apply to all classes of employees."

Not only impliedly the plaintiffs of both the cases had agreed to be governed by these Standing orders but, as I read the pleadings in both the suits, expressly they claim to be so governed and the defendant Company did not dispute this fact. I would, therefore, overrule the contention of the learned Advocate-General that the Works Standing orders having been framed and adopted in accordance with Central Act 20 of 1946 could apply to the plaintiffs only if they plead and prove that they were workmen within the meaning of that Act, and hold that the Standing orders applied to them.

12. There is no provision, however, in the Works Standing orders conferring any right on an employee of Tisco Ltd. to get gratuity money on retirement either in terms of the Standing Orders or with reference to the Retiring Gratuity Rules. The only relevant provision in this connection put in the negative form in paragraph 24(a) of these standing orders is:

"An employee shall be liable to be dismissed if he has been guilty of misconduct. An employee dismissed for misconduct shall not be entitled to any notice or pay in lieu of notice and thereupon shall not be entitled to any benefits or privileges under these orders or any other benefits or privileges provided by the Company."

I may note here in passing that misconduct as defined in a clause of paragraph 23 of the said orders means "Habitual late attendance, and habitual absence without leave or without sufficient cause." Even in regard to the plaintiff in First Appeal 444 of 1963 it was not pleaded or found that he was dismissed for misconduct or that he was guilty of misconduct as defined in clause (vi) of paragraph 23. What I want to emphasise,

however, with reference to paragraph 24 (a) is that its language does not confer any right on the employee to claim any benefit or privilege, under the Retiring Gratuity Rules. There were various kinds of benefits and privileges provided by the Company as stated by both the plaintiffs in their respective plaint. One has to determine the nature of the privileges with reference to the Rules themselves.

13. Paragraph 51 of the Standing orders makes provision for requisite period of notice in respect of various employees of the Company to enable it at any time to discharge an employee from service or terminate his services. Paragraph 52 says that the employees who wish to leave the Company's service must give the company the same notice as the company is required to give them. The plaintiffs claim that they gave notice to the Company in accordance with the Standing Orders. Paragraph 54 of the Standing orders says that every uncovenanted employee will retire from service on attaining the age of 60 years, while making provision under certain circumstances for extension of service. Paragraph 55 provides that every permanent employee shall be entitled to a service certificate at the time of his dismissal, discharge or retirement from service. With reference to paragraph 55, I may observe here that the plaintiff of First Appeal 444 of 1963 was entitled to a service certificate at the time of his retirement, which was not given to him.

14. Then comes the question whether the Retiring Gratuity Rules of 1937 were a condition of service of the plaintiffs. Rule 2 says that the Rules shall be deemed to have been established on and from the 1st of April, 1937 pursuant to a resolution of the Directors of the Company passed on the 6th day of January, 1937 but the present Rules shall be deemed to have come into force as from 1st January, 1948 pursuant to the resolution of the Directors of the Company passed on the 4-4-1948. Neither of the plaintiffs has claimed or could claim that when he joined service of the Tisco Ltd. in one case in the year 1929 and in the other in the year 1940, he did so expressly agreeing to the Gratuity Rules being one of the conditions of his service. Ext. 5 a notice of advertisement dated 26-4-63 in the suit giving rise to First Appeal 444/63, inviting applications to a certain post in a stated salary with other allowances as permissible under the rules, provident fund, leave, privileges, retiring gratuity, etc. is of no consequence. I, however, hold that the Gratuity Rules when they came into force from 1st January, 1948, impliedly became the service conditions of all the employees under service of Tisco Ltd. unless expressly

excluded. Again I say on the basis of the pleadings of the parties and the unchallenged evidence of the plaintiff that this position is not disputed — rather is admitted.

15. But the question is what is the nature of the privilege conferred by the Retiring Gratuity Rules as an implied condition of service. In a Civil Court for the enforcement of an alleged right of gratuity, the answer is to be found on interpretation of the Rules themselves and within their four corners. Cases decided by the Supreme Court under the Industrial Disputes Act, 1947 are not a safe guide and do not fully cover the point to be decided for enforcement of the alleged right in a Civil Court.

16. I shall now read some of the relevant rules from the Retiring Gratuity Rules of 1937 (Ext. D or Ext. A/1). Rule 6(a) says —

"Subject to the conditions referred to in these Rules, every permanent uncovenanted employee of the Company, whether paid on a monthly, weekly or daily basis, including those borne on the pay rolls of the Company at the Collieries and at the Ore Mines and Quarries, will be eligible for a retiring gratuity which shall be equal to half a month's salary or wages for every completed year of continuous service, subject to a maximum of twenty months' salary or wages in all."

Rule 7 was added by an amendment brought about by the resolution of the Board of Directors dated 1st May, 1959, and it reads thus —

"Notwithstanding anything contained in these Rules a gratuity shall become due and be payable and shall always have been deemed to have become due and payable only in such instalments and over period or periods as may be fixed by the Board of Directors of the Company or subject to the direction of the Board by the Managing Agents. Until any such instalment shall become or have become due and payable, the employee or any dependant who qualifies for payment under the Gratuity Rules shall not be eligible to receive or be paid and shall not have been deemed to have become eligible to receive or be paid any such instalment of the gratuity."

Rule 8 provides for taking into consideration the periods of service in different sister concerns for computing the total period of service. Rule 10 which in my opinion, creates the insurmountable difficulty in the way of the plaintiffs in enforcing their claim of gratuity, as a matter of right runs thus —

"All retiring gratuities granted under these Rules other than special gratuity to be paid under the provisions of Rule 22 hereof shall be at the absolute dis-

cretion of the Company irrespective of whether an employee has or has not performed any of the conditions herein-after stated, and no employee howsoever otherwise eligible shall be deemed to be entitled as of right to any payment under these Rules."

This rule was amended on 25-8-55. Before amendment, it was Rule 9 as contained in Ext. A. The relevant words with which we are concerned in these appeals were identical. The only amendment was that special gratuity to be paid under the provision of Rule 22 was not left at the absolute discretion of the Company and by necessary implication was provided to be claimed as a matter of right. Rule 22 provides for special gratuity in case of an employee who agrees in writing to forgo the amount of annual bonus, in other words, special gratuity is to be paid in lieu of bonus which the employee could have got but for his forgoing to receive it.

Rule 11(1) says that uncovenanted employees of the Company governed by the Industrial Disputes Act or any legislation providing for any retiring or retrenchment benefit will be granted the retiring or retrenchment benefit as provided in the aforesaid Act, but may be granted the excess under the Rules. Sub-rule (2) of Rule 11 says that uncovenanted employee of the Company, not governed by the said Act or any other legislation may, subject to the provisions of the Rules, be granted a gratuity, on fulfilment of the conditions provided therein, one of which is completion of 15 years continuous service. It would thus be seen that under Rule 6 on fulfilment of service condition an employee becomes eligible for retiring gratuity, he does not become entitled, as a matter of right. He merely attains, on fulfilment of the condition, the benefit of eligibility or suitability for the retiring gratuity and not the right. Under Rule 6, the whole of the amount of gratuity becomes payable in one lump sum, and that is the reason that rule 7 was introduced by an amendment in the year 1959 that "notwithstanding anything contained in these Rules" which phrase by necessary implication has got to mean that notwithstanding the contrary provision in Rule 6, a gratuity shall become due and be payable in such instalments as may be fixed by the Board of Directors of the Company. The first part of rule 7 does not repeal or wipe off the effect of rule 10; rather the second part fortifies it in that it says that until any such instalment shall become or have become due and payable, the employee who qualifies for payment under the Gratuity Rules shall not be eligible to receive

it. In my opinion, therefore, until and unless the Company has decided to pay the gratuity money, in accordance with rule 7 or otherwise, the mere fact of the employee becoming eligible to get it under Rule 6 does not create any right for the payment of gratuity under the Rules by enforcement of such a claim in a Civil Court. The matter of payment of gratuity is at the absolute discretion of the Company and the employee, however unfortunate the position may be under the modern stage of the society, is not entitled to claim it as a matter of right even though payment of gratuity under the Rules is an implied condition of service, yet the condition is further conditioned by the provisions made in the rules and is subject to them.

It is, no doubt, true that the plaintiffs were in the service of the Tisco Ltd. on the tacit understanding and hope that on retirement they would get the gratuity money in accordance with the Rules. As a court of law however dealing with the enforcement of the alleged right in a Civil Court, I cannot persuade myself to take the view that it is possible to decree the suit of the plaintiffs on the footing of the Rules being an unconditional promise on the part of the employer to pay the gratuity money. It may well be that an industrial dispute can be raised by the workmen of Tisco Ltd. to do away with the provision of Rule 10 contained in the Rules as it is unconscionable and incompatible with the modern notions or conditions which ought to govern the relation between employer and employee.

It may further well be that if an industrial dispute raised by workmen claiming gratuity even according to the Rules as they exist goes before the Tribunal under the Central Act 14 of 1947, the Tribunal may be in a position to award the gratuity as a matter of right even under the existing Rules. But a Civil Court cannot do so. An industrial tribunal deciding a dispute under Central Act 14 of 1947, as laid down by the Federal Court in *Western India Automobile Association v. Industrial Tribunal*, AIR 1949 FC 111 and *Bharat Bank Ltd. v. Employees of the Bharat Bank Ltd.*, 1950 SCR 459=(AIR 1950 SC 188), can create new rights and bring about industrial truce by awarding such sums as ought to be granted. But the Civil Court is unable to do so. Payment of gratuity money can, no longer, be called a gratuitous payment or payment as a matter of reward or boon as was the view expressed earlier in many cases, to wit, *Bawan Das v. Mulchand*, ILR (1884) 6 All 173, *Janaki Das v. East Indian Ry. Co.*, (1884) ILR 6 All 634, *Natha Gulab and Co. v. W. C. Shaller*, AIR 1924 Bom 88, *Usman Abubakar Sanli v. Chief Ac-*

counts Officer, G. I. P. Rly., AIR 1943 Bom 453, Secy. of State v. Jamuna Das, AIR 1932 Pat 311 and Secy. of State v. Bholu Nath, AIR 1933 Cal 409. It may be called an earned money or a money which the workman is entitled to get as a matter of right on fulfilment of the conditions entitling him to claim the benefit of gratuity when the matter is before the industrial tribunal under Central Act, 14 of 1947. Yet I do not find it possible to hold that the law of contract or the law of master and servant which is the only law to be enforced in a Civil Court can justify an interpretation of the Gratuity Rules in question that the plaintiffs can be granted decrees for payment of gratuity money on the footing that it was the unconditional or unconditioned contractual obligation of the employer to pay such a money.

17. In the case of AIR 1949 FC 111 Mahajan J. as he then was, observed at page 117 (column 1):

".... that when dispute arises about the employment of a person at the instance of a trade union, or a trade union objects to the employment of a certain person, the definition of industrial dispute would cover both those cases. In each of those cases although the employer may be unwilling to do so, there will be jurisdiction in the Tribunal to direct the employment or non-employment of the person by the employer. This is the same thing as making a contract of employment when the employer is unwilling to enter into such a contract with a particular person."

In Bharat Bank's case, 1950 SCR 459= (AIR 1950 SC 188), Mukherjee, J. as he then was, pointed out that the function of the Industrial Tribunal was not merely to interpret or give effect to contractual rights but it can create new rights and obligations for the purpose of keeping industrial peace. On this very reasoning, case under the Industrial Disputes Act laying down that the Industrial Tribunal could go into the question of colourable or mala fide exercise of right to terminate the services of an employee by an employer were distinguished by a Bench of this Court in Jagdish Vastralaya v. State of Bihar, AIR 1964 Pat 180 while dealing with the power of the authority under Section 26 of the Bihar Shops and Establishments Act of 1954, and it was held that the power was restricted and that the authority could not go into similar questions.

18. Learned Advocate-General attempted to support his argument based upon rule 10 of the Gratuity Rules with reference to Rules 3 and 4, and specially he strongly relied upon the latter. The former merely says —

"These Rules shall be interpreted by the Agents whose decision shall be final and binding."

Even assuming it to be so, no question of interpretation of the rule is involved in this case. Rule 4 lays down—

"The Board of Directors of the Company shall have the power, from time to time, and at any time, to repeal, add to, vary or alter these Rules or frame such other Rules as they may think fit."

Counsel submitted that promise to give a benefit conditioned with the power to withdraw it at any time is no valid or effective grant of the benefit or the gift. He relied upon a passage at page 783 in Mulla's Transfer of Property Act, 5th Edition, which says —

".... a gift revocable at pleasure is no gift at all. The same principle applies in the law of contracts, for a promise to pay what the promisor pleases is no promise at all."

At the foot note is noted the case of Roberts v. Smith, (1859) 4 H. & N. 315 =157 ER 861 in support of the above principle of law. In that case, the matter of remuneration was left open by the employee at the discretion and pleasure of the employer for his time and labour, which he may think deserving of; in other words, the employee agreed to work; he left the remuneration in the hands of the employer. Martin, B. said at page 863 of the English Report —

".... In reason and commonsense that is a liability in honour, and not a liability by contract."

Bramwell, B. and Watson, B. also agreed. The former said at page 864 —

"The obvious construction of the letters is this, that if the Company is not formed there is to be no claim, but defendant may give something as a gratuity."

I do not think that Rule 4 is capable of being placed at par with the words which were the subject matter of consideration in Roberts's case. My interpretation of Rule 4 is that the Board of Directors of the Company had the power from time to time and at any time to repeal or amend the Rules. If they repeal them before retirement of a particular employee, the employee will not be eligible to any benefit granted under the Rules; he may not be able to challenge the repeal in a court of law and to enforce the payment of gratuity. The position may be different before industrial tribunal. But until and unless the Rules are repealed, mere power to repeal them cannot mean that if otherwise a right could be found to have been created under them, the power of repeal will militate against the creation of such a right.

19. The view which I have expressed above finds some support from the deci-

sion of P. B. Mukharji, J. in *Benode Behary Roy v. General Insurance Society Ltd.*, AIR 1950 Cal 232. Rule 94 of the bye law of the company making provision for grant of gratuities was held to be ineffective because in accordance with bye-law 4 which granted to the Board of Directors the right of altering or adding to the rules had been exercised before the retirement of the plaintiff in that case. Bye-law 9 had been cancelled before his retirement. In that view of the matter, following the decisions in *Smith v. Galloway*, (1898) 1 QB 71 and the decision in *Yeo v. Stewart*, (1947) 2 All ER 28 the learned Judge held at page 235 (Column 2) —

"I have come to the conclusion that when an employee of a company, by the very terms of his contract of service is to act according to the bye-laws of the Company, and one of such bye-laws is that the bye-laws can be added to or altered at any time by the Company, then the employee is bound by any alteration or addition of the bye-laws that may duly be made by the Company even though such addition or alteration was made after the contract of service. This is so even if it means that the employee thereby loses any vested right, i. e. any right acquired by him before such alteration or addition."

I am not quite sure as to whether the view expressed in the last part of the passage extracted is correct, but it seems to me that an employee having agreed to adopt the rules as a service condition, one of which rules granted the power to the employer to repeal or alter them could not make a grievance if they were so repealed or altered before his retirement. I find it difficult to see how a right to get gratuity, if one can spell out such a right from the Rules, is created before retirement. The right can only be found on retirement, and if before the coming into existence of such a right the Rules are altered or repealed, no grievance can be made for the same. But until and unless they are so repealed merely because of the power to do so, it cannot be said that no right will be created.

Mr. Lalnarayan Sinha fairly conceded that rule 10 would be in the nature of a forfeiture or penal clause and as in equity the courts in India could give relief to the employee against such a clause if otherwise a right could be found to have been created in favour of the employee who has retired. He, however, submitted that reading rules 4 and 10 together it should be held that no right was created and rule 10 is neither a forfeiture nor a penal clause. For the reasons given above, the argument as placed by the learned Advocate General does not fully

commend itself to me but, at the same time, reading and interpreting the rules as a whole, I hold no right is created in favour of a retiring employee to claim retiring benefit of gratuity as a matter of right and it is not a case where the right, if vested in the employee, has been allowed to be divested at the sweet will of the employer under rule 10 of the Gratuity Rules.

20. The view I have expressed above on interpretation of the gratuity rules, especially Rule 10, finds support from 3 decisions of the English Courts cited on behalf of the appellant. In *Rose and Frank Co. v. Crompton and Brothers Ltd.*, 1925 AC 445 one of the clauses of the written arrangement arrived at between the English company and the American Firm ran as follows:—

"This arrangement is not entered into nor is the memorandum written, as a formal or legal agreement, and shall not be subject to legal jurisdiction in the law Courts either of the United States or England, but it is only a definite expression and record of the purpose and intention of the three parties concerned, to which they each honourably pledge themselves, with the fullest confidence based on past business with each other that it will be carried through by each of the three parties with mutual loyalty and friendly co-operation.

This is hereinafter referred to as the 'honourable pledge clause'. Disputes arose between the parties and the English Company determined the arrangement without notice. Before the relations between the parties were broken off, the American Firm had given and one of the English Companies had accepted certain orders for goods. In an action by the American Firm for breach of contract and for non-delivery of goods it was said by Lord Phillimore in his speech at page 454 —

"It is true that when the tribunal has before it for construction an instrument which unquestionably creates a legal interest, and the dispute is only as to the quality and extent of that interest, then later repugnant clauses in the instrument cutting down that interest which the earlier part of it has given are to be rejected, but doctrine does not apply when the question is whether it is intended to create any legal interest at all. Here, I think, the overriding clause in the document is that which provides that it is to be a contract of honour only and unenforceable at law."

Following this decision the same view was expressed by Atkinson, J., in *Jones v. Vernon's Pools, Ltd.*, (1938) 2 All ER 626 and by the court of Appeal in *Appleson v. H. Littlewood, Ltd.*, (1939) 1 All ER 464.

21. In all the earlier cases referred to above, except in the Calcutta case, AIR 1933 Cal 409, the question was whether the gratuity money was attachable in execution of a creditor's decree before the money was delivered to the retired employee. It was held that it was in the nature of a gift which was not complete before delivery and hence it was not attachable. The notion of gratuity money being so was on the footing that it was purely a gratuitous payment or a gift. It is difficult to go whole hog with this view in modern times. In the Calcutta case the plaintiff sued for gratuity money. Rule 8 of the Rules for the grant of gratuity stated that on fulfilment of certain conditions gratuity may be allowed. The argument that the word 'may' should be construed to mean as 'shall' was rejected. *Inter alia*, on the ground that "gratuity . . . is something of the nature of a gift and a gift is not a thing which can be compelled".

The other learned Judge also said that "being a gift it is something which the employee cannot claim as of right. I am not prepared to call the payment of gratuity money a gift — pure and simple yet. I am constrained to take the view that under the Rules of Tisco Ltd. it is in the nature of an inchoate claim or interest, and not a right enforceable by a suit in a court. Under the contract of service, the grant of gratuity money has been left to the sole discretion of the employer, saying in express words that no employee howsoever otherwise eligible shall be deemed to be entitled as of right to any payment under the Rules."

22. Before I deal with the Supreme Court cases under the Industrial Disputes Act, I may say a word about the decisions of the Madhya Pradesh High Court in AIR 1962 Madh Pra 361. A learned single Judge held in that case that the term 'wages' included also gratuity payable to a workman on the termination of his employment. The question which falls for decision in these appeals did not arise to be canvassed or decided in that case.

23. In AIR 1960 SC 251, the point for determination was whether the workmen were entitled to the double benefit of a gratuity scheme as well as retrenchment compensation under Section 25-F of the Industrial Disputes Act. The Industrial Tribunal made an award after examining the financial position of the company and held that the gratuity scheme framed by the earlier award should be enforced subject to certain modification specified by it. The company went up in appeal to the Supreme Court. In that context, Gajendragadkar, J. as he then was, delivering the judgment of the Court, said at page 253 (column 2)—

"Gratuity is a kind of retirement benefit like the provident fund or pension. At one time it was treated as payment gratuitously made by the employer to his employee at his pleasure, but as a result of a long series of decisions of industrial tribunals gratuity has now come to be regarded as a legitimate claim which workmen can make and which, in a proper case can give rise to an industrial dispute. Gratuity paid to workmen is intended to help them after retirement, whether the retirement is the result of the rules of superannuation or of physical disability. The general principle underlying such gratuity schemes is that by their length of service workmen are entitled to claim a certain amount as a retiral benefit."

Likewise I could extend the principle laid down by the Supreme Court in the above case arising out of an industrial dispute to the enforcement of the alleged contractual obligation in the Civil Court, but I feel I cannot legitimately do so. Apart from other considerations, the provision of law contained in Central Act 14 of 1947 brings about the distinction. Sub-section (3) of Section 18 says:

"A settlement arrived at in the course of conciliation proceedings under this Act or an arbitration award in a case where notification has been issued under sub-section (3A) of Section 10A or an award of a Labour Court, Tribunal or National Tribunal which has become enforceable shall be binding on —

"(a) all parties to the industrial dispute."

The scope of an industrial award and matters which can be covered thereunder are materially different from those of a decree of a Civil Court. The observation of the Supreme Court has got, therefore, to be understood in the light of the powers of the industrial tribunal to create new rights and contracts for industrial peace and its award being binding on the parties to the industrial dispute. Unfortunately, the law to be administered in a suit filed in a Civil Court does not permit me to go to extent to which the Supreme Court could go in an appeal from an award of the industrial tribunal. Similar is the position in regard to the other Supreme Court cases, namely *Bharatkhand Textile Manufacturing Co. Ltd. v. Textile Labour Association*, AIR 1960 SC 833, *AIR 1962 SC 673*, *Burhanpur Tapti Mills Ltd. v. Burhanpur Tapti Mills Mazdoor Sangh*, AIR 1965 SC 839 and *All India Reserve Bank Employees' Association v. Reserve Bank of India*, AIR 1966 SC 305. In the case of *Bharatkhand Textile Co. Ltd.*, AIR 1960 SC 833, the claim for gratuity made by the workmen of the Textile Co. had been rejected by an industrial court as being premature in view of the fact that the Employees' Provident Funds Act had al-

ready been passed and the statutory scheme for provident fund was about to come into force.

In accordance with the observation of the industrial court, in the previous award the workmen made an application for institution of a gratuity fund after coming into force of the Employees' Provident Funds Act, claiming introduction of a comprehensive scheme of gratuity. Under these circumstances, it was held that the Employees' Provident Funds Act did not exclude the jurisdiction of industrial court to frame an additional scheme for gratuity. In that connection, it was observed by Gajendragadkar, J. at page 839 (column 2):

"A claim for gratuity is a claim for retiral benefit and it is strictly not a claim to receive a share of the profits at all, and so there would be no scope for importing the several considerations which are relevant in determining the claim for profit bonus."

In the case of the Garment Cleaning Works, AIR 1962 SC 673 the matter again arose out of an industrial dispute, in which two demands made by the respondent workmen of the appellant company were referred for industrial adjudication; the demands were for gratuity and provident fund respectively. In that connection similar observations were made by Gajendragadkar, J. at page 675 (column 2), and then it was said that gratuity once earned could not necessarily be denied to the workmen on the ground of his dismissal for misconduct. In the case of Burhanpur Tapti Mills Ltd. the only question before the Supreme Court was whether the industrial Court of Madhya Pradesh erred in introducing in its award a scheme of gratuity. In that case, Hidayatullah, J. as he then was said at page 841 —

"A scheme of gratuity and a scheme of pensions have much in common. Gratuity is a lump sum payment while pension periodic payment of a stated sum. They are both 'efficiency device' and are considered necessary for an 'orderly and humane elimination' from industry of superannuated or disabled employees who but for such retiring benefit would continue in employment even though they function inefficiently. . . .

It compensates the employee who as he grows old knows that some compensation for the gradual destruction of his wage earning capacity is being built up. By inducing voluntary retirement of old and worn out workmen it confers on the employer a benefit akin to the replacing of old and worn out machinery."

In the Reserve Bank's case before the Supreme Court, AIR 1966 SC 305 again arising out of an industrial dispute, in paragraph 41 at page 321 reference was made to several decisions of the Supreme Court, and then it was said:

"In these cases it was held by this Court that gratuity is not a gift but is earned and forfeiture except to recoup a loss occasioned to the establishment, is not justified". In view of the law of the land so firmly established with reference to the cases arising out of industrial disputes, Mr. Palkhivala appearing for the Reserve Bank undertook to get the rules brought in line with the decisions of the Supreme Court. No case was cited before us either by Mr. B. C. Ghose or by Mr. G. C. Mukherji appearing for the different plaintiff in support of his contention that in view of the weighty observations of the Supreme Court in cases arising out of industrial disputes, the alleged right to get the gratuity money should be enforced by grant of a decree in a Civil Court at the instance of an employee. I must hasten to add that I do not mean to say that it can never be enforced, it can be so done provided the terms and conditions of service can be spelt out to create such a right.

24. In Braithwaite and Co. (India) Ltd. v. Employees' State Insurance Corporation, (1968) 1 SCA 394=(AIR 1968 SC 413) on which reliance was placed by the learned Advocate General the facts were that the Insurance Company which was the appellant before the Supreme Court had introduced a scheme of paying inam to its employees. The payment of inam was not among the original terms of contract of employment. The offer under the scheme was to make incentive payments, if certain specified conditions were fulfilled by the employees. The appellant reserved the right of withdrawing the scheme altogether without assigning any reason and of revising its conditions at its sole discretion. The question was whether the inam was wages within the meaning of Section 2(22) of the Employees' State Insurance Act of 1948. It was answered by the Supreme Court in the negative, Bhargava, J. delivering the judgment of the court laid stress on the fact that while making the offer, the company in clear words, reserved the right to withdraw the scheme altogether without assigning any reason or to revise its conditions at its sole discretion. On a consideration of that clause as also the other clauses of the scheme, it was held by the Supreme Court that the payment of inam had not become a term of contract of the employment. I am not prepared to hold on the basis of the authority, as I find the distinctive features between the facts of the case before the Supreme Court and of that in our hand, that Gratuity Rules had not become a part of the condition of service of the two plaintiffs. As I have said above, undisputedly on the pleadings and unchallengeably on the evidence, it had become so.

25. While holding therefore, that neither of the plaintiffs is entitled to get a decree for the gratuity money to which he became eligible on his retiring from service, I feel inclined to observe that the Company, on its Rules framed for the benefit of the employees, would have been well advised to pay the gratuity money to the plaintiffs. The only justification which appears to me in the records of these cases of not paying the gratuity money is that on a strict interpretation of the word 'retirement' which is defined in clause (g) of Rule 1 of the Gratuity Rules, 1937 perhaps, the case of termination of service on the part of the employee is not covered by the definition. I must make it clear that at no point of time this was the stand of the company nor was this argument advanced before us. Clause (g) of Rule 1 says —

" 'Retirement' shall mean the termination of service by reason of any cause other than removal by dismissal or discharge due to misconduct."

Dismissal or discharge postulates action of the employer which brings about termination of service. And, reading in that light, perhaps, the spirit of the rule is that if the termination of the service is brought about by the employer by service of notice, he must not ask the employee to leave the service without payment of compensation in the shape of retirement benefit. The position on strict interpretation of the term 'retirement' or in equity may not be identical. An employee who brings about the termination of his service by a notice without any rhyme or reason is, perhaps, not on the same footing as the employee whose service has been terminated by the employer. Be that as it may the conclusion at which I have arrived in the appeals is not based upon the view point which I have just expressed.

26. In the result, I allow First Appeal No. 444 of 1963, set aside the judgment and decree of the court below and dismiss the plaintiff's suit. First Appeal No. 554 of 1964 is dismissed and the dismissal of the plaintiff's suit is maintained. On the facts and in the circumstances of the cases, however, I shall direct the parties to bear their own costs throughout in both.

27. WASIUDDIN, J. :— I agree.

GGM/D.V.C.

Order accordingly.

AIR 1969 PATNA 64 (V 56 C 16)

S. N. P. SINGH AND
KANHAIYAJI, JJ.

Sirinivas Fogla and others, Appellants
v. Satyanand Gupta and others, Respondents.

A. F. A. D. No. 470 of 1965, D/- 26-7-1968, from order of Sub. J., 1st Court Monghyr, D/- 8-6-1965.

(A) Transfer of Property Act (1882), Ss. 58 and 60 — Usufructuary mortgage — Sudbharna bond providing that in default of payment on due date of repayment the money covered by the bond is to be treated as consideration money for sale deed — Stipulation is a clog on equity of redemption and is void — Rights and title of parties are not changed — Relations of mortgagor and mortgagee continue, after due date, as creditor and debtor. AIR 1930 PC 142 & AIR 1965 SC 225, Rel. on; AIR 1957 Pat 502 & AIR 1949 Pat 197, Dist. (Para 8)

(B) Transfer of Property Act (1882), S. 60 — Equity of redemption — Usufructuary mortgage — Admission by mortgagor that in default of payment on due date, the mortgagee has become absolute owner — Title by adverse possession cannot be claimed — Further unless both parties are cognizant of their rights there can be no acquiescence. AIR 1919 All 126 & AIR 1959 Pat 230 & (1904) ILR 32 Cal 296, Rel. on; AIR 1965 Pat 262 & AIR 1966 SC 405 & (1892) 19 Ind App. 203 (PC) & AIR 1922 Pat 258 & AIR 1957 Pat 308, Dist. (Para 10)

Cases Referred: Chronological Paras

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| (1966) AIR 1966 SC 405 (V 53) = | |
| (1966) 1 SCR 606, Bharat Singh v. Mt. Bhagirathi | 9 |
| (1965) AIR 1965 SC 225 (V 52) = | |
| (1964) 8 SCR 239, Murarilal since deceased Umedil Lal v. Devkaran since deceased Jagan Prasad | 7 |
| (1965) AIR 1965 Pat 262 (V 52), Khadimal Haque v. Maral Dubey | 0 |
| (1959) AIR 1959 Pat 230 (V 46) = | |
| 1958 BLJR 738, Ramlochan Singh v. Pradip Singh | 9 |
| (1957) AIR 1957 Pat 308 (V 44) = | |
| ILR 36 Pat 362, Dr. Abdul Khair v. Miss Sheilla Myrtila James | 9 |
| (1957) AIR 1957 Pat 502 (V 44) = | |
| ILR 36 Pat 753, Sukhdeo Singh v. Lekha Singh | 6 |
| (1949) AIR 1949 Pat 197 (V 36) = | |
| ILR 26 Pat 717, Markanda Mahapatra v. Kameswar Rao | 6 |
| (1938) AIR 1938 Pat 22 (V 25) = | |
| ILR 16 Pat 766 (FB), Ramkhehawan Sahu v. Surendra Sahl | 10 |
| (1930) AIR 1930 PC 142 (V 17) = | |
| 57 Ind App 168, Mehrban Khan v. Makhana | 8 |

termination of the tenancy. On a closer examination of the argument, the fallacy in it becomes apparent. If the relevant expression had been used in sub-section (2) i.e., if the second sentence in the opening part of sub-section (2) had read "If the Controller after giving the tenant a reasonable opportunity of showing cause against the eviction is satisfied that whether before or after the termination of the tenancy. . .",

there would have been something in the submission made before us by the landlord. The said expression is conspicuous by its absence in sub-section (2) which contains the exceptions carved on the blanket prohibition against the eviction of a tenant contained in sub-section (1) of section 13. Sub-section (1) is in the negative form and contains an absolute bar. The presence of the expression "before the termination of the tenancy" in sub-section (1) does not enlarge the scope of the field covered by sub-section (2) by falling in which all that happens is that the bar contained in sub-section (1) ceases to have effect. If in addition to the bar in sub-section (1) of section 13, there is any other legal impediment against the ejectment of the tenant, nothing contained in sub-section (2) appears to affect the same. The effect of the word 'before' in relation to the termination of the tenancy in sub-section (1) is that even in a case where there is an express agreement by a tenant of his being liable to ejectment without the formal termination of his tenancy by a notice of eviction, he would still not be liable to ejectment unless his case falls within the mischief of sub-section (2). It appears to be appropriate to point out specifically that the requirement of service of notice under S. 106 of the Transfer of Property Act is made by that provision itself subject to a contract to the contrary. The cases of eviction of a tenant before the termination of his tenancy to which reference appears obviously to have been made in sub-section (1) of section 13 would include cases of statutory forfeiture of tenancy under the general law in which event, before the termination of the stipulated period of a tenancy, he would be liable to ejectment but for the absolute bar contained in sub-section (1) of section 13 subject to the permissive clauses enumerated in sub-section (2) of that section. It is to provide against such cases being left out of the field of protection afforded by section 13 (1) that the expression "whether before or" has been added to the other relevant provision in section 13 (1). There is no doubt that the expression "whether before or after the termination of the tenancy" has been construed by this Court in some cases as being equivalent to the non obstante clause "not-

withstanding the termination of the tenancy" but the question of the exact scope, meaning, interpretation and effect of the word 'before' did not come up for consideration in any of those cases. Moreover as already observed, it has been authoritatively held by the Supreme Court that notwithstanding the presence of the non obstante clause in the relevant provision in a Rent Restriction Act, the requirement of service of a notice under section 106 of the Transfer of Property Act is not abrogated by such a provision in a Rent Control Act. There is, therefore, no force at all in this submission of the landlord. Nothing else contained in the Act has been pointed out by the landlord or has otherwise been noticed by us which would take the case out of the scope of the law laid down by the Supreme Court in *Manujendra Dutt's case*, AIR 1967 SC 1419. It is, therefore held that no order for the eviction of the tenant under sub-section (2) (i) of section 13 of the Act can be passed against the tenant without proof of service on him of a proper notice envisaged by section 106 of the Transfer of Property Act in spite of the fact that the statutory provisions of that Act are not applicable to the Punjab State.

14. Though service of notice of termination of tenancy has not been proved in this case, the landlord stated before us that if we come to the conclusion that such a notice was necessary in this case we should not dismiss his application for eviction of the tenant but should remand the case to the Rent Controller for a fresh decision after giving the parties an opportunity to prove the service or non-service of the requisite notice. To the adoption of such a course, no objection was raised by the tenant; nor could, in fact, any such objection be raised in view of the fact that the tenant had not specifically pleaded want of service of such a notice in the trial Court. In so observing, we are not oblivious of the fact that the tenant had, in fact, no opportunity to file a written statement in this case because he was permitted to join the proceedings only from the stage of evidence at which he appeared and the order for proceeding *ex parte* against him passed on April 12, 1967, prevented him from filing his reply to the petition for eviction. Moreover, no plea of service of notice having been taken in the petition for eviction, there could be no opportunity for the tenant to deny the service of such a notice in the proceedings at the trial stage when, before the authoritative pronouncements of the Supreme Court on the subject, it was commonly understood that such a notice was not necessary. This cannot, however, be held, though so argued by

the landlord, to amount to a waiver of the right to insist on the service of the requisite notice. He took up the defence in the first appellate court and though the learned District Judge held that there was no reason to permit the tenant to raise that point for the first time at the appellate stage, the Appellate Authority did go into the merits of the point and proceeded to adjudicate upon it. Moreover, in the course we are adopting, no prejudice would be caused to either side by this question being allowed to be raised by the tenant. It may be appropriate to mention at this stage that the landlord is also asking in this case for his pound of flesh on account of the technical default of the tenant, though the tenant was not wholly unjustified in withholding the rent when the litigation relating to the very title to the property was pending which is even at this stage not yet finally settled and when the tenant offered, even before us, to pay up to the landlord the subsequent rent upto date with costs and interest, if the landlord chose to accept it. We cannot, however, blame even the landlord for blatantly refusing that offer, as it is probably his legal right to adopt that course.

15. For the foregoing reasons, we allow this petition for revision and set aside the orders of the Appellate Authority as well as of the Rent Controller directing the eviction of the tenant-petitioner and remand the case to the Rent Controller for a fresh decision after allowing the parties an opportunity to prove or disprove that at least a fifteen days notice terminating the tenancy of the tenant and calling upon him to hand over possession of the premises to the landlord was actually served by the landlord on the tenant before filing of the petition for eviction. The decision of the Rent Controller as upheld by the Appellate Authority on the other points is upheld. In the circumstances of the case, there is no order as to costs of the proceedings in this Court.

16. SHAMSHER BAHADUR, J.: I agree.
HSK/D V C. Revision allowed.

AIR 1969 PUNJAB & HARYANA 34
(V 56 C 7)

R S NARULA, J.

K. C. Gupta and others, Petitioners v.
Union of India, New Delhi and others,
Respondents.

Civil Writ No. 2986 of 1965, D/- 9-5-1967.

(A) Constitution of India, Art. 226 —
Delay and laches — Validity of Punjab

IK/JK/C923/67

Service Integration Rules (1957) and order of Central Government passed in 1961 — Final order against representations communicated in October 1965 — Writ petition filed soon thereafter — Petition cannot be dismissed on ground of undue delay. (Para 5)

(B) Constitution of India, Arts. 309, 162, Sch. 7 List II Entry 41 — States Reorganisation Act (1956), Ss. 129, 115 — Punjab Service Integration Rules (1957), R. 1 — Rules are valid — AIR 1961 Mys 210 Diss. from.

Punjab Service Integration Rules (1957) were made after 1-11-1956 when erstwhile PEPSU employees had already become subject to control of new State of Punjab. The said rules were not made under States Reorganisation Act but under proviso to Art 309 of Constitution. These rules were framed in consultation with, and by approval of Central Government. Entire process of integration in Punjab was carried out by State authorities in accordance with orders and subject to directions of Central Government. While disputing the equation of gazetted posts of District Panchayat Officers in PEPSU with non-gazetted posts of District Panchayat Officers in Punjab, validity of above rules was challenged.

Held: the State Government had the right and authority to frame the rules in exercise of powers conferred on it by the proviso to Art 309 and to equate the two units of the services in question in exercise of its executive power under Art. 162 read with entry 41 in List II of the Seventh Schedule, subject to the control and direction of the Central Government under the relevant provisions of the States Reorganisation Act. The rules were not ultra vires S 129 of the Act but were valid and legal. S 129 of the Act no doubt conferred exclusive power on the Central Government to frame rules under the Act, but this did not take away from the States their normal authority to make rules regarding their services AIR 1961 Mys 210 Diss from. AIR 1965 Guj 23 (FB), Foll. 1967-1 Lab LJ 15 (Mys) and AIR 1964 Madh Pra 307 Consd (Paras 13, 15)

(C) Constitution of India, Art. 226 — Natural justice — States Reorganisation Act (1956), Ss. 115, 116 — Proceedings under — Persons making detailed representations — They are not entitled as of right to be heard orally — Central Government is not expected to act judicially — Oral hearing not asked for — No grievance of same can be made — Principles of natural justice held not violated — AIR 1967 SC 1269 Expld. AIR 1960 SC 493 and AIR 1967 Punj 98 Rel. on.

(Para 18)

(D) Constitution of India, Art. 226 — States Reorganisation Act (1956), Ss. 114,

115, 116 — Principles regarding equation of posts as determined at conference of Chief Secretaries in 1956 — Equation of gazetted posts of District Panchayat Officers in Pepsu with non-gazetted posts of District Panchayat Officers in Punjab—Allegation of violation of above principles — High Court cannot interfere with decision of Government in that behalf. (Para 19)

(E) Constitution of India, Art. 226 — Relief—States Reorganisation Act (1956), Ss. 115, 116 — Joint seniority list as result of integration — Junior illegally placed above petitioner — Representations against this illegality accepted by Central Government — Necessary directions made in that behalf — Revised list not corrected — Petitioner's name directed to be kept above junior. (Para 20)

(F) Constitution of India, Art. 226 — Certiorari — Administrative orders—Punjab Service Integration Rules (1957), Part IV R. 11 (o)—Equation of gazetted posts of District Panchayat Officers in PEPSU with non-gazetted posts of District Panchayat Officers in Punjab—Representations of former rejected by Central Government — High Court cannot sit in appeal over that decision — Relief under Art. 226 is not open. (Para 20)

Cases Referred: Chronological Paras

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v. Dr. (Miss) Binapani Dei 18
(1967) 1967-1 Lab LJ 15 = 1965-2
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v. Union of India 9, 16
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Pradesh 17
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(1964) AIR 1964 Madh Pra 307 (V 51)=
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of Madhya Pradesh 10
(1961) AIR 1961 Mys 210 (V 48),
M. A. Jaleel v. State of Mysore 7, 8, 13
(1960) AIR 1960 SC 493 (V 47)=
1960-2 SCR 569, S. Kapur Singh
v. Union of India 18

D. S. Nehra and M. R. Agnihotri, for Petitioners; Anand Sarup, Advocate General (Punjab) with J. C. Verma, for Respondents (Nos. 1 and 2); H. S. Wasu with B. S. Wasu and L. S. Wasu, for Respondents (Nos. 3, 5 to 7).

ORDER: The validity and constitutionality of the Punjab Service Integration Rules, 1957, framed by the Governor of Punjab, under Article 309 of the

Constitution has been impugned by K. C. Gupta and two others, the petitioners in this case.

2. All the three petitioners joined the service of the erstwhile Patiala and East Punjab States Union (hereinafter referred to as Pepsu in 1956, as District Panchayat Officers. They were confirmed as such in their respective posts in October, 1956, with the concurrence of the Public Service Commission. The petitioners are all Graduates. The posts held by the petitioners in PEPSU were gazetted and were in the pay scale of Rupees 250-15-400. The District Panchayat Officers in the erstwhile State of Punjab (prior to its reorganisation in 1956) were non-gazetted and were in the time-scale of Rs. 170-350. Consequent on the merger of PEPSU with the then State of Punjab in accordance with the provisions of the States Reorganisation Act (37 of 1956) (hereinafter called the Act), the petitioners became the employees of the new State of Punjab with effect from the 1st of November, 1956. It is not disputed that according to the provisions of the Act, the Central Government is constituted as the authority for the integration of the employees of the erstwhile State of PEPSU with the employees of the State of Punjab.

The Punjab Service Integration Rules, 1957 (hereinafter referred to as the Integration Rules), framed by the Governor of Punjab, under Article 309 of the Constitution of India, were notified on July 1, 1957, and published in the official gazette of that date. Part IV of the said Rules provided machinery for the equation of services and part VI contained rules for determination of inter se seniority between the employees of the Punjab and PEPSU States. The gazetted posts of District Panchayat Officers of the erstwhile Pepsu State were equated with the non-gazetted posts of District Panchayat Officers of the erstwhile Punjab State. By counting the length of service in the equated cadre, 21 persons were placed above the petitioners and they were placed at Nos. 22 to 24 in the provisional joint seniority list. Respondents Nos. 3 to 13 were placed above them. The remaining persons who had been placed above the petitioners have not been impleaded as they are stated to have retired or left the Department concerned before the filing of the petition.

Annexure 'A-1' to the writ petition is the revised joint seniority list of the employees of the Panchayat Department (field staff). Separate representations, dated May 3, 1957, were submitted by the petitioners (copy of the representation of Bhupinder Singh petitioner No. 3 being Annexure 'B' to the writ petition), to the Director of Panchayats, Punjab, against the above-said equation as well

as against the fixing of their seniority as assigned to them. The seniority list was finalised and is claimed by the respondents to have been circulated with a communication, dated April 19, 1958, by the Director of Panchayats, Punjab. Petitioners Nos. 1 and 2 submitted appeals against the positions assigned to them in the list. Their appeals were considered by the State Advisory Committee. Later on a joint representation by all the three petitioners and some other persons was submitted praying for their representations being considered by the Central Advisory Committee. The matter was then placed with the Government of India for the consideration of the case of the petitioners by the Central Committee.

The representations were rejected and the petitioners were informed of the same by letter, dated August 26, 1959, from the Secretary to the Punjab Government in the Integration Department (copy of the communication is Annexure 'C' to the writ petition). With the said letter, a copy of the decision of the Central Government was enclosed. According to the said order, the Government of India was satisfied that the posts held by the petitioners in PEPSU had been correctly equated and that the representations of the petitioners had no force and had, therefore, been rejected. Thereafter the petitioners submitted further representations questioning the validity of the previous order, and complaining against the same. By letter, dated April 14, 1961 (Annexure 'F'), the Deputy Secretary to the Punjab Government informed the Director of Panchayats, Punjab, that the representations of the petitioners, against their equation with non-gazetted District Panchayat Officers in Punjab, had been reconsidered by the Government of India on the advice of the Central Advisory Committee for gazetted officers.

A copy of the fresh decision taken by the Central Government was enclosed with the said communication. According to that decision, the Central Government, having regard to the broad similarity in the jurisdiction, functions and duties attached to the posts in question, approved the equation of the gazetted posts of District Panchayat Officers, Pepsu, with the non-gazetted posts of District Panchayat Officers in Punjab. It was further held in that decision that Mohinder Singh (who has since left the Department), who had held non-gazetted post of Educational and Propaganda Officer in Pepsu could not be shown in the joint seniority list above the Officers of the same region, who held gazetted posts of District Panchayat Officers, and that, therefore, Mohinder Singh should be shown as junior to all the Panchayat

Officers of Pepsu. It is not disputed that this decision of the Central Government was somehow not communicated by the Director of Panchayats to the petitioners till they submitted another representation, in December, 1964, complaining of their case having been kept pending. The explanation given by respondent No. 2 (State of Punjab) for not having communicated the said decision to the petitioners (as contained in paragraph 14 of the written statement) is that the decision of the Government of India "could not be conveyed immediately after it was taken in 1961 as papers were mislaid somewhere."

According to the return of the State, the said decision was conveyed to the petitioners only in October, 1965. In the meantime, the petitioners sent their last reminder, dated August 11, 1965 (Annexure 'D'). In reply, the Secretary to the Punjab Government sent with his letter, dated October 26, 1965 (Annexure 'E'), a copy of letter, dated April 14, 1961 (Annexure 'F'), and a copy of the Central Government's decision (Annexure 'G') to the petitioners. It was in the situation detailed above that the present writ petition was filed to quash and set aside the orders of the State Government and the Central Government in the matter of equation of the posts of the petitioners to the non-gazetted posts in the erstwhile State of Punjab and the final gradation list published in February, 1964. In the writ petition a further prayer has been made to direct the Central Government to frame appropriate integration rules and to integrate the petitioners in the new State of Punjab without being influenced by the State Government. The petitioners claim to be entitled to be integrated with Class II employees of the erstwhile State of Punjab and pray for a fresh gradation list being prepared after giving due consideration to the cadre, position, rights, status, rank and scale of pay of the petitioners.

2A. The writ petition has been contested by the respondents. The Central Government has filed its brief written statement, wherein it is averred that the principles which were to govern the integration of services affected by the reorganisation of the States were agreed at the conference of Chief Secretaries held in 1956, according to which principles the equation of posts was to be determined with due regard to the following factors:

(i) The nature and duties of a post;

(ii) The responsibilities and powers exercised by the officers holding a post, the extent of territorial or other charge held and the responsibilities discharged;

(iii) The minimum qualifications, if any prescribed for recruitment to the post;

(iv) The salary of the post.

It has been added in the return of the Central Government that the Punjab Government made merely provisional equations and drew up provisional combined gradation lists of Officers of the Panchayat Department, and invited the Officers concerned to submit representations, which when received were forwarded by the State Government along with its comments to the State Advisory Committee. Thereafter, on the request of some of the Officers of the Panchayat Department, the State Government referred the representations to the Government of India for being placed before the Central Advisory Committee. The last mentioned Committee consisted of the Chairman of the Union Public Service Commission, Shri P. N. Saprú, Member of the Rajya Sabha, who is a retired Judge of the Allahabad High Court and Shri K. Y. Bhandarkar, retired Secretary of the Central Government in the Ministry of Law.

The said Central Advisory Committee claims to have considered the representations of the petitioners and the recommendations of the State Government and to have made its recommendation to the Central Government, who considered them and passed final orders to which reference has already been made. It is stated in the return that no personal hearing was given to the petitioners by the Central Advisory Committee or by the Central Government as it was not necessary to adopt such a course. According to the Central Government, all that the State Government did was to take preliminary action which was necessary before the Government of India could pass final orders, and that the representations of the petitioners were duly considered and rejected by the Government of India itself in consultation with the Central Advisory Committee. It has been denied that the Government of India delegated any of its functions under the Act to the State Government.

3. The State of Punjab, respondent No. 2, has filed a detailed written statement, according to which the Integration Rules were made in accordance with the advice of the Central Government and were subjected to the directions which the Government of India might issue under section 115 (5) and section 117 of the Act. Respondents Nos. 3 and 5 to 7 have filed a joint return, dated May 21, 1967, in the form of an affidavit of Hari Krishan, respondent No. 5. Various additional defences have been raised in their return.

4. Narinder Sarup, petitioner No. 2, has filed a joint replication on behalf of all the petitioners with the leave of the Court obtained on October 24, 1966, in C. M. 3921 of 1966. In the replication the petitioners have set out points of dissimilarity between the positions held by them in the erstwhile State of Pepsu on the one hand and between the posts held by their counterparts in Punjab with whom they have been equated on the other hand. The only other significant thing brought out in the replication is a list of the grounds on which it is claimed that the equation statement prepared by respondents Nos. 1 and 2 is arbitrary and against the Integration Rules themselves.

5. At the hearing of the writ petition Mr. Anand Swarup, the learned Advocate General for the State of Haryana, who is appearing in this case on behalf of respondents Nos. 1 and 2, took up a preliminary objection to the effect that this petition should be dismissed as it has been filed after undue delay. Inasmuch as the vires and validity of the Integration Rules which were framed in 1957, and the orders of the Central Government which were passed in 1961, are being questioned by the petitioners, it is claimed that the petition should be dismissed without going into merits, as it was filed after about eight years of the framing of the Rules and after the expiry of about four years from the date of the final orders of the Central Government. The petitioners could have no cause of action if their representations had been accepted or if they were otherwise satisfied with the process of integration in so far as it concerned them. Any writ petition filed by them for declaring the Integration Rules to be invalid though they were not affected by them, would have been dismissed in limine. The first time when they could justly come to this Court under Art. 226 of the Constitution was when the final order of the Central Government against the representations of the petitioners was communicated to them. This did not admittedly take place before October, 1965. The writ petition has been filed soon thereafter. In these circumstances, I do not find any merit in the preliminary objection raised on behalf of the respondents and I have no hesitation in rejecting the same.

6. On behalf of the petitioners, the following five points have been raised by their learned counsel Mr. D. S. Nehra:

(1) The State Government had no right to frame the Integration Rules and either to frame a formula for equation of posts or for grouping them. The Central Government which was the sole and exclusive statutory authority under the Act, had no jurisdiction to abdicate its func-

tions in favour of the State Government;

(2) The impugned orders of the Central Government are liable to be set aside as they were passed in quasi-judicial proceedings without affording the petitioners any opportunity of being heard in support of their representations. The impugned equation and fixation of seniority of the petitioners is, therefore, liable to be set aside, as the same was decided upon in violation of the principles of natural justice;

(3) The impugned equation is arbitrary and contrary to the principles settled by the Central Government as brought out in its return;

(4) The equation and the fixation of seniority of the petitioners has also been ordered in violation of rule 16 of the Integration Rules, and is in contravention of even the decision of the Central Government itself in the matter of placing of Mohinder Singh in the joint seniority list; and

(5) in any case the petitioners were entitled to ad hoc relief to alleviate the hardship which has been caused to them by the impugned orders.

7. The argument of the first point proceeds like this. The State Government has executive power under Article 162 of the Constitution read with entry 41 in List II of the Seventh Schedule to make integration of its services. The State has also power under Article 246 of the Constitution to make laws with respect to its public services and matters incidental thereto. In the absence of anything else, the State could make laws and rules for integration of its services and take all other necessary steps for that purpose. Sub-section (5) of section 115 of the Act has by operation of Article 4 of the Constitution transmitted the said power of integration of the State services exclusively to the Central Government, thus leaving no such power with the State Government. Reliance is placed for this argument on a Division Bench judgment of the Mysore High Court in *M. A. Jaleel v. State of Mysore*, AIR 1961 Mysore 210.

In that case it was held that the source of the power to enact section 115 (5) of the States Reorganisation Act consists of Articles 3 and 4 of the Constitution and the inevitable consequence of the enactment of that sub-section is that the relevant States have been deprived of their power to make integration in the broad field of its executive authority. The learned Judges held that by virtue of Article 4 (2) of the Constitution, the validity of the provision of sub-section (5) of section 115 of the Act is not open to attack as offending the general exe-

cutive power of the State conferred on it by the Constitution. It was further held that it is not permissible for the Central Government which is a delegate of the Parliament to assign to the Government of any State its entire responsibility to make integration enjoined on it by the Act. At this stage it would be appropriate to set out the provisions of Articles 2, 3, 4 and 162 of the Constitution, and sections 115 (1), (2), (3) and (5), and 117 of the Act.

Articles:

"2. Parliament may by law admit into the Union, or establish, new States on such terms and conditions as it thinks fit.

3. Parliament may by law:

(a) Form a new State by separation of territory from any State or by uniting two or more States or parts of States or by uniting any territory to a part of any State;

(b) increase the area of any State;

(c) diminish the area of any State;

(d) alter the boundaries of any State;

(e) alter the name of any State;

Provided that no Bill for the purpose shall be introduced in either House of Parliament except on the recommendation of the President and unless where the proposal contained in the Bill affects the area, boundaries or name of any of the States, the Bill has been referred by the President to the Legislature of that State for expressing its views thereon within such period as may be specified in the reference or within such further period as the President may allow and the period so specified or allowed has expired.

Explanation I.—In this article, in cls (a) to (e), "State" includes a Union territory, but in the proviso, "State" does not include a Union territory.

Explanation II.—The power conferred on Parliament by clause (a) includes the power to form a new State or Union Territory uniting a part of any State or Union territory to any other State or Union territory."

"4(1) Any law referred to in article 2 or article 3 shall contain such provisions for the amendment of the First Schedule and the Fourth Schedule as may be necessary to give effect to the provisions of the law and may also contain such supplemental, incidental and consequential provisions (including provisions as to representation in Parliament and in the Legislature or Legislatures of the State or States affected by such law) as Parliament may deem necessary.

(2) No such law as aforesaid shall be deemed to be an amendment of this Constitution for the purposes of Article 368. 162. Subject to the provisions of this Constitution, the executive power of a State

shall extend to the matters with respect to which the Legislature of the State has power to make laws.

Provided that in any matter with respect to which the Legislature of a State and Parliament have power to make laws, the executive power of the State shall be subject to, and limited by, the executive power expressly conferred by this Constitution or by any law made by Parliament upon the Union or authorities thereof."

Sections:

" 115. Provisions relating to other service. — (1) Every person who immediately before the appointed day is serving in connection with the affairs of the Union under the administrative control of the Lieutenant-Governor or Chief Commissioner in any of the existing States of Ajmer, Bhopal, Coorg, Kutch and Vindhya Pradesh, or is serving in connection with the affairs of any of the existing States of Mysore, Punjab, Patiala and East Punjab States Union and Saurashtra shall, as from that day, be deemed to have been allotted to serve in connection with the affairs of the successor State to that existing State.

(2) Every person who immediately before the appointed day is serving in connection with the affairs of an existing State, part of whose territories is transferred to another State by the provisions of Part II shall, as from that day, provisionally continue to serve in connection with the affairs of the principal successor State to that existing State unless he is required by general or special order of the Central Government to serve provisionally in connection with the affairs of any other successor State.

(3) As soon as may be after the appointed day, the Central Government shall, by general or special order, determine the successor State to which every person referred to in sub-section (2) shall be finally allotted for service and the date with effect from which such allotment shall take effect or be deemed to have taken effect.

(4) xx xx xx xx

(5) The Central Government may by order establish one or more Advisory Committees for the purpose of assisting it in regard to—

(a) the division and integration of the services among the new States and the States of Andhra Pradesh and Madras; and

(b) the ensuring of fair and equitable treatment to all persons affected by the provisions of this section and the proper consideration of any representations made by such persons.

117. Power of Central Government to give directions— The Central Government may at any time before or after the appointed day give such directions

to any State Government as may appear to it to be necessary for the purpose of giving effect to the foregoing provisions of this Part and the State Government shall comply with such directions."

8. Mr. D. S. Nehra, the learned counsel for the petitioners, submitted that the object of the Parliament in enacting the above-mentioned provisions of the Act was to avoid interested elements in the States not doing proper justice on account of possible prejudice for or against different units of the integrated States in the matter of integration. Mr. Nehra submitted that the State Government could no doubt make laws and rules for its services after the integration, but its power to do so in relation to the process of integration, which according to legal fiction took place on the midnight between 31st of October and 1st November, 1956, had been taken away by the Act. The provisions of the Act conferring the relevant power on the Central Government are deemed to have taken away the normal authority of the State under Article 309 of the Constitution to make rules for its services relating to integration. Mr. Nehra is no doubt substantially supported by the dictum of Mysore High Court in *M. A. Jaleel's case*, AIR 1961 Mys 210 (supra).

9. Counsel has then referred to a later judgment of another Division Bench of the same Court (*K. S. Hegde and M. Santosh, JJ.*), in *G. M. Shankaraiah v. Union of India* 1967-1 Lab LJ 15 (Mys) wherein it was held that the Central Government was charged with the duty of integrating the services in the new States to ensure fair and equitable treatment to all persons affected by the provisions of section 115 of the Act and that sub-sections (2) and (3) of S. 115 specifically confer the power on the Central Government to divide the services of existing States and allot some of its Officers to one or other of the successor States. In the case of Pepsu and Punjab, however, there was no difficulty of allocation of services of one State to the other as there was no dispute about all the Pepsu employees having been integrated with their counterparts in the State of Punjab, which was the successor State qua Pepsu.

10. The next case to which reference has been made by Mr. Nehra is of *P. K. Roy v. State of Madhya Pradesh*, AIR 1964 Madh Pra 307. A Division Bench of the Madhya Pradesh High Court held in that case that the State Government had no power to do the work of integration as a delegate of the Central Government and that section 117 of the Act could not be construed to authorise delegation of powers by the Central Government to the State Government. On that basis it was held that the power

of formulating the principles for integration could not be delegated to the State Government. At the same time the learned Judges of the Madhya Pradesh High Court made it clear that the gathering of material and the doing of all incidental and subsidiary acts as would assist the Central Government in its task of integration could be delegated to the States.

11. Mr. Nehra has also referred to Section 129 of the Act which confers exclusive power on the Central Government to make rules to give effect to the provisions of the Act. No power is conferred by any provision of the Act on the State Government to make any rules regarding integration. Express and exclusive power to make rules regarding integration conferred on the Central Government is claimed by Mr. Nehra to exclude by implication and by operation of Article 4 of the Constitution the normal authority of the State Government to make rules on that subject.

12. The Advocate-General for the State of Haryana has, on the other hand, referred to a Full Bench judgment of the Gujarat High Court in *A. J. Patel v. State of Gujarat*, AIR 1965 Guj 23 (FB). In a very lucid and exhaustive judgment the learned Judges of the Gujarat High Court held that there are no express words in the States Reorganisation Act, expressly conferring the power of integration of the services in question "exclusively" on the Central Government. Considering the provisions of sub-sections (1), (2) and (3) of section 115 of the Act, they held that the division of services has been done partly by the Legislature and is allocated partly to the Central Government. It was held by the Full Bench of the Gujarat High Court that though Parliament has the authority to make provisions relating to the integration of services in connection with the affairs of the newly formed States, yet no provision in the Act has taken away the authority of the States to make rules for the same purpose in exercise of its ordinary authority under Articles 162 and 309 of the Constitution. The use of the expression "in regard to" in section 115 (5) of the Act was held not to suggest the purposes for which assistance has to be given, but refers to the subject-matter of the connection wherewith assistance has been rendered. The dictum of the Court in this connection is available in the following passage:

"Having considered the provisions of section 115 as a whole and having considered the provisions in the light of the other provisions contained in the States Reorganisation Act, it appears to us that the Central Government has certain functions to perform in connection with the integration of services, but that it is not constituted the sole and exclusive autho-

rity for the purpose of the integration of services and that the power of the State Government is not wholly taken away in connection therewith. The provisions of sub-section (5) of section 115 would be fully satisfied if the power of the State Government conferred under Article 163 of the Constitution is made subject to any directions which the Central Government may give to the State Government in connection with the integration of services. The Central Government has been assigned functions in connection with the ensuring of fair and equitable treatment to all persons affected by the provisions of section 115 and has been vested with the power to give directions to the State Government in connection therewith. The Central Government is assigned functions in connection with the proper consideration of any representations made by persons affected by the provisions of the said section, and has been empowered to give directions to the State Government in connection therewith. Having functions to perform in connection with all these matters and having got the power to give directions to any State Government in connection therewith, it would be proper to hold that the powers of the State Government to integrate the public services of the State conferred under the Constitution exist and survive to the extent that such have not been abrogated for the purpose of giving effect to the directions that may be issued by the Central Government to the State Government. This construction will preserve the power of the State Government to integrate its public services subject to any directions in connection therewith given by the Central Government.

To the extent that the Central Government chooses to exercise that power, the power of the State Government would be circumscribed or limited."

The Full Bench of the Gujarat High Court held that they could not agree with the decision of the Mysore High Court to the effect that the Central Government was constituted the exclusive authority for integration.

13. After giving my serious consideration to the matter, and with the greatest respect to the learned Judges of the Mysore High Court, who decided the case AIR 1961 Mys 210, I am inclined to agree with the middle course adopted by the Gujarat High Court. Section 129 of the Act no doubt confers exclusive powers on the Central Government to frame rules under the Act, but this does not, in my opinion, take away from the States their normal authority to make rules regarding their services. The Integration Rules were made after the 1st of November, 1956, when the erstwhile Pepsu employees had already become subject to

the control of the new States of Punjab. The Integration Rules were not made under the States Reorganisation Act but under proviso to Article 309 of the Constitution. Moreover, it is clear from the unequivocal averments in the written statement of the Central Government, filed in this case, that these rules were framed in consultation with the Central Government and had the approval of that Government. In fact, it is clear from the following passage in the return of the Union of India that the entire process of integration in the new State of Punjab was carried out by the State authorities in accordance with the orders and subject to the directions of the Central Government:

"The Government of Punjab made provisional equations and drew up provisional combined gradation lists of officers of the Panchayat Department, and invited the Officers concerned to submit representations within the specified period. The representations made were forwarded by the State Government, along with their comments to the State Advisory Committee. Thereafter, on the request of some of the Officers of the Panchayat Department, the State Government referred the representations to the Government of India, for their being placed before the Central Advisory Committee. The Central Advisory Committee consists of the Chairman, Union Public Service Commission, as Chairman, Shri P. N. Saprú, Member, Rajya Sabha, and retired Judge of Allahabad High Court, and Shri K. Y. Bhandarkar, retired Secretary, Union Law Ministry, as Members. That Committee considered the representations and sent their recommendations to the Central Government, who considered them and passed final orders on the representations, after fully considering all the points which were raised in the representations. No personal hearing was given by the Central Advisory Committee or by the Government of India, as it was not necessary that personal hearing be given. The Central Government's orders are binding on all concerned, including the State Government. It is, therefore, not correct to say that the work of integration has not been done by the Central Government. Although the State Government took the preliminary action, which was necessary before the Government of India passed final orders the representation of Shri K. C. Gupta against the provisional equation of posts was duly considered and rejected by the Government of India in consultation with the Central Advisory Committee. The powers of the Government of India were not delegated to the State Government."

14. In the written statement of the State of Punjab, the contents of para-

graph 5 are relevant in this respect and are, therefore, quoted below verbatim:

"The Punjab Service Integration Rules, 1957, were framed by the State Government under Article 309 of the Constitution of India in accordance with which the Governor of a State is empowered to make such rules in regard to the recruitment and conditions of service of persons appointed to Public Services and posts in connection with the affairs of that State. These rules were made in accordance with the advice of the Central Government. They are subject to the directions which the Government of India may issue under sections 115 (5) and 117 of the States Reorganisation Act, 1956."

15. The Integration Rules were not framed by the State Government in exercise of any power of the Central Government which might have been delegated to the State. In fact no delegation of any functions of the State (Sic-Central?) Government under the Act has been proved. The question of such delegation being legal or not does not, therefore, arise. Moreover, no exception has been taken even at the hearing of this case to the formula of equation by cadre to cadre adopted by the Punjab State. On the other hand, Mr. Nehra has frankly conceded that the grouping formula was not only unworkable, but would have been opposed to the principles of justice and that the only proper way of integrating the services was by suitably integrating one cadre with another. The only quarrel of the petitioners is with the particular equation made in respect of the petitioner, between the District Panchayat Officers of the erstwhile Pepsu and their counterparts in the State of Punjab as it existed prior to November 1, 1956. So far as the said equation is concerned, the matter was taken up by the petitioners themselves to the Central Government and the Central Government considered the detailed representations of the petitioners and upheld the impugned decision of equation.

Whether a better or different decision could be arrived at or not, and whether the equation approved of by the Central Government was on merits proper or not, is outside the scope of the enquiry before me in this writ petition, as this Court is not expected to sit in appeal over the said decision on merits. The fact remains that the equation was under the directions of, and in any case, with the approval of the Central Government. It is, therefore, held that the State Government had the right and authority to frame the Integration Rules of 1957, in exercise of powers conferred on it by the proviso to Article 309 of the Constitution and to equate the two units of the services in question in exercise of its

executive power under Article 162 of the Constitution read with entry 41 in List II of the Seventh Schedule, subject to the control and direction of the Central Government under the relevant provisions of the Act. This is what has been done in the instant case and no fault can, therefore, be found with it. The Integration Rules are not ultra vires section 129 of the Act and are valid and legal.

16. In order to decide the second question raised by the learned counsel for the petitioners, it is first necessary to come to the conclusion whether the decision to equate particular units of services in one State with a particular corresponding unit in the other, is a quasi-judicial process or not. Mr. Nehra has relied on the observations of the Division Bench of the Mysore High Court in the case of Shankariah (G. M.), 1967-1 Lab LJ 15 (Mys) (supra) to the effect that it is reasonable to infer that the power conferred on the Central Government under section 115 (5) of the Act is a quasi-judicial power, as the procedure prescribed indicates that the power is judicial as the test of "fair and equitable treatment" envisaged by the Act is an objective test.

17. Reliance has also been placed by the learned counsel on the following observations in the judgment of Grover, J. in *Madan Lal v. Union of India*, 1967 Cur LJ (Pb and Har) 62:

"There can be no proper consideration unless the party or the parties that are going to be affected by any decision in the joint seniority in the integrated service are told what the representations of other parties who are claiming seniority are to enable a proper representation being sent by the party or the parties likely to be affected. The statute, therefore, itself contains an indication that some hearing or opportunity must be afforded to the persons likely to be affected by the decision of the Central Government in the matters by the aforesaid provision."

Mr. Harnam Singh Wasu, the learned counsel for respondents Nos. 3 and 5 to 7, has on the other hand referred to the judgment of S. K. Kapur, J. in *Shaligram Anantram v. Union of India* AIR 1967 Punj 98, wherein it has been expressly held that the various sections in the Act do not give to the employees concerned a right to require the Central Government to carry out the adjustment or integration in a particular manner, and that this having been left entirely to the Central Government, neither section 115 nor section 116 of the Act leads to the conclusion that in exercising powers thereunder the Central Government is acting judicially. Mr. Wasu has also relied upon a Division Bench judgment of

the Madhya Pradesh High Court in *Vinod Kumar Radhika Prasad v. State of Madhya Pradesh*, AIR 1966 Madh Pra 134.

18. Mr. Nehra, learned counsel for the petitioners, has then referred to the note of a recent judgment of the Supreme Court in *State of Orissa v. Dr. (Miss) Binapani Dei*, 1967 SC (Notes) 76; (AIR 1967 SC 1269), and has argued that even in an administrative matter like the retirement of a Government servant on the basis of his age determined at an *ex parte* enquiry, the person affected has a right to be heard and any order passed without giving him such an opportunity is liable to be set aside. Counsel also relied upon the observations made in the judgment of the Supreme Court in that case to the effect that though the deciding authority in such a situation is not in the position of a Judge called upon to decide an action between contesting parties and though strict compliance with the form of judicial procedure may not be insisted upon, the authority concerned is nevertheless under a duty to give the person against whom an enquiry is held, an opportunity to set up his version or defence and an opportunity to correct or to controvert any evidence in the possession of the authority which is sought to be relied upon to his prejudice.

The principles laid down in the above cases are well known and well settled. What Mr. Nehra, however, is missing is that in the Supreme Court judgment in 1967 SC (Notes) 76 : (AIR 1967 SC 1269) (supra), as well as in the judgment of Grover, J. in 1967 Cur LJ (Pb and Har) 62 (supra), the question that arose was whether a person against whom some action had to be taken was or was not entitled to know the evidence against or the material on the basis of which the action was proposed to be taken against him, and to meet the same. The answer to the above question has always been in the affirmative. No action was proposed to be taken by the Central Government against the petitioners in the instant case. No material prejudicial to their interest, was being considered *ex parte*. What the Government was considering was the detailed written representations of the petitioners themselves. I am not aware of it having ever been laid down that in the absence of a statutory requirement to that effect any person who has made a representation, is entitled as of right to be heard orally before his representation can be disposed of.

It was held in *S. Kapur Singh v. Union of India*, AIR 1960 SC 493, that an opportunity of making an oral representation is not a necessary postulate of an opportunity of showing cause for the purpose of satisfying the constitutional requirements of Article 311 of the Consti-

tution. Moreover, I am bound by the judgment of this Court in Shaligram Anantram Chaturvedi's case, AIR 1967 Punj 98 (supra), and cannot in the face of it hold that the Central Government is expected to act judicially in the course of proceedings under sections 115 and 116 of the Act. In any case, the petitioners cannot make any just grievance in this behalf as they never asked for an oral hearing at any stage of the proceedings before the Government. No principle of natural justice has, in any case, been violated in the impugned proceedings. There is, therefore, no force even in the second contention of Mr. Nehra.

19. The third ground of attack pressed in the case almost travels into the merits of the controversy. The contention of Mr. Nehra is that though four criteria; viz. (i) nature of duties; (ii) responsibilities and powers etc.; (iii) minimum qualifications; and (iv) salary, had been laid down by the Central Government for determining equation of posts or cadres, the Government, according to its own return, took into account, in the present case, only one out of them, that is the nature and duties of the posts held by the petitioners on the one hand and their counterparts in the Punjab on the other. The grievance of the petitioners is that the greater responsibilities, the higher powers exercised by the Pepsu Officers, the fact that the minimum qualification in Pepsu was being a graduate and in Punjab it was being a matriculate, and the vast difference in the salary of the two sets of posts have been completely ignored by the Central Government in rejecting the representations of the petitioners against the impugned equation.

The petitioners admit that they represented on these points to the Central Government. The principles laid down by the Central Government were for their own guidance and it does not appear to me to be possible for the High Court to interfere in the decision of the Government in that behalf. The orders passed by the Central Government are not speaking orders nor was it necessary to support the orders with reasons. It is, therefore, not possible to know what considerations weighed with the Central Government in upholding the impugned equation proposed by the Punjab State. I cannot find my way to interfere with the order of equation on that ground.

20. The fourth argument relates to the alleged violation of rule 16 of the Inte-

gration Rules. The said rule reads as follows:

"Inter se seniority of any employee in the parent State shall not be disturbed in determining his seniority in the State of Punjab under these rules."

The complaint is that Mohinder Singh, who was junior to the petitioners in Pepsu has been illegally placed above the petitioners in the joint seniority list prepared as a result of the integration. This grievance of the petitioners appears to be fully justified. In fact the petitioners represented against this illegality and their representation was accepted by paragraph (2) of the orders of the Central Government (Annexure 'G'), whereby it was directed that Mohinder Singh, who held the non-gazetted post of Educational and Propaganda Officer in Pepsu, could not be shown in the joint seniority list above the petitioners, who held gazetted posts of District Panchayat Officers. The Central Government clearly directed that Mohinder Singh should be shown as junior to all the Panchayat Officers of Pepsu. Though Mohinder Singh has since left the Department, the petitioners claim to have been prejudicially affected by the initial mistake committed by the Punjab Government in showing him above the petitioners in the joint seniority list.

The learned Advocate-General for the State of Haryana has conceded that it is a matter of regret that despite the above-said directions of the Central Government, which are binding on the State authorities, Mohinder Singh has in fact been shown at No. 16 in the revised joint seniority list (Annexure 'A-1'), though the petitioners are shown at Nos. 22 to 24 therein. Name of Mohinder Singh should have been taken out from No. 16 and the names of the personnel from Nos. 17 to 24 should have been lifted up by one number and Mohinder Singh should have been placed at No. 24 in the said list in compliance with the orders of the Central Government referred to above. This should now be done and the consequential effect and benefit of chain reaction of this change (in accordance with the directions of the Central Government) should be given to the petitioners.

21. The last submission advanced on behalf of the petitioners is this. It is pointed out that there were the following relevant corresponding services in the erstwhile Pepsu and Punjab:

PEPSU

1. District Panchayat Officers (graduates or double graduates) in the time-scale of Rs. 250-15-400;

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District Panchayat Officers (including under-graduates) in the time-scale of Rupees 170-10-350;

2. Selection grade Panchayat Officers in the scale of Rs. 125-230;
3. Panchayat Officers in the time-scale of Rs. 100-160;
4. Propaganda and Education Officers in the scale of Rs. 200-10-300.

22. The argument is that Selection Grade Panchayat Officers having been equated separately (with their counterparts in Punjab) from the Panchayat Officers in the two States simply because of difference of their salary, the District Panchayat Officers of Pepsu should also have been kept in a cadre separate from their counterparts in Punjab on account of the vast difference in the scale of their pay as well as their educational qualifications and importance of duties. It is the equation of the District Panchayat Officers of the two States which is the solitary basic grievance of the petitioners. There is no dispute that if the equation is correct, the inter se seniority of the petitioners with the Punjab Officers has been correctly fixed except for the case of Mohinder Singh, which has already been dealt with above. It has been argued that even if the equation of the various services in the Panchayat Department of the Integrated State cannot be questioned as such, the petitioners should have been granted relief, in the above circumstances, on an ad hoc basis, in accordance with the requirements of the proviso to rule 11 (a) of Part IV of the Integration Rules. Rule 11 (a) is in the following terms:

"11. (a) The pattern of services and posts obtaining in the Punjab State being taken as a norm, the PEPSU State services and posts shall, having regard to all relevant considerations, be normally equated with them in the corresponding services and posts:

Provided that if any case of inequity or injustice is brought to the notice of the Integration Committee it shall be decided on an ad hoc basis.

Explanation:— The equation of services and posts shall cover the period when the equated services and posts were in lower pay scales. (b) Such of the services and posts in the Pepsu State which are not equated shall be treated as unequated."

The petitioners did feel that injustice had been done to them and represented even for an ad hoc relief on that basis. The Central Government, which is admittedly the competent authority to deal with the matter on merits, rejected the representations of the petitioners. In such a situation, it is not for this Court to sit in appeal over the decision of the Central Government on merits and to

- Selection grade Panchayat Officers in the time-scale of Rs. 125-230;
- Panchayat Officers in the time-scale of Rs. 100-160;
- Education Panchayat Officers in the scale of Rupees 170-10-350.

decide whether injustice had or had not been occasioned to the petitioners by the said equation. What is fair and equitable distribution was to be decided by the Government. The petitioners have had ample opportunity of representing their case to the Union of India. Their representations were considered with the help of the Central Advisory Committee of Gazetted Officers. Even if the petitioners justly feel that they have not been equitably and fairly treated in the matter of equation of their services and consequent integration, they can hardly claim any relief under Article 226 of the Constitution, as this Court does not sit in appeal over the decisions of the Central Government on merits under the Act.

23. No other point has been argued in this case by the counsel for the parties. The writ petition, therefore, succeeds only partially. Respondent No. 2 is directed to implement the decision of the Central Government contained in paragraph 2 of its order (Annexure 'G') communicated with its letter, dated April 14, 1961 (Annexure 'F'), and to work out and adjust the inter se seniority of the integrated cadre of the petitioners with effect from November 1, 1956, on the basis that the name of Mohinder Singh was deemed to have been placed below those of the petitioners in the joint seniority list and to give the petitioners benefits, if any, that may accrue to them in chain reaction of the requisite implementation. In all other respects the petition fails and is dismissed, but without any order as to costs.

SSG/D.V.C.

Petition partly allowed.

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(V 56 C 8)

MEHAR SINGH, C. J.
AND SHAMSHER BAHADUR, J.
Smt. Hardev Kaur, Appellant v. Chowdhry Jodh Singh, Respondent.

Letters Patent Appeal No. 364 of 1967, D/- 2-5-1968 against judgment of A. N. Grover, J. in Probate Case No. 2 of 1966 D/- 4-9-1967.

Provident Funds Act (1925) Ss. 3, 4(1) (c) and 5 (as amended in 1946) — Defence Services Officers—Provident Fund Rules, R. 9 (viii) — Subscriber can dispose of provident fund by will — Subs-

FL/IL/C804/68

criber appointing his parents as nominees and also making a will in favour of his father — Held though nomination in favour of parents was not valid widow of subscriber could not claim provident fund money either under S. 3 (2) or under the relevant rules when there was disposition by will in favour of father by the subscriber: Case law discussed. AIR 1947 Cal 176 and AIR 1936 Mad 477 held no longer good law.

(Paras 9, 17, 19)

Cases Referred: Chronological Paras

- (1961) AIR 1961 Ker 126 (V 48) =
ILR (1960) Kerala 1386 (FB), Sarojini Amma v. Neelakanta 15
(1957) AIR 1957 Madh Pra 79 (V 44) =
1957 MPLJ 233, Union of Bharat,
Ministry of Railway v. Mst.
Asha Bi 12, 13
(1949) AIR 1949 Nag 85 (V 36) =
ILR (1948) Nag 357, Governor-
General in Council v. Jagannath
Suka 13
(1949) AIR 1949 Sind 38 (V 36) =
Pak Cas 1949 Sind 125, Noor
Mahomed v. Mt. Sardar Khatun 12, 16
(1947) AIR 1947 Cal 176 (V 34) =
50 Cal WN 872, Keshab Lal v.
Ivarani Rudra 13
(1940) AIR 1940 Cal 395 (V 27) =
ILR (1940) 1 Cal 476, Nidhusudan
Mukherjee v. Bibhabati Debi 14
(1936) AIR 1936 Mad 477 (V 23) =
ILR 59 Mad 855, Mon Singh v.
Moti Bai 13
(1930) AIR 1930 Oudh 145 (V 17) =
ILR 5 Luck 712 (FB), N. M.
Robinson v. H. H. Robinson 16
(1928) AIR 1928 Lah 773 (V 15) =
108 Ind Cas 894, Hardial Devi
Ditta v. Janki Das 16
(1926) AIR 1926 Cal 1061 (V 13) =
95 Ind Cas 848, Kalisadhan Mitra
v. Prafulla Chandra 17
(1924) AIR 1924 Sind 57 (V 11) =
18 Sind LR 311, Aimai v. Awabai 16
Atma Ram, for Appellant; K. L. Kapur,
for Respondent.

SHAMSHER BAHADUR, J.: The broad and substantial question for determination in the Letters Patent Appeals Nos. 364 and 389 of 1967 from the judgment dated 4th September 1967 of Grover J. relates to the competency to dispose of by will the provident fund of a subscriber belonging to the Defence Services and governed by Defence Services Officers' Provident Fund Rules (hereinafter called the Rules).

2. Flt. Lt. Panj Rattan Singh, who died in an aircraft accident on 17th of June, 1966, was an officer in the Air Force and had been married to Hardev Kaur, appellant in L. P. A. No. 364 of 1967, at Nabha on 16th of November, 1958. The marriage did not seem to prosper and the husband applied under

S. 12 of the Hindu Marriage Act for a decree declaring the marriage a nullity. The application was made while the husband was posted at Jamnagar in August, 1959. This petition was not pressed and appears to have been withdrawn. From the contents of this petition (Exhibit R. W. 6/2) the principal allegation of the husband was that his wife was already pregnant when he married her and fraud had been perpetrated on him when the marriage was solemnised. The parties do not appear to have lived together for any length of time and a will Ex. A. 1 was executed by the husband on 14th of May, 1959, by which he bequeathed to his father Jodh Singh Chowdhury or his heirs, executors or administrators absolutely all his movable and immovable property and appointed him an executor of the will.

3. After the death of Flt. Lt. Panj Rattan Singh (hereinafter called the officer), his father Jodh Singh Chowdhury applied to this Court for the probate of the will under the provisions of the Indian Succession Act, he having been unsuccessful in obtaining the payment of the provident fund amounting to Rupees 23,529/-, out of the total expected assets of Rs. 36,143.49 P., from the Controller of Defence Accounts, Meerut. The citations were published in the Tribune and the proceedings were fixed for hearing on 3rd of November, 1966. The caveator Hardev Kaur, widow of Panj Rattan Singh, contested the grant of the probate. It may be mentioned at this stage that Jodh Singh and his wife Gurcharan Kaur were appointed nominees by the Officer in respect of his provident fund on 5th of March, 1960. As an indication of the officer's intention, reference may be made to certain documents, the existence of which is not disputed by the parties. On 10th of December, 1959, the officer wrote to the authorities (Exhibit R. W. 5/A) that the dependants mentioned in this letter, including his father, mother, brothers and sisters, may be paid the pensionary benefits. There is also the officer's record check form of 16th of July, 1960 (Exhibit R. W. 2/1) according to which the parents of the officer were appointed nominees to share the proceeds of the provident fund half and half. In another check form of 27th July, 1965 (Exhibit R. W. 2/2) the parents again are shown as nominees of the provident fund.

4. Grover J., on the evidence adduced before him, found that the will had been duly executed; indeed no challenge was ever offered to its execution before the learned Judge. In the words of the learned Judge, the learned counsel for the widow "could not point to any pleading of the respondent or to any other facts or evidence which would throw any doubt

on the factum of the deceased being of a sound disposing mind at the material time, I would, therefore, hold that the execution and attestation of the will has been duly proved in accordance with law." It may here be mentioned in passing that the attesting officers who appeared before the learned Judge, deposed about their signatures on the will which were appended in the presence of the testator and also those of the testator which were made in their presence.

5. It was contended on behalf of the widow however, that the nomination in favour of the parents not being valid under the Rules, the provident fund and other dues are now payable to the widow as his only legal heir and dependent. The amounts, which were claimed in the probate, were these:

- | | |
|--|---------------|
| (1) Provident fund standing in the account of the deceased with Controller of Defence Accounts, Meerut | Rs. 23,529.00 |
| (2) Amount lying under O.D.S. with Controller of Defence Accounts | Rs. 200.00 |
| (3) Payable by Director of Personal Services, AIR Hd. qr. New Delhi and O. C., I. A. F. Central Accounts Office, New Delhi, as | |
| (i) Gratuity (approximately) | Rs. 5,000.00 |
| (ii) Pay allowance & Bounty | Rs. 1,000.00 |
| (iii) Benevolent Fund | Rs. 1,500.00 |

There were other items also but we are not concerned with them in these appeals. They included the personal assets of the deceased officer of about Rupees 5000/- in worth.

6. The learned Judge granted a probate in favour of Jodh Singh Chowdhury in respect of the provident fund. The gratuity amounting to Rs. 5000/- having been sanctioned by the President in favour of the widow was excluded from the assets on the concession of the counsel for Jodh Singh. The learned Judge further reached the conclusion that the pension having become payable to the widow could not be probated for. The benevolent fund amounting to Rupees 1500/- was also excluded from the probate on the concession of the counsel for Jodh Singh. The sum of Rs. 1200/- was, however, included in the probate. In the result, probate was granted for the provident fund and the sum of Rs. 1200/-. The amounts of Rs. 5000/- and Rupees 1500/- representing gratuity and benevolent fund respectively were excluded from the probate and it was found that the widow alone was entitled to them.

7. From the judgment of Grover J., the widow of the officer Hardev Kaur has preferred Letters Patent Appeal No. 364 of 1967 while Jodh Singh has appealed in respect of the items excluded from the probate in L. P. A. No. 389 of 1967. This judgment will dispose of both these appeals.

8. Before discussing the contentions of the parties' counsel, it would be necessary to advert to the relevant provisions of the Rules and the Indian Provident Funds Act. The Defence Services Officers' Provident Fund Rules define "family" in clause (iii) of rule 2 to mean "the wife or wives and children of a subscriber, and the widow, or widows, and children of a deceased son of the subscriber". Clause (viii) of rule 9, on which reliance is placed by the learned counsel, is to this effect:

"(viii) On the death of a subscriber before quitting the service—

(i) when the subscriber leaves a family—

(a) if a nomination made by the subscriber in accordance with the provisions of clause (i) above, in favour of a member or members of his family subsists, the amount standing to his credit in the Fund or the part thereof to which the nomination relates shall become payable to his nominees in the proportion specified in the nomination;

(b) if no such nomination in favour of a member or members of the family of the subscriber subsists, or if such nomination relates only to a part of the amount standing to his credit in the Fund, the whole amount or the part thereof, to which the nomination does not relate, as the case may be, shall, notwithstanding any nomination purporting to be in favour of any person or persons other than a member or members of his family, become payable to the members of his family in equal shares:

Provided that no share shall be payable to—

(1) sons who have attained legal majority;

(2) sons of a deceased son who have attained legal majority;

(3) married daughters whose husbands are alive;

(4) married daughters of a deceased son whose husbands are alive, if there is any member of the family other than those specified in clauses (1), (2), (3) and (4);

Note 1 — (i) Any sum payable under these rules to a member of the family of a subscriber vests in such member under sub-section (2) of section 3 of the Provident Funds Act, 1925.

(ii) * * *

9. The Provident Funds Act, 1925, relating to Government and other Provident Funds, defines a dependant in clause (c) of section 2 as "a wife, husband, parent, child, minor brother, unmarried sister and a deceased son's widow and child, and, where no parent of the subscriber or depositor is alive, a paternal grand-parent". Section 3 of the Act refers to compulsory deposits and is in these words:

"(1) A compulsory deposit in any Government or Railway Provident Fund shall not in any way be capable of being assigned or charged and shall not be liable to attachment under any decree or order of any Civil, Revenue or Criminal Court in respect of any debt or liability incurred by the subscriber or depositor, and neither the Official Assignee nor any receiver appointed under the Provincial Insolvency Act, 1920, shall be entitled to, or have any claim on any such compulsory deposit.

(2) Any sum standing to the credit of any subscriber to, or depositor in any, such Fund at the time of his decease and payable under the rules of the Fund to any dependant of the subscriber or depositor, or to such person as may be authorized by law to receive payment on his behalf, shall, subject to any deduction authorized by this Act and, save where the dependant is the widow or child of the subscriber or depositor, vest in the dependant, and shall, subject as aforesaid, be free from any debt or other liability incurred by the deceased or incurred by the dependant before the death of the subscriber or depositor."

With regard to repayments, an elaborate machinery is provided in section 4 which says:

"(1) When under the rules of any Government or Railway Provident Fund the sum standing to the credit of any subscriber or depositor, or the balance thereof after the making of any deduction authorized by this Act, has become payable, the officer whose duty it is to make the payment shall pay the sum or balance as the case may be, to the subscriber or depositor, or, if he is dead, shall—

(a) if the sum or balance, or any part thereof, vests in a dependant under the provisions of section 3, pay the same to the dependant or to such person as may be authorized by law to receive payment on his behalf; or

(b) if the whole sum or balance, as the case may be, does not exceed five thousand rupees, pay the same, or any part thereof, which is not payable under clause (a), to any person nominated to receive it under the rules of the Fund, or, if no person is so nominated, to any person appearing to him to be otherwise entitled to receive it; or

(c) in the case of any sum or balance, or any part thereof, which is not payable to any person under clause (a) or clause (b) pay the same, —

(i) to any person nominated to receive it under the rules of the Fund, on production by such person of probate or letters of administration evidencing the grant to him of administration to the estate of the deceased or a certificate granted under the Succession Certificate Act, 1889, or

(ii) where no person is so nominated, to any person who produces such probate, letters or certificate. It is to be observed that clause (c) envisages the payment of provident fund in absence of a valid nomination to a person entitled to receive it under a probate or letters of administration. A disposition of the provident fund by will appears to be accepted by implication.

10. Section 5 deals with the rights of nominees and its principal features under the Amending Act of 1946 are:

"(1) Notwithstanding anything contained in any law for the time being in force or in any disposition, whether testamentary or otherwise, by a subscriber to, or depositor in, a Government or Railway Provident Fund of the sum standing to his credit in the Fund, or of any part thereof, where any nomination, duly made in accordance with the rules of the Fund, purports to confer upon any person the right to receive the whole or any part of such sum on the death of the subscriber or depositor occurring before the sum has become payable or before the sum having become payable, has been paid, the said person shall, on the death as aforesaid of the subscriber or depositor, become entitled, to the exclusion of all other persons, to receive such sum or part thereof, as the case may be, unless—

(a) such nomination is at any time varied by another nomination made in like manner or expressly cancelled by notice given in the manner and to the authority prescribed by those rules, or

(b) such nomination at any time becomes invalid by reason of the happening of some contingency specified therein,—

and if the said person predeceases the subscriber or depositor, the nomination shall, so far as it relates to the right conferred upon the said person, become void and of no effect;

Provided that.

11. It is common ground that the nomination in favour of the parents of the officer cannot be regarded as valid as they are not included in the term 'family' as defined in the Rules. What Mr. Atma Ram seeks to deduce from this is that the provident fund becomes automatically payable to the widow under rule 9 (viii) (i) (b). We have heard argu-

ments at great length on the rights of a nominee. According to one line of thought, the nominee, under the provisions of the Act, is entitled to receive payment absolutely and unconditionally and he does not receive it as a trustee. According to this view, the heirs of a nominee would exclude the other dependants or members of the family under the Rules or the Act. It may, however, be mentioned that two of the principal planks on which this reasoning is based have been removed by the amendments introduced in the Provident Funds Act. From sub-section (1) of S. 5 the word 'absolutely' has been deleted. It would further be noted that by the amendment it is said that if the nominee predeceases the subscriber or depositor the nomination shall, so far as it relates to the right conferred upon the said nominee become void and of no effect. The second view, for which there is preponderance of authority, says that a nominee receives the payments of a provident fund for and on behalf of dependants and members of the family of the deceased between whom it would be divided according to the personal law of the parties.

12. Reference may first be made to a Division Bench decision of the Sind High Court of Chief Justice Tyabji and Mehar J. in *Noor Mahomed v. Mt. Sardar Khatun*, AIR 1949 Sind 38, in which much of the case law is discussed. It was observed by the Chief Justice that:

"In every case the right conferred by the Act upon the nominee, whether the nominee be a dependant or not, is the 'right to receive' the amount deposited in the Provident Fund by the subscriber, nothing more and nothing less, although it is enacted that the nomination shall be deemed to confer such right absolutely, notwithstanding anything contained in any law or any disposition made by the subscriber."

In speaking about "vesting" the learned Chief Justice observed that:

"Vesting in relation to property means the acquisition of the legal right of immediate possession and dominion over property. It means nothing more. The words 'the sum shall vest in the nominee' do not connote anything more than that in law the legal right to immediate possession of and dominion over the property shall pass from the trustees of the fund to the nominee, and do not mean that the full rights of ownership, including the right to the beneficial enjoyment of the property, shall pass to the nominee. The nominee becomes entitled to possession of the sum without having to obtain letters of administration or a succession certificate. A property may vest in one person, and the beneficial right of enjoying the property as an owner may at the

same time vest in another person. The effect of the provident fund vesting in the nominee, when the nominee is a dependant, is therefore quite clear. It confers on the nominee the immediate right to possession and dominion over the amount, without in any manner affecting the beneficial rights of the actual owners, whoever they may be, either as "heirs or legatees."

This view found favour with a Division Bench of Chief Justice Hidayatullah and Chaturvedi J. in *Union of Bharat, Ministry of Railway v. Mst. Asha Bi*, AIR 1957 Madh Pra 79. In discussing the effect of section 5 of the Act, the learned Chief Justice observed that:

"Section 5 merely wipes out all the personal and other law for the time being in force and also sets at naught any other disposition by the subscriber, whether testamentary or otherwise, creating a right in the nominee to receive the money from the Government or the other holder of the provident fund. It is also stated in the section that the nomination confers this right on the nominee absolutely. This last provision cannot be read as making the nominee the owner of the fund. It only gives him the right to demand it unconditionally. For example it is not open to the holder of the fund to demand any document from a Court or to ask the recipient for an indemnity bond or security before the payment is made. The right is conferred absolutely or in other words, unconditionally. So long as the nomination stands, the nominee is required only to prove that he is the person nominated by the subscriber and he can then receive the amount without any conditions being imposed on him."

It was held by this Division Bench that:

"The nomination is in its nature testamentary and being ambulatory the death of the nominee in the lifetime of the subscriber defeats the nomination, so that on the death of the member his legal personal representative is entitled to the property and not the legal representative of the nominee."

Both in the judgments of Chief Justice Tyabji and Chief Justice Hidayatullah, it has been emphasised that the nomination made by a subscriber is to prevail over any other disposition made by him and indeed nomination itself is regarded in its nature as testamentary. These observations cannot, however, be projected to mean that when there is no valid and subsisting nomination, the subscriber is precluded from making a will about his provident fund.

13. A seemingly contrary view in the Nagpur case in *Governor-General in Council v. Jagannath Suka*, AIR 1949 Nag 85, by Chief Justice Grille and Hidayatullah J. (as the Chief Justice then was) appears to have been fully discuss-

ed in the later judgment of the Madhya Pradesh Court (AIR 1957 Madh Pra 79) and that case must be deemed to have been decided on its own facts. The view taken by a Division Bench of Edgley and Rahman JJ. in *Keshab Lal v. Ivarani Rudra*, AIR 1947 Cal 176, where the legal representatives of a nominee were preferred over the heirs cannot be regarded as good law now in view of the amendment which had been introduced in the Act in 1946. The same observations would apply to a Division Bench authority of Beasley C. J. and Stodart J. in *Mon Singh v. Mothi Bai*, AIR 1936 Mad 477, where it was held that on the death of a nominee the provident fund vests in his heirs.

14. Mr. Atma Ram, the learned counsel for the widow, has placed very strong reliance on a Single Bench judgment of Panckridge J. in *Nidhusudan Mukherjee v. Smt. Bibhabati Debi*, AIR 1940 Cal 395, where the learned Judge observed that the rights of nominee, which include the rights of the nominee's representatives are expressly postponed to the rights of dependants. This conclusion, which the Court drew from the provisions of section 4 of the Act can only mean that the rights of the dependants cannot be curtailed or overreached by nominations. But in the absence of nomination, the ruling cannot be extended to mean that the rights of the family members cannot be abridged by the testamentary disposition of the subscriber.

15. Mr. Kapur, the learned counsel for Jodh Singh, has argued that an analogous provision in the Life Insurance Act has been construed in the way which is in consonance with the view that a nominee merely collects the money for distribution between the dependants as beneficiaries. Sub-section (1) of section 39 of the Insurance Act, 1938, says that:

"The holder of a policy of life insurance on his own life, may when effecting the policy or at any time before the policy matures for payment, nominate the person or persons to whom the money secured by the policy shall be paid in the event of his death."

Under sub-section (6) the amount secured by the policy becomes payable to the nominee or nominees. It came for determination before a Full Bench of the Kerala High Court in *Sarojini Amma v. Neelakanta*, AIR 1961 Ker 126, whether the nominee under the Insurance Act had a mere right to collect the amount or a right to appropriate it as well. It was held by the Court that the nominee had a bare right to collect the policy money on the death of the assured and to give a good discharge to the insurance company. He did not become the owner of the money payable under the policy and

he is liable to make it over to the legal representatives of the assured.

16. Mr. Atma Ram's contention that there being no valid subsisting nomination, the provident fund should be paid to the widow under the relevant rules can only be accepted if it is found that the provident fund cannot be disposed of by the subscriber by a will. In the submission of Mr. Atma Ram, the provident fund cannot form a part of the estate as the Legislature has gone to the extent of protecting it from the hands of the creditors of the subscriber. An elaborate machinery, in his submission, has been set up under the Act in Ss. 3, 4 and 5 to ensure that the benefit of the provident fund accrues either to the subscriber if he survives or to his heirs in case of his death. It is not possible to make an inference that the Legislature having freed the provident fund from the demands of the creditors also intended that the subscriber should have no dominion over it and no power of disposition by a will. In AIR 1949 Sind 38, Chief Justice Tyabji observed at page 42 that the vesting of the provident fund in the nominee confers on him "the immediate right to possession and dominion over the amount, without in any manner affecting the beneficial rights of the actual owners, whoever they be, either as heirs or legatees". It was clearly envisaged that the beneficiaries of the provident fund would include the legatees, if any. It would thus be difficult to agree with Mr. Atma Ram that the deceased officer had no power to make a will in favour of his father. In a Full Bench of the Oudh Chief Court in *Norah Margaret Robinson v. H. H. Robinson*, AIR 1930 Oudh 145 (FB), the probate in respect of a will disposing of the provident fund in her favour was granted in favour of Norah Robinson and it seems to have been assumed that the money standing to the credit of a deceased person in Railway Provident Fund deposit is personal asset of the deceased. Addison J. in *Hardial Devi Ditta v. Janki Das*, AIR 1928 Lah 773, following the ruling in AIR 1924 Sind 57, held that "on the subscriber's death the Fund forms part of his undisposed of estate". In *Aimai v. Awabai*, AIR 1924 Sind 57, on which Addison J. relied, it was said that appointment of a nominee did not constitute a gift or will in his favour and on the subscriber's death the provident fund forms part of his undisposed of estate.

17. That provident fund can be disposed of by will is also a view of a Division Bench of Walmsley and Chakravarti JJ. in *Kalisadhan Mitra v. Prafulla Chandra Mitra*, AIR 1926 Cal 1061. In that case, a person holding a deposit in the Railway Provident Fund filed a declaration in favour of a person who in the

event of his death was entitled to receive payment, and it was added by the subscriber that "I make this my will so far as regards such deposit". It was held that the rules of the Fund did not prevent a declaration from being treated as a will. Apart from the rule on which Mr. Atma Ram has relied that the money becomes payable to a dependant if there is no nomination, there is no provision in the relevant rules to suggest that the deceased officer did not have disposing power over his provident fund. Nor do we see our way to accede to his submission that the widow is at any rate entitled to the benefit of the provident fund under subsection (2) of section 3 of the Act. The observations in some of the rulings that the provident fund is to be administered in accordance with the relevant rules, do not preclude the legal right of a subscriber to dispose of it by a will.

18. In our opinion, the appeal of Hardev Kaur must, therefore, fail and is dismissed. We would make no order as to costs.

19. With regard to the appeal of Jodh Singh, Mr. Kapur only stresses that the gratuity should have been included in the assets for which probate has been granted. He has invited our attention to Pension Regulations for the Air Force, Part II (1961 edition), a reference which was not available to him when the matter was argued before the learned Judge. In regulation 68, relating to payment of pension in respect of deceased pensioners, it is stated thus:

"68 (a) Subject to provisions of clause (b), arrears of pension or gratuity due to the estate of a deceased pensioner may be paid to the legal heir on production of a certified copy of the probate of the will, if any, left by the deceased, or letters of administration granted by a court of law or an indemnity certificate signed by two responsible persons that the claimant is the legal heir . . . If the legal heir is a minor, payment shall be made to the legal guardian or when there is none, to the person appointed by a court of law.

(b) Claims to arrears of pension preferred after the expiration of one year from the pensioner's death may be admitted in full by the Controller of Defence Accounts (Pensions) if he is satisfied with the claimant's explanation for the delay; if he is not satisfied with the explanation, he shall obtain orders of the President."

Apart from the contentions raised in this appeal to which I would advert in a moment, it is remarkable to observe that in this regulation testamentary power to dispose of pension and gratuity is fully assumed. There is hardly any principle which would justify this Court to say

that the Rules framed should be so construed as to exclude such a power of testamentary disposition of a subscriber with regard to provident fund.

20. Mr. Kapur has invited our attention to Exhibit R. W. 5/A of 10th December, 1959, wherein the officer had named his parents amongst the persons who were to receive pensionary benefits. He has also asked to take account of the letter dated 10-3-1967, (Exhibit R. W. 3/1) of the Ministry of Defence addressed to the Controller of Defence Accounts (Pensions) in which a special family pension to the widow at the rate of Rupees 160/- per mensem has been granted and the death gratuity of Rs. 2,670/- has been fixed. It is submitted by him that the amount of gratuity actually came to be fixed in this letter and he was not in a position to submit before the learned Judge that this specified sum should be made a subject of probate. We think, there is force in Mr. Kapur's argument especially in view of the observation of Grover J. towards the end of his judgment that:

"Gratuity could not form part of the assets of the deceased and Mr. Kapur has been unable to show anything to the contrary."

We would, therefore, allow the appeal of Jodh Singh only to the extent that the sum of Rs. 2,670/- as gratuity should be included in the list of assets for which probate is to be granted in favour of Jodh Singh. L. P. A. No. 389 of 1967 would be allowed only to this extent. We would make no order as to costs of this appeal as well.

21. MEHAR SINGH, C. J.: I agree.
RSK/D.V.C. Order accordingly.

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(V 56 C 9)

R. S. NARULA AND
S. S. SANDHAWALIA, JJ.

Shanker Iron and Steel Rolling, Mills, Amloh, Petitioners v. Union of India through the Secretary, Central Excise, New Delhi and others, Respondents.

Civil Writ No. 703 of 1963, D/- 8-7-1968, referred by Shamsher Bahadur J., D/- 5-1-1967.

(A) Central Excises and Salt Act (1944), S. 37 — Central Excise Rules (1944), Rr. 8 (1), 177, 178 — Exemption from Excise Duty to manufacturers who applied for licence prior to 13-6-62 — 'D' a manufacturer-licensee applying for exemption — Before he could get the orders of exemption 'D' selling his manufacturing concern with good-will to 'G' — 'G' applying for licence and exemption as successor to 'D' — Held, under R. 178 licence

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is personal and is not transferable — Held further that nobody can claim exemption from liability to pay a tax or an excise duty as a matter of right — It is for the State to grant exemption in suitable cases — There is no equality either in matter of taxation or in its exemption — Person who sets up new units or purchased old units cannot be exempted and there is no discrimination under Art. 14 of the Constitution — The differentiation between manufacturers prior to 13-6-62 and subsequent thereto is reasonable — Constitution of India, Article 14. (Paras 7, 8)

(B) Constitution of India, Art. 14 — Equal protection of Law — Reasonable classification for discrimination — Types of classifications enumerated.

The guarantee of equal protection of law and equality before the law does not prohibit reasonable classification. It only forbids class legislation. The only classification which amounts in law to invidious discrimination, is the one, between the object of which and that of the legislation in question, there is no rational relationship or nexus. Subject to the aforesaid condition, valid classification of persons or objects can be made by a law-making authority on any approved basis, e.g. occupation, standing, age, locality, point of time etc. The basis of classification may be historical, geographical, in view of difference in time or locality, difference in the nature, the trade, calling or occupation of persons sought to be affected by the legislation, difference in the position or nature of different business concerns, difference in the category of employers or employees, difference in length or nature of service, difference in the nature and incidence of particular rights, and various other bases, which it is impossible to attempt to enumerate exhaustively. AIR 1951 SC 97 and AIR 1960 SC 923, Foll. (Para 9)

(C) Constitution of India Art. 14 — Taxation laws — Discretion of Government in selecting persons or bodies to be taxed — Only when selection operates unequally that it will violate Art. 14. AIR 1962 SC 1733, Rel. on. (Para 13)

Cases Referred: Chronological Paras

- (1965) AIR 1965 All 305 (V 52),
Naini Glass Works, Allahabad v.
Collector, Central Excise, Allahabad 14
- (1964) AIR 1964 SC 980 (V 51)=
(1963) Supp 1 SCR 993, Mohmedalli
v. Union of India 12
- (1964) AIR 1964 SC 1095 (V 51)=
(1964) 1 SCWR 606, Shivram Poddar
v. Income-tax Officer, Central
Circle II, Calcutta 14
- (1964) AIR 1964 Punj 192 (V 51),
Jaswant Sugar Mills Ltd. Meerut
v. Union of India, New Delhi 12

- (1963) AIR 1963 SC 98 (V 50)=
(1963) 1 SCA 278, Orient Weaving
Mills (P.) Ltd. v. Union of India 12
- (1962) AIR 1962 SC 1733 (V 49)=
(1963) 1 SCR 404, East India
Tobacco Co. v. State of Andhra
Pradesh 13
- (1960) AIR 1960 SC 923 (V 47)=
(1960) 3 SCR 528, Hathisingh
Manufacturing Co. Ltd., Ahmeda-
bad v. Union of India 11
- (1957) AIR 1957 Mad 301 (V 44)=
1957-1 Mad LJ 281, Rangaswami
Chettiar and Co. v. Govt. of
Madras 12
- (1951) AIR 1951 SC 97 (V 38) =
1951 SCR 127, Ramjilal v. Income-
tax Officer, Mohindar Garh 11

H. L. Sibal, Senior Advocate with S. C. Sibal, for Petitioners; C. D. Dewan, Deputy Advocate-General, Haryana (S. S. Dewan with him), for Respondents.

JUDGMENT: The constitutionality of the last proviso to the gazette notification of the Central Government, dated June 13, 1962 (Annexure 'A-1') as amended by notification, dated November 10, 1962 (Annexure 'E'), under sub-rule (1) of rule 8 of the Central Excise Rules, 1944 (hereinafter referred to as the 1944 Rules) providing that the exemption from liability to pay excise duty under the Central Excises and Salt Act (1 of 1944) (hereinafter called the Act) in respect of re-rollable scrap of iron and steel covered by item No. 26AA of the First Schedule to the Act, shall not be available for the benefit of persons who began to manufacture the relevant product on or after the 13th of June, 1962, has been called in question in this petition under Articles 226 and 227 of the Constitution of India, on the ground that the said exception to the exemption suffers from invidious discrimination and amounts to an unreasonable restriction on the fundamental right of the petitioners guaranteed to them under Art. 19(1)(f) of the Constitution. The relevant facts leading to the filing of this petition which are not in dispute are set out herein below.

2. One Dev Raj was carrying on business of re-rolling used re-rollable scrap for the manufacture of iron bars etc. for quite some time prior to April, 1962, under the name and style of Shanker Iron and Steel Rolling Mills at Amloh in district Patiala. The re-rolled product was for the first time subjected to excise duty under the Act with effect from April 24, 1962. The levy of the excise duty in question made it uneconomical for the smaller units of re-rolling mills to compete with larger units. A representation on behalf of such manufacturers was, therefore, made to the Central Government by the Northern India Steel Rolling Mills Association. Dev Raj had in

the meantime made an application for a licence under section 6 of the Act on May 3, 1962 (Annexure 'R-1'). The representation of the abovementioned association was favourably considered by the Government and notification, dated June 13, 1962 (Annexure 'A-1') was issued by the Central Government exempting with effect from the 24th of April, 1962 (with effect from the date of imposition of the excise duty on the product in question) iron or steel products in dispute from the levy of excise duty on the fulfilment of certain specified conditions, viz:

(a) that the re-rolling product had been manufactured out of re-rollable scrap on which appropriate amount of excise duty had already been paid;

(b) the person claiming the exemption under the notification must be only such who did not use more than one metric ton of billets in any calendar month or more than ten metric tons of billets in a year for re-rolling; and

(c) provided that the manufacturer of the product in question had applied for a licence under the Act before the 13th of June, 1962.

3. Out of the three conditions precedent for obtaining the requisite exemption mentioned in the notification of June 13, 1962, the one which is relevant for the purposes of this case is only the last one contained in the second proviso to the notification to the effect that any manufacturer who had applied for licence on or after the 13th of June, 1962, would not be eligible for the exemption. A copy of the notification, dated June 13, 1962, was forwarded by the Government of India to the Northern India Steel Rolling Mills Association with the Government's letter, dated July 5, 1962 (Annexure 'A'). In response to the association's representation Dev Raj applied for the exemption and his application was allowed on July 24, 1962.

The grant of the exemption was communicated to the Shanker Iron and Steel Rolling Mills (then owned exclusively by Dev Raj) in Government's letter, dated July 26, 1962 (Annexure 'B'). It was stated in the letter that the exemption would continue to operate till the concern fulfilled the terms and conditions undertaken in the declaration filed on July 21, 1962, or till further orders. It is not disputed that the declaration, dated July 21, 1962, had been filed by Dev Raj. Before, however, the communication, dated July 26, 1962, conveying the exemption could reach the addressee, Dev Raj sold away his business concern in question along with the good-will and the firm name, to Ganga Deen and others by a conveyance-deed, dated July 27, 1962. Letter Annexure 'B' which had been addressed to the firm name was received by Ganga Deen through whom the pre-

sent petition has been filed on July 28, 1963.

As the 1944 Rules provided that on the transfer of a manufacturing unit, the licence granted to the transferor comes to an end, Ganga Deen and others made application, dated October 3, 1962 (Annexure 'C' corresponding to Annexure 'R-3'), to the Superintendent, Central Excise, Mandi Gobindgarh, intimating the fact of their having purchased the good-will as well as the proprietary rights of the petitioner concern and praying for the issue of the requisite licence for the remaining period of 1962 without payment of fresh licence fee as a licence for that period had already been issued to Dev Raj.

In the meantime a representation (Annexure 'D') had been made on behalf of the affected manufacturing units for extending the date fixed in the last proviso to the notification of June 13, 1962, as some small units had not made an application for the requisite licence before the 13th of June, 1962, on account of the very small period of time which elapsed between the 24th of April and the 13th of June, 1962. It is on a consideration of the said representation that the impugned notification, dated November 10, 1962 (Annexure 'E') was issued in which for the original second proviso contained in the notification of June 13, 1962, the following was substituted:

"Provided further that the products manufactured by a person applying for licence on or after the 13th June, 1962, shall not be eligible for the exemption unless a penalty not exceeding an amount equal to the duty that would have been payable by him on the products manufactured during the period beginning with the 13th June, 1962, and ending with the date of application, is paid by him to the Collector concerned.

Provided also that the products manufactured by a person applying for licence on or after the 1st December, 1962, shall not be eligible for exemption.

Provided also that nothing contained herein shall apply to the products manufactured by a person who began to manufacture such products on or after the 13th June, 1962."

4. It is not disputed before us that the only ground on which the claim for the requisite exemption was refused to the petitioners was that they fell within the mischief of the last proviso reproduced above, i.e. on the ground that nothing contained in the notification granting the exemption could apply to the products manufactured by Ganga Deen and others who now owned the Shanker Iron and Steel Rolling Mills and who had begun to manufacture the products in question only on October 8, 1962, after hav-

ing purchased the manufacturing unit by sale deed, dated July 27, 1962.

It is further claimed on behalf of the petitioners that they submitted another application, dated November 30, 1962 (Annexure 'F') for a new licence under the Act for the year ending December 31, 1962. During the pendency of the application of the petitioners, they were allowed by the Government (vide Annexure 'G') to clear their goods on payment of excise duty or to execute a bond in the prescribed form. The petitioners adopted the latter course. Ultimately on April 3, 1963, the petitioners were informed (Annexure 'H') that their claim for exemption had been rejected and that they should clear their manufactured goods under the Excise Rules. Their representation to the Central Government was finally rejected by order, dated May 4, 1963 (Annexure 'R-7'). The said order of the Central Government was couched in the following language:

"The last proviso of notification No. 131/62, dated the 13th June, 1962, as amended by notification No. 192/62 dated the 10th November, 1962, states that nothing contained therein shall apply to the products manufactured by a person who began to manufacture such products on or after the 13th June, 1962. In the present case the transferee started the production of products on the 8th October, 1962, and as such does not satisfy the conditions and is not entitled for the exemption."

Before the Central Government's order could be communicated to the petitioners, they had already filed on the same day, i.e. May 4, 1963, this petition praying for a suitable writ, order or direction being issued to the respondents, (i) Union of India, (ii) Deputy Superintendent, Central Excise, Gobindgarh, and (iii) Assistant Collector, Central Excise, Chandigarh, to exempt the petitioners from payment of the excise duty in question and to restrain the respondents from levying the same on them. The said relief was claimed on two main grounds, viz. (a) that the petitioners had qualified themselves for the exemption in terms of the Central Government's notifications, dated June 13, 1962, and November 10, 1962, and (b) the discrimination against the petitioners was hit by Article 14 of the Constitution. The petition was admitted by Falshaw, C. J. (as he then was) and Jindra Lal, J. on May 6, 1963.

5. The common case of all the three respondents as disclosed in the written statement, dated September 25, 1963, is that the exemption in question had been granted on July 24, 1962 (intimation despatched on July 26, 1962) to Dev Raj, and that the mere fact that the said communication, dated July 26, 1962, was addressed to the Mills does not entitle

the new proprietors to claim that the exemption had been granted to the Mills or to them as owners by purchase. On the legal question, the impugned order of the Government has been supported by the respondents on the basis of the last proviso contained in the notification, dated November 10, 1962, and it has been stated that in view of the said proviso the new proprietors of the Mills, who commenced the manufacture of the dutiable goods on their own showing from October 8, 1962, or in any case from July 27, 1962, as is being now claimed in the writ petition, were not entitled to earn exemption as they were hit by the said proviso, which absolutely took away the right to claim exemption from persons who commenced manufacture of the products in dispute after the 13th of June, 1962.

It has been added that no exemption at all has been granted under the notification in question to any person who was not manufacturing the dutiable goods in question prior to June 13, 1962. In reply to the attack under Article 14 of the Constitution, the respondents have averred that the pre-June 13, 1962, manufacturers constitute a class by themselves and the exemption from the excise duty in question subject to the conditions contained in the two relevant notifications has been granted to all the members of that class in order to protect their very existence in the trade and to enable them to stand in competition with large units and as a result to protect the interest of the workers in those small units who it was apprehended would have been thrown out of employment in case the imposition of duty in question was insisted upon.

The exemption can be availed of only by such of the manufacturers as answer to the description mentioned in the notifications. Exemption, according to the return of the respondents, was granted in favour of the members of the above-said class because it was considered that the small units should be allowed to exist in the national interest and in so far as it was thought that the products manufactured by them were necessary to meet the requirements of the country. It was added that the position of the small-scale units who had already come into existence before the introduction of the duty stood on a different footing from that of those who came into the business later, and, therefore, with open eyes.

The case of the respondents is that while it was not the intention of the Government to unduly disturb the economy of the manufacturers owning small units and possibly to force their closure, it was considered undesirable on the ground of public policy to encourage

further fragmentation of existing units by extending the benefit of such exemption to all new-comers as that would have in fact amounted to discrimination. The classification contained in the impugned proviso has been justified as reasonable on the abovementioned basis. The return of the respondents continues to state that no person or class of persons can claim exemption as a matter of right and inasmuch as the petitioners purchased the Mills after the issue of the notification, they were admittedly not the manufacturers prior to the crucial date, i.e. prior to June 13, 1962. An objection of a somewhat preliminary nature has been taken in paragraph 13 of the return to the effect that the petitioners have not availed of remedies by way of appeal and revision provided for by the Act.

6. When this petition came up before Shamsheer Bahadur, J., on January 5, 1967, the learned Judge in a detailed order of reference observed that the petitioners came within the mischief of the impugned proviso but made the reference as the issue of alleged discrimination on which much could be said for both sides had been raised in the case and because there was likely to be a Letters Patent Appeal against the decision of the Single Judge in either eventuality. It is in pursuance of the said order of the learned Single Judge that this case has come up for disposal before us.

7. In view of the clear language of the second proviso contained in the notification, dated November 10, 1962 (already reproduced in an earlier part of this judgment), and in view of the observations of Shamsheer Bahadur, J. in this respect in his order of reference, Mr. Hira Lal Sibal, the learned counsel for the petitioners, did not seriously press the first ground to the effect that the word "person" in the second proviso includes a transferee of the original manufacturer. Even otherwise, there is no force in the said contention. Section 3 of the Act provides that there shall be levied and collected in such manner as may be prescribed duties of excise on all excisable goods (subject to certain exceptions) which are produced or manufactured in India at the rates set forth in the First Schedule.

Section 6 states *inter alia*, that the Central Government may by notification in the official gazette provide that from such date as may be specified in the notification, no person shall, except under the authority and in accordance with the terms and conditions of a licence granted under the Act, engage in the production or manufacture of any specified goods included in the First Schedule. It is the common case of both sides that the description of the product in question is set out in the First Schedule to

the Act and that the relevant notification in respect thereof was issued by the Central Government under section 6 imposing the restriction under that provision with effect from April, 24, 1962. Section 37 of the Act authorises the Central Government to make rules for carrying into effect the purpose of the Act.

In exercise of the power conferred by the said section, the Central Government framed the 1944 Rules. Rule 8 of the said Rules authorises the Central Government to exempt, subject to such conditions as may be specified in the notification in the official gazette, any excisable goods from the whole or any part of the duty leviable on such goods.

Chapter VIII of the 1944 Rules commencing with rule 174 and ending with rule 181A deals with licensing under S. 6 of the Act. The purview of rule 174 provides that the manufacturers of excisable goods except salt shall be required to take out a licence and shall not conduct their business otherwise than by the authority and subject to the terms and conditions of a licence granted by a duly authorised officer in the proper form. Rule 175 contains the procedure for obtaining the requisite licence. Under rule 176, a form of application for a licence has been prescribed. The rule further directs that every application for a licence shall be submitted so as to reach the licensing authority at least one month before the commencement of the year for which it is required and shall be accompanied by the prescribed fee. Rule 177 is not relevant for our purposes.

Sub-rule (1) of rule 178 states, *inter alia*, that every licence granted or renewed under the 1944 Rules shall be for a period not exceeding one year and shall expire on the date specified therein. Sub-rules (2) to (6) of rule 178 are quoted below verbatim:

"(2) Every licence shall be deemed to have been granted or renewed personally to the licensee and no licence shall be sold or transferred.

(3) Where a licensee transfers his business to another person, the transferee shall obtain a fresh licence under these Rules but it shall be granted free of fee for the residue of the period covered by the original licence.

(3A) Where a licensee dies, the original licence shall be deemed to have been terminated and if more than one person claiming to be the heir to the deceased, apply for the grant of a fresh licence for the same premises, the licence shall be granted to the person who in the opinion of the licensing authority, is in actual possession of the said premises, provided that the grant of the licence to such person shall not prejudice

the rights of any other person over the licensed business or the licensed premises to which such person may be lawfully entitled.

(4) If the holder of a licence enters into partnership in regard to the business covered by the licence he shall report the fact to the licensing authority within thirty days of his entering into such partnership and shall get his licence suitably amended. Where a partnership is entered into, the partner as well as the original holder of the licence shall be bound by the conditions of that licence.

(5) If a partnership is dissolved every person who was a partner shall send a report of the dissolution to the licensing authority within ten days of such dissolution.

(6) If during the currency of a licence the licensee desires to transfer his business to new premises, he shall intimate his intention to the licensing authority at least fifteen days in advance, specifying the address of the new premises, and get his licence suitably amended. The licence shall thereupon, hold good in respect of the new premises."

In view of the clear statutory provisions contained in sub-rule (3) of rule 178, it cannot be successfully argued on behalf of the petitioners that a transferee from an original manufacturing licensee could be deemed to be a licensee even for the remaining period of the year in respect of which the original manufacturer had taken out a licence.

Under sub-rule (2) of rule 178, a licence granted to Dev Raj in the instant case was personal to himself, and benefits of the same could not be transferred by him to Ganga Deen and others, even if Dev Raj intended to do so. Ganga Deen and others, transferees from Dev Raj, cannot therefore, claim that they should be deemed to be persons who had been manufacturing the dutiable goods in question prior to June 13, 1962, though in fact they purchased the manufacturing concern only in the end of July, 1962.

8. It is the second contention on which lengthy and serious arguments were addressed by Mr. Sibal. He argued that on the construction which the respondents want to put on the impugned proviso contained in the notification, dated November 10, 1962, the proviso becomes unconstitutional, as the classification contained therein has no reasonable nexus with the objects of the grant of the exemption in question. According to the written statement of the respondents, submitted Mr. Sibal, the object of the notifications in question was to enable the small manufacturing units to continue in existence to avoid their labour being thrown on the road and to permit in the national interest the production of the re-rolled iron bars etc.

Learned counsel submitted that it was not necessary for the fulfilment of any one of the abovesaid objects that new manufacturing units which come into existence or which merely change hands after 13.6.1962 should be deprived of the exemption from the payment of excise duty. He first took up the analogy of the death of the original owner and the possibility of the son being deprived of the exemption. He then took up the example of a partnership concern wherein some partners may be changed. As already indicated different rules apply to the case of death and to the case of partnership (vide various relevant clauses of rule 178 of the 1944 Rules). So far as transfer is concerned, the situation has to be viewed differently.

Nobody can claim exemption from liability to pay a tax or an excise duty as a matter of right. It is for the State to grant exemption in suitable cases to any particular class for cogent reasons. There is no question of any equality in the matter of a tax or in the matter of grant of exemption from liability to pay a tax.

The object of granting the exemption in the instant case was to protect the smaller units of the existing industries against their being forced to be closed down on account of the additional liability which the owners of those industrial units could not have envisaged at the time of starting their business. There could be no such justification for an exemption in case of persons who either install a new unit or purchase an existing one with the full knowledge of excise duty being leviable on persons who were not manufacturing the product in question prior to the 13th of June, 1962. There is great force in the argument of Mr. C. D. Dewan, the learned Deputy Advocate-General for the State of Haryana, who appears for respondents that the Government could even have said that the exemption would not be granted to persons who commenced the manufacture after the 24th of April, 1962, i. e., the date on which the duty was levied on the article in question, and that the mere fact that the Government allowed even those people who had commenced the manufacture later on up to the 13th of June, 1962, should not invalidate the notifications.

Once it is seen that the object of granting the exemption was to benefit only those persons who were already manufacturing the article prior to June 13, 1962, it is obvious that the impugned proviso has a direct nexus with the object of the notifications. Mr. Sibal is not quite correct in contending that the Government has taken away from the transferees the licence which had been granted to the transferor. The licence granted to Dev Raj was personal to him and came to an end by operation of rule 178 immediately.

when he transferred the manufacturing units. The vires of rule 178 have not been challenged by Mr. Sibal.

9. The guarantee of equal protection of laws and equality before the law does not prohibit reasonable classification. It only forbids class legislation. The only classification which amounts in law to invidious discrimination is the one between the object of which and that of the legislation in question there is no rational relationship or nexus. Subject to the aforesaid condition, valid classification of persons or objects can be made by a law-making authority on any approved basis, e.g. occupation, standing, age, locality, point of time etc. In other words the basis of classification may be historical, geographical, in view of difference in time or locality, difference in the nature, the trade, calling or occupation of persons sought to be affected by the legislation, difference in the position or nature of different business concerns, difference in the category of employers or employees, difference in length or nature of service, difference in the nature and incidence of particular rights, and various other bases, which it is impossible to attempt to enumerate exhaustively.

10. The basis of the classification contained in the impugned proviso is in point of time. The validity of such a classification, would, in my opinion, depend on whether the date fixed for the impugned piece of legislation which acts as the dividing line between two sets of persons is or is not related to the objects of the legislation. If a haphazard date is fixed for which no justification can be given and which has no relationship with the objects of the legislation, it may possibly be open to an attack under Article 14 of the Constitution. As already stated, however, the basis on which the dividing line contained in the date June 13, 1962, has been fixed in this case, is too obvious to need any detailed discussion. That was the date of the first notification granting the exemption.

It was clearly intended that only those persons who were already manufacturing the goods up to that date, on certain conditions be exempted from liability of paying the excise duty. If this safeguard had not been taken, it would have enabled some of the bigger units to split themselves up into smaller units after June 13, 1962 to obtain benefit of the exemption and thus defeat the very object of the legislation. The classification of pre-June 13, 1962, manufacturers, and post-June 13, 1962, owners of manufacturing units, is in these circumstances demonstrably related to the object sought to be achieved by the original notification, i.e., to exempt only those persons

who were actually manufacturing the article prior to June 13, 1962. This classification was in fact not introduced for the first time in the notification, dated November 10, 1962.

The restriction contained in the impugned proviso was inherent even in the original notification of June 13, 1962. Any person who was not manufacturing the product in question prior to June 13, 1962, could not possibly have applied for a licence before that date. The notification of 13th of June provided that the benefit of exemption would not be available to persons who had not applied for a licence before June 13, 1962.

11. The object of issuing the second notification (dated November 10, 1962) was not to enlarge the scope of the class of persons so as to permit manufacturers who were not in the trade prior to June 13, 1962 to take benefit of the exemption. The obvious object of the second notification was to permit those who were actually manufacturing the product prior to June 13, 1962, but who had by chance not applied for a licence up to that date to take benefit of the exemption on certain conditions provided they applied for the licence up to December 1, 1962.

In these circumstances, it is impossible to hold that the impugned proviso is hit by Article 14 of the Constitution. It is not for the first time that classification has been made from the point of time. Such a classification was upheld in *Ramjilal v. Income-tax Officer, Mohinder Garh*, AIR 1951 SC 97, in *M/s. Hathising Manufacturing Co., Ltd. Ahmedabad v. Union of India*, AIR 1960 SC 923, and in various other cases. In the last mentioned case it was authoritatively held by their Lordships of the Supreme Court that by enacting a law which applies generally to all persons who come within its ambit as from the date on which it becomes operative, no discrimination is practised.

12. Mr. C. D. Dewan was correct in submitting on the basis of the Division Bench judgment of the Madras High Court in *K. Rangaswami Chettiar and Co. v. Government of Madras*, AIR 1957 Mad 301 (at p. 309), that the principle that in case of ambiguity a taxing statute should be construed in favour of the tax-payer does not apply to a provision giving a tax-payer relief in certain cases from a section clearly imposing a liability. His submission based on the Division Bench judgment of this Court in *Jaswant Sugar Mills Ltd., Meerut v. Union of India*, New Delhi, ILR 1964 Punj 192, to the effect that one who assails a classification must carry the burden of showing that it does not rest on any reasonable basis and if any state of facts can reasonably be con-

ceived to sustain a classification, the existence of that state of facts must be assumed, is not without force.

In that case it was further held that the limit of an exemption from excise duty had to be drawn somewhere and the Court, though bound to examine the effects of the limits so fixed and its incidence on the various types of producers, could not substitute its own judgment for that of the Executive. In *Mohmedalli v. Union of India*, AIR 1964 SC 980 (at p. 986), it was held that classification between establishments which had been in existence for less than three years and those which had been in existence for less than five years was an understandable classification with a view to save newly started establishments from the additional burden of making contribution to provident fund in respect of its employees under the Employees' Provident Funds Act, 1952. In *Orient Weaving Mills (P) Ltd. v. Union of India*, AIR 1963 SC 98, Sinha, C. J. (as he then was), who wrote the judgment of the Supreme Court, held that the notifications under rule 8 (1) of the 1944 Rules granting exemption to certain classes of persons were not bad in so far as they exempted only the classes of persons whose liability it was to pay the tax and not the class of goods in respect of which the tax had to be paid, as the duty of excise is payable by the persons producing the goods though it is on the production of the goods.

On that basis it was held that the exemption is also refused to such goods as come within the description of excisable goods, but it is valid classification to exempt one set of producers of the same goods and not another set of producers when the two sets (co-operative societies alone were exempted) fall in a distinct class. From a study of the case law on the subject referred to above, it is clear that the classification contained in the impugned proviso is not hit by Article 14 and is a valid and permitted classification. For the same reason the proviso does not impose any unreasonable restriction on the fundamental rights of the petitioners and is not hit by Article 19 of the Constitution.

13. Though a taxation law must also pass the test of Article 14, but in deciding whether such a law is discriminatory or not, it is necessary to bear in mind that the State has a wide discretion in selecting persons or bodies it will tax and that a statute is not open to attack on the ground that it taxes some persons or bodies and not others. It is only when within the range of its selection the law operates unequally or when classification cannot be justified that the law would be violative of Article 14 (judgment of the Supreme Court in *East*

India Tobacco Co. etc. v. State of Andhra Pradesh, AIR 1962 SC 1733).

14. In the view we have taken of the main contention advanced by Mr. Sibal in this case, it is unnecessary to deal with an objection of somewhat preliminary nature which was raised towards the end of his submissions by Mr. C. D. Dewan, learned counsel for the respondents, to the effect that we should dismiss this writ petition on the short ground that the petitioners have not availed of the alternative remedy by way of a statutory appeal against the order of the Collector refusing to grant the petitioners the exemption in dispute. Reliance was placed by Mr. Dewan for this contention on the judgment of the Allahabad High Court in *Naini Glass Works, Allahabad v. Collector, Central Excise, Allahabad*, AIR 1965 All 305, and on the authoritative pronouncement of the Supreme Court in *Shivram Poddar v. Income-tax Officer, Central Circle II, Calcutta*, AIR 1964 SC 1095. It is, however, significant to note in this case that though it was not so mentioned in the writ petition, the case had gone right up to the Central Government which had also rejected the claim of the petitioners by order Annexure 'R-7', a copy of which has been placed on the record of this case by the respondents themselves.

15. No other point having been argued before us in this case, the writ petition fails and is accordingly dismissed though without any order as to costs.
BDB/D.V.C. Petition dismissed.

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(V 56 C 10)

R. S. SARKARIA, J.

Banarsi Dass Durga Prasad, Petitioner
v. Panna Lal Ram Richhpal Oswal and
others, Respondents.

Civil Revn. No. 31 of 1968, D/- 12-1-1968.

(A Civil P.C. (1908), S. 115, O. 1, R. 10 — Order dismissing application under O. 1, R. 10 — High Court can interfere in revision if it finds some material irregularity or illegality in order. AIR 1951 Punj 352 and 1968-70 Pun LR 98, Rel. on; AIR 1926 P.C. 142, Ref. (Para 3)

(B) Civil P.C. (1908), O. 1, R. 10 — Addition of parties — A person may not be added as defendant merely because he would be incidentally affected by the judgment.

Under sub-para (2) of O. 1, R. 10, a person may be added as a party to a suit in two cases only, i.e., when he ought to have been joined and is not so joined, i.e. when he is a necessary party, or,

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when without his presence the questions in the suit cannot be completely decided. There is no jurisdiction to add a party in any other case merely because that would save a third person the expense and botheration of a separate suit for seeking adjudication of a collateral matter, which was not directly and substantively in issue in the suit into which he seeks intrusion. A person may not be added as a defendant merely because he would be incidentally affected by the judgment. (1892) 1 Ch 487, Foll.

(Paras 5, 6)

(C) Civil P. C. (1908), O. 1, R. 10 — Addition of party—Addition of defendant when plaintiff is opposed to such addition — Not desirable.

As a rule the Court should not add a person as a defendant in a suit when the plaintiff is opposed to such addition. The reason is that the plaintiff is the dominus litis. He is the master of the suit. He cannot be compelled to fight against a person against whom he does not wish to fight and against whom he does not claim any relief.

The word 'may' in sub-rule (2) imports a discretion. In exercising that discretion, the Courts will invariably take into account the wishes of the plaintiff before adding a third person as a defendant to his suit. Only in exceptional cases, where the Court finds that the addition of the new defendant is absolutely necessary to enable it to adjudicate effectively and completely the matter in controversy between the parties, will it add a person as a defendant without the consent of the plaintiff AIR 1958 Andh Pra 195, Ref.

(Para 9)

Cases Referred: Chronological Paras

- (1968) 1968-70 Pun LR 98 = 1968 Cur LJ 10, Punjab University v. Arya Pratibha Sabha, Punjab 3
(1962) AIR 1962 Mad 346 (V 49) = (1962) 1 Mad LJ 380, Abdul Razack v. Mohammad Shah 8
(1962) AIR 1962 Pat 357 (V 49), Motiram Roshanlal Coal Co. v. District Committee, Dhanbad 8
(1960) AIR 1960 J & K 67 (V 47), Bindru v. Sada Ram 8
(1959) AIR 1959 Madh Pra 359 (V 46) = 1959 MPLJ 841, Muttal Begum v. Mehbab Rehman 8
(1958) AIR 1958 Andh Pra 195 (V 45) = 1957 Andh LT 844, Razia Begum v. Anwar Begum 8, 9
(1951) AIR 1951 Punj 352 (V 38) = 52 Pun LR 88, Indar Singh v. Hazara Singh 3
(1926) AIR 1926 PC 142 (V 13) = ILR 54 Cal 338, Umedmal v. Chand Mal 3
(1926) AIR 1926 Mad 836 = ILR 50 Mad 34, Pryaga Dass v. Board of Commra. 8

(1892) 1892-1 Ch 487 = 61 LJ Ch 319, Moser v. Marsden 5, 6
Rajendra Nath Mittal, for Petitioner.

ORDER: This is a civil revision directed against an order, dated 28th December, 1967, of the Senior Subordinate Judge, Narnaul, dismissing the application of the petitioner, Banarsi Dass, under Order 1 Rule 10, Civil Procedure Code, for being impleaded as a defendant in Suit No. 326 instituted by Panna Lal and Banwari Lal against Smt. Chameli.

2. Shri Banarsi Dass had instituted a suit in the Court of the Subordinate Judge at Narnaul for specific performance of a contract of sale against Smt. Chameli, widow of Udha Ram. During the pendency of that suit, Panna Lal and Banwari Lal instituted the aforesaid Suit No. 326, dated 18th November, 1967, against Smt. Chameli for a permanent injunction restraining her from interfering with the possession of the plaintiffs over a chabutra 4½ sq. ft. in area, shown in the map annexed to the plaint. In the alternative, they prayed for possession of that property. In his application under Order 1, Rule 10, Civil Procedure Code, Banarsi Dass alleged that this Chabutra was a part of the property, which was the subject matter of his suit for specific performance of contract against Smt. Chameli. He further averred that the suit brought by Panna Lal and Banwari Lal against Smt. Chameli was collusive, and Smt. Chameli, by confessing judgment in that case, wanted to defeat his suit for specific performance. In short, it was urged that the decision in the suit brought by Panna Lal and Banwari Lal would incidentally affect his claim against Smt. Chameli. The Subordinate Judge dismissed the petition, holding that Banarsi Dass was neither a necessary nor a proper party to be added as a defendant in the suit instituted by Panna Lal and another. He, therefore, dismissed his application.

3. The first question to be considered, is, whether this revision petition against an order dismissing an application under Order 1, Rule 10, Civil Procedure Code, is maintainable. There is divergence of judicial opinion on this point. Some of the High Courts have held that no revision lies against such an order. But the weight of authority seems to be in support of the view that the High Court can interfere in revision under section 115 of the Code of Civil Procedure, if it finds that there is some material irregularity or illegality in the order. Though the point was not directly discussed, this view is implicit in the decisions of this Court reported as AIR 1951 Punj 352, and 1968-70 Pun LR 98. The observations in AIR 1926 PC 142 also lend support to that view. I would, therefore, answer this question in the affirmative.

4. As regards the merits of the case, I do not find any good ground to issue notice to the respondent. Order 1, Rule 10, Civil Procedure Code, provides for addition of two kinds of parties, namely, (1) necessary parties who ought to have been joined and in whose absence no effective decree can be passed at all, and (2) proper parties, whose presence enables the Court to adjudicate more 'effectively and completely' all the questions involved in the suit. It is admitted by the counsel for the petitioner that Banarsi Dass was not a necessary party to the suit instituted by Panna Lal and other against Smt. Chameli. Nor does he maintain that Banarsi Dass's addition as defendant in the suit brought by Panna Lal, etc., against Smt. Chameli would be necessary to decide 'effectively and completely' the issues between Panna Lal, etc. and Smt. Chameli in that suit. All that the learned counsel says is that the collusive decree that might be passed in favour of Panna Lal, etc., will indirectly injure his interests in the suit for specific performance brought by him against her, and thus force him to institute another suit against Panna Lal and Smt. Chameli with regard to that collusive decree. If Banarsi Dass is added as a defendant in the suit brought by Panna Lal, etc., that would, according to the learned counsel, avoid multiplicity of suits.

5. I am afraid, the contention cannot be accepted. Under sub-para (2) of O. 1, Rule 10, Civil Procedure Code, as already observed, a person may be added as a party to a suit in two cases only, i.e., when he ought to have been joined and is not so joined, i.e., when he is a necessary party, or, when without his presence the questions in the suit cannot be completely decided. In my opinion, there is no jurisdiction to add a party in any other case merely because that would save a third person the expense and botheration of a separate suit for seeking adjudication of a collateral matter, which was not directly and substantively in issue in the suit into which he seeks intrusion. The leading authority on the point is the English case, *Moser v. Marsden*, (1892) 1 Ch 487. The plaintiff, in that case was the patentee of a machine. He brought an action against the defendant for using a machine, which he alleged was an infringement of his patent. M., the maker and patentee of the defendant's machine, applied to be added as a defendant, alleging that a judgment in the action would injure him, and that the present defendant would not efficiently defend the action. It was held that M., not being directly interested in the issues between the plaintiff and defendant, but only indirectly and commercially affected, the Court had no jurisdiction to add him as a de-

fendant. The judgment in that case turned on an interpretation of Order XVI, rule 11, of the Supreme Court, which is in pari materia with Order 1, Rule 10 (2) of the Code of Civil Procedure. The following observations of Lord Justice Lindley would be useful:

"... It cannot be said that the case comes within that part of the rule which provides that the Court may order the names of any parties, whether plaintiffs or defendants, 'who ought to have been joined,' to be added. In no sense can it be said that Montforts ought to have been joined as a party to this action. But reliance is placed on the following words of the rule, which provide for adding the names of parties 'whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter'. But what is the question involved in the action? The question, and the only question is whether what Marsden is doing is an infringement of the Plaintiff's patent.... Can it be said that the rule prevents the Plaintiff from proceeding against a defendant without having to litigate with every body who may be in any way affected, however indirectly, by the action? It appears to me that it does not. The counsel for the Applicant grounded his argument on the allegation that Montforts' interest would be affected by the decision in this action. It is true that his interest may be affected commercially by a judgment against the Defendant, but can it be said that it would be legally affected? Can we stretch the rule so far as to say that whenever a person would be incidentally affected by a judgment he may be added as a defendant?"

6. I am in respectful agreement with the above observations in *Moser's case*, 1892-1 Ch 487. The law in India on this point is the same, i.e. a person may not be added as a defendant merely because he would be incidentally affected by the judgment.

7. Moreover, if Banarsi Dass were to be added as a defendant in the suit commenced by Panna Lal, etc., it would amount to introduction of a new cause of action. The Court would then have to enquire into the circumstances under which Smt. Chameli's agreement with Banarsi Dass entered, an enquiry with which Panna Lal and Banwari Lal had nothing to do. Such a course will supplant Panna Lal's case altogether and would, in substance, drag him into a different controversy between Banarsi Dass and Smt. Chameli.

8. There is difference of judicial opinion among the High Courts on the question, whether the Court has power under

Order 1, Rule 10, Civil Procedure Code, to direct a person to be impleaded as a defendant when the plaintiff is opposed to his addition as a party. The Jammu and Kashmir High Court in Bindru v. Sada Ram, AIR 1960 J & K 67, and Andhra Pradesh High Court in Razia Begum v. Anwar Begum, AIR 1958 Andh Pra 195, have taken the view that the Court has the power to implead a party if it considers that his presence is necessary or proper for disposing of the case, and that an order under the aforesaid rule can be made even if the plaintiff does not consent. On the other hand, the Madras High Court in Pryaga Dass v. Board of Commissioners, ILR 50 Mad 34 : (AIR 1926 Mad 836), Abdul Razack v. Mohammad Shah, AIR 1962 Mad 346, the Madhya Pradesh High Court in Muftabai Begum v. Mehbab Rehman, AIR 1959 Madh Pra 359, and the Andhra Pradesh High Court in Motiram Roshanlal Coal Co. v. District Committee, Dhanbad, AIR 1962 AP 357, have held that no person can be brought on record as defendant, if the plaintiff does not want him, and that if he is a necessary party the suit must fail on account of his non-joinder.

9. I would prefer to steer a middle course and draw the golden mean. As a rule, the Court should not add a person as a defendant in a suit when the plaintiff is opposed to such addition. The reason is that the plaintiff is the dominus litis. He is the master of the suit. He cannot be compelled to fight against a person against whom he does not wish to fight and against whom he does not claim any relief. If opposition by the plaintiff to the addition of parties is to be disregarded as a rule, it would be putting a premium on the undesirable practice of third parties intruding to ventilate their own grievances, into a litigation commenced by one at his own expense against another. The word 'may' in sub-rule (2) imports a discretion. In exercising that discretion, the Courts will invariably take into account the wishes of the plaintiff before adding a third person as a defendant to his suit. Only in exceptional cases, where the Court finds that the addition of the new defendant is absolutely necessary to enable it to adjudicate effectively and completely the matter in controversy between the parties, will it add a person as a defendant without the consent of the plaintiff. An instance of such exceptional cases is furnished by the one reported as AIR 1958 Andh Pra 195. In that case, the plaintiff had sought a declaration that she was the legally wedded wife of the defendant, and the applicant sought to be added as a defendant to contest the claim. The applicant claimed to be another married wife of the defendant.

The prayer was granted on the consideration that the declaration of the status of the party acts, more or less, in rem and affects the parties for generations to come. The case before me is not an exceptional case of that kind.

10. Still there is another aspect of the matter which has been discussed by the learned Subordinate Judge in his order. Banarsi Dass has yet no vested right in the property which is the subject matter of his suit for specific performance. He is still striving to establish his right to the property. So far his right is merely inchoate. He cannot, therefore, be said to be a person whose rights would be legally affected by the decree in Panna Lal's suit.

11. For all the reasons aforesaid, I do not find any force in this petition, which I hereby dismiss in limine.

RSK/D.V.C.

Petition dismissed.

AIR 1969 PUNJAB & HARYANA 60
(V 56 C 11)

MEHAR SINGH C. J. AND
B. R. TULI, J.

P. D. Gaur, Appellant v. N. Balasundram, Respondent.

Letters Patent Appeal No. 106 of 1968, D/- 1-8-1968, from judgment of Khosla J. in Cr. Original No. 111 of 1967, D/- 3-1-1968.

(A) Letters Patent (Lah), CL 10 — Order of Single Judge convicting appellant for disobedience of orders of High Court in Civil proceedings — Order is appealable: AIR 1958 Punj 445, Foll. (Para 4)

(B) Letters Patent (Lah), CL 10 — Parties — Appeal against order of Single Judge convicting a person for contempt of High Court in a case initiated on complaint made by private person and not by Court on its own motion — Court is not made respondent to such appeal. (Para 5)

(C) Contempt of Courts Act (1952), Section 3 — Person not let off on acceptance of apology but convicted of offence of committing contempt of Court — Appeal against conviction can be maintained. (Para 6)

(D) Contempt of Courts Act (1952), Section 3 — State providing counsel to its official for his defence in contempt petition or for presenting and prosecuting appeal against conviction — There is nothing objectionable if State considers that Officer has not committed any contempt or his conviction is unjustified. (Para 7)

(E) Contempt of Courts Act (1952), Section 3 — Complainant obtaining order

IL/JL/D300/68

staying recovery of sales tax from him on furnishing bank guarantee within two months — Order extending period of two months — Taxation Inspector not knowing about order extending period visiting complainant's office to elicit information if any extension has been granted — Knowledge of order on part of inspector not proved — Held, there was no contempt of court: AIR 1962 SC 1089, Foll. Criminal Original No. 111 of 1967, D/- 3-1-1968 (P & H), Reversed.

(Para 9)

Cases Referred: Chronological Paras

(1962) AIR 1962 SC 1089 (V 49)=

1962 (2) Cri LJ 236, Hoshiar Singh v. Gurbachan Singh 9

(1958) AIR 1958 Punj 445 (V 45)=

ILR (1958) Punj 2104 = 1958 Cri LJ 1439, Ram Narain Mathur v. Chief Justice and Judges of the High Court at Chandigarh 4

U. D. Gaur, for Appellant; D. D. Verma and S. K. Aggarwal, for Respondent.

B. R. TULI, J.: On a petition under section 3 of the Contempt of Courts Act, 1952, filed by N. Balasundram, the appellant was held guilty of committing the contempt of this Court and was administered a severe warning by R. P. Khosla, J. The appellant has filed this Letters Patent Appeal against his conviction.

2. The petitioner, N. Balasundram, is the proprietor of Messrs. Eastern Electronics, Faridabad, and he had obtained an ad interim stay order from the Vacation Judge in Civil Writ No. 979 of 1967 staying recovery of the amount of sales tax due on the petitioner's furnishing bank guarantee for the amount in question within two months from the date of order. This order was confirmed on 21st of July, 1967, by Sarkaria, J., and the time was extended by three weeks for putting in the security i.e. upto 18th of August, 1967. On 18th of August, 1967, further extension of two months was granted in the presence of the Advocate for the State and the Departmental Authorities. On 22nd August, 1967, P. D. Gaur, appellant, went to the office of the Eastern Electronics to find out whether the period for furnishing security had been further extended by the High Court. The petitioner, N. Balasundram, alleged in his petition that P. D. Gaur went to his factory on 22-8-1967 at about 10.00 A.M. and threatened Shri B. N. Sharma, Manager, with arrest of the petitioner and attachment of his property. The Manager told him that the Taxation Department was time and again wilfully disobeying the order of this Court whereupon P. D. Gaur asked the Manager to submit an affidavit to the effect that the stay was still operative and valid and time for furnishing the bank guarantee had been further extended. As the peti-

tioner had already left by air for Madras, his Manager regretted his inability to comply with the direction of P. D. Gaur. Ultimately, the Manager gave him a letter addressed to K. R. Awasthy, Excise and Taxation Officer, Faridabad, stating that the time for furnishing bank guarantee had been further extended till 16th October, 1967. P. D. Gaur filed his reply to the contempt petition in which he stated that on 22-8-1967, he did not go to execute any warrant against the petitioner but visited his office for eliciting information if any extension order had been issued and he was informed that a further extension had been allowed on 18-8-1967. He pleaded that he had not committed any contempt and that the rule might be discharged.

3. The learned Single Judge who tried the contempt petition held that since the order for extension of the time for furnishing bank guarantee had been extended on 18th August, 1967, in the presence of the counsel for the Departmental Authorities including P. D. Gaur, there was no justification for the appellant to plead that he had no information about the order having been passed. The learned Single Judge, therefore, held him guilty of contempt and administered severe warning in view of the fact that the appellant had thrown himself at the mercy of the Court and had tendered an unconditional apology.

4. Feeling aggrieved from the order of conviction, the appellant has filed this appeal under clause 10 of the Letters Patent. The learned counsel for N. Balasundram, respondent, has raised four preliminary objections which are dealt with hereafter. The first preliminary objection is that no Letters Patent Appeal is competent. The charge against the appellant was of disobedience of an order of stay granted by this Court in a pending Civil Writ which is a civil proceeding. It has been held by a Division Bench of this Court (Gosain and Grover, JJ.) in Shri Ram Narain Mathur v. The Hon'ble The Chief Justice and the Hon'ble Judges of the High Court at Chandigarh (ILR (1958) Punj 2104) that an appeal under clause 10 of the Letters Patent against the order of a Single Judge of the High Court holding the appellant guilty of contempt of the High Court is competent. Such an order is not made in the exercise of the criminal jurisdiction of the High Court. Even if a distinction between civil and criminal contempts is to be accepted, the order of the Single Judge in this case would still be appealable inasmuch as the punishment awarded by him is for disobedience of the orders of the High Court in civil proceedings which constitute civil contempt. We are in respect-

ful agreement with the proposition of law laid down in that judgment and hold that the Letters Patent Appeal is competent in the present case.

5. The second objection raised by the learned counsel for the respondent is that the Chief Justice and other Judges of this Court were necessary parties to the appeal as the contempt had been committed of this Court. I find no substance in this objection. The petition for contempt was filed by the respondent and was prosecuted by him. It is not necessary that the Chief Justice and the Judges of the High Court should be made parties to an appeal against the order of a Single Judge convicting a person of the offence of having committed the contempt of the High Court in a case initiated on a complaint made by a private person and not initiated by the Court on its own motion. The High Court, in such a case, is the Court of Record entrusted with the power of punishing contempt under the Contempt of Courts Act and the Court whose judgment or order is under appeal is not made a respondent to that appeal.

6. The third objection raised by the learned counsel is that the appeal was not competent as the appellant had tendered unqualified apology. There is no substance in this contention either. The appellant had pleaded that he had not committed any contempt for the reason that he did not know of the extension of time granted by this Court and that he had gone to the office of the respondent merely to elicit information whether the time had been extended. During the course of the trial, he tendered unqualified apology to avoid any severe punishment. The appellant was not let off on the acceptance of his apology but was convicted of the offence of having committed contempt of Court and for this reason he has the right to file an appeal against his conviction.

7. The fourth objection is that the appeal has been filed by the State and is, therefore, incompetent. The memorandum of appeal shows that the appellant is P. D. Gaur and the memorandum of appeal at the end is signed by the Assistant Advocate General and Public Prosecutor, Haryana. It means that the State of Haryana provided its own counsel to the appellant which is not at all objectionable. Even before the learned Single Judge, the appellant was defended by a State counsel. I do not find anything objectionable in the State providing a counsel to its official for his defence in a contempt petition or for presenting and prosecuting his appeal against conviction if it considers that the officer has not committed any contempt or his conviction is unjustified.

8. There being no force in the preliminary objections raised by the learned counsel for the respondent, I proceed to determine whether any contempt was committed by the appellant.

9. Admittedly the stay order passed by Sarkaria, J., on 21st July, 1967, had extended the period for furnishing the bank guarantee till 18th of August, 1967, and on the latter date, the time was further extended by two months in the presence of the Advocate for the State and the Departmental Authorities. 18th August 1967, was a Friday and it has not been proved on the record that any intimation of the extension of time had been given to the appellant on the 18th August, 1967, or that he had got the information of the order extending the time before he went to the office of the respondent on 22nd August, 1967. The appellant stated that he had no such knowledge of the order extending the time and had gone to the petitioner's office to elicit information whether the time had been further extended on the 18th August, 1967, or not. It has been held by the Supreme Court in *Hoshier Singh v. Gurbachan Singh*, AIR 1962 SC 1089 that in the matter of a prohibitory order it was well settled that it was not necessary that the order should have been served upon the party against whom it had been granted in order to justify committal for breach of such an order, provided it was proved that the person complained against had notice of the order aliunde. It was, therefore, necessary for the respondent to prove that the appellant had the information or the knowledge of the extension of the order for furnishing bank guarantee prior to 22nd August, 1967, when he went to the office of the petitioner. This fact not having been proved, the appellant had not disobeyed the order of this Court by going to the office of the petitioner on 22nd August, 1967, and he cannot be said to have committed any contempt of Court.

10. For the reasons given above, this appeal is allowed and the conviction of the appellant is set aside. There will, however, be no order as to costs.

11. MEHAR SINGH, C. J.: I agree.
RSK/D.V.C. Appeal allowed.

AIR 1969 PUNJAB & HARYANA 62
(V 56 C 12)

P. C. PANDIT, J.

Umrao Singh Gopi Chand and others,
Petitioners v. State of Haryana through
the Secy. Town and Country Planning,
Department, Chandigarh and others, Res-
pondents

Civil Writ No. 2603 of 1967, D/- 30-7-1968.

IL/JL/D820/68

Land Acquisition Act (1894), Ss. 6, 5A, 4 and 17 (1) — Proceedings for acquisition of land — Notification under S. 4 mentioning that objection to acquisition could be filed within 30 days before Land Acquisition Collector—Notification under Ss. 6 and 17 (1) — Notification held to be not bad in law.

Proceedings for acquisition of certain lands on which residential houses had been constructed and tubewells were installed, commenced by notification under section 4 dated 8-9-1966. That notification mentioned that any objection to acquisition could be filed within 30 days of publication of that notification before Land Acquisition Collector. Notification was duly published in Official Gazette and by beat of drum in places concerned. No objection was filed within 30 days of publication of that notification. Notification under Ss. 6 and 17 (1) was issued on 29-7-1967. Part of notification under section 17 (1) was quite separate and distinct from one under section 6. These two parts were not interdependent and action could be taken separately under each part. Validity of notification under S. 6 was challenged in writ petitions by persons concerned. Government categorically stated in return that recourse to section 17 (1) and possession of land would not be taken before award was made.

Held that validity of notification under section 6 could not be challenged on ground that no opportunity of filing objection under section 5A was given. Grievance against action under section 17 (1) had been satisfied by State. Notification under S. 6 was not bad in law. AIR 1965 SC 1763, Dist.; 1968 Cur LJ 389 (Punjab), Foll. (Paras 6 to 10)

Cases Referred: Chronological Paras

- (1968) 1968 Cur LJ 389=70 Pun LR 601, Tej Bhan Chugh v. State of Haryana 81
 (1965) AIR 1965 SC 1763 (V 52)= 1966 All LJ 1, Sarju Prasad Saha v. State of Uttar Pradesh 8, 81
 (1964) AIR 1964 SC 1217 (V 51)= ILR (1964) 1 All 1, Nandeshwar Prasad v. Uttar Pradesh Government 11

H. L. Sarin with Bhal Singh Malik, for Petitioners; Anand Sarup, Advocate-General (Haryana), for Respondents.

ORDER: This order will dispose of four connected writ petitions, Nos. 2603, 2724 and 2824 of 1967 and 294 of 1968, in which the same points are involved for decision. It is conceded by the counsel for the parties that the decision in C. W. 2603 of 1967 will cover the other cases as well. I will, therefore, refer to the facts of that writ petition only.

2. This petition under Articles 226 and 227 of the Constitution has been fil-

ed by Umrao Singh and 15 others, residents of Faridabad, district Gurgaon, challenging the notification dated 29th of July, 1967, issued by the Governor of Haryana. The said notification reads thus:

"No. 2141/LAO.—Whereas the Governor of Haryana is satisfied that land specified below is needed by Government, at the public expense, for a public purpose, namely, for Planned Development of Sector No. Seventeen in Ballabgarh-Faridabad Controlled Area, in tehsil Ballabgarh, district Gurgaon, it is hereby declared that the land described in the specification below is required for the aforesaid purpose.

This declaration is made under the provisions of section 6 of the Land Acquisition Act I of 1894, to all whom it may concern and under the provisions of section 7 of the said Act, the Land Acquisition Collector, Directorate of Urban Estates, Haryana, Chandigarh, is hereby directed to take order for the acquisition of the land.

Plans of the land may be inspected in the offices of the Land Acquisition Collector, Directorate of Urban Estates, Haryana, Chandigarh, and Estate Officer, Urban Estates, Department of Town and Country Planning, Faridabad, district Gurgaon.

In view of the urgency of acquisition, viz. relieving of acute and pressing demand for housing in Faridabad, Ballabgarh belt, due to large scale development of industry in that area, the Governor of Haryana in exercise of the powers under section 17 of the said Act, is further pleased to direct that the Land Acquisition Collector, Directorate of Urban Estates, Haryana, Chandigarh, shall proceed to take possession of the land here-in specified in accordance therewith.

xx xx xx xx
 The case of the petitioners was that their land, on which they had constructed pucca residential houses and installed tubewells, was covered by the said notification. According to them, in the third week of October, 1967, they received notices from the Land Acquisition Collector respondent No. 2 issued under section 9 of the Land Acquisition Act, 1894 (hereinafter called the Act), calling upon all persons interested in the land specified in the said notification that they should attend personally or by agent at the Canal Rest House, Faridabad on 9-11-1967 to state the nature of their respective interest in the land and particulars of their claims to compensation for such interest. In the various notices, issued under section 9 of the Act, the land sought to be acquired and belonging to the petitioners, was mentioned. It was on the receipt of

those notices that the petitioners learnt for the first time about the acquisition proceedings and the impugned notification. Their case was that the land sought to be acquired was neither waste nor arable and, consequently, the provisions of section 17 of the Act could not be invoked in the instant case. The petitioners were never called upon to file their objections under section 5-A of the Act before issuing the impugned notification.

The petitioners, therefore, bona fide believed that the compliance of S. 5-A of the Act had been dispensed with by the State of Haryana, respondent No. 1. In spite of their best efforts, the petitioners had not been able to find out from the Government Gazette if any notification had been issued by respondent No. 1 under section 4 of the Act. The impugned notification has been challenged solely on the ground that the powers under sub-section (1) of S. 17 of the Act could be exercised by respondent No. 1 only in respect of arable land as laid down therein and not with respect to the land on which pucca residential houses were standing and tube-wells installed. It was also contended that the notification under section 6 of the Act was issued by respondent No. 1, without following the procedure prescribed by section 5-A of the Act, which was obligatory. By taking the impugned action, according to the petitioners, the Government had deprived them of a very valuable right of filing objections under section 5-A of the Act. If an opportunity had been given to them to do so they could have objected to the acquisition of the land and proved to the satisfaction of the Collector that the said land should not be acquired. Under these circumstances, a prayer was made that the entire notification should be quashed.

3. In the return filed by the State, it had been mentioned that the notifications under sections 4 and 6 of the Act had been duly published in the Government Gazette and they had also been given due publicity by beat of drum by the Patwaris concerned in the villages in which the lands were situated. It was thus incorrect to say that the petitioners were not in the know of the said notifications. It was also said that immediate possession, under section 17 of the Act, had also so far not been taken from the petitioners. The possession would be taken from them, as soon as the award was announced and compensation paid for the land and the constructions etc., acquired by the Government. The compliance of the provisions of section 5-A of the Act was not dispensed with. On the other hand, in the notification under section 4 of the Act, it was notified that objections under section 5-A

should be filed with the Land Acquisition Collector. In fact, many objections were received from other interested persons, but the petitioners did not do so. The notification under section 6 of the Act was made in accordance with law, because the procedure prescribed by section 5-A of the Act had been followed.

4. During the course of the arguments, the Advocate General, Haryana, made a statement at the bar that award had been made in all the cases and compensation had been deposited in Court. The possession of the land had been taken from the petitioners in C. Ws. 2724 and 2824 of 1967 and 294 of 1968, but not in C. W. 2603 of 1967. It was further stated by him that the notification under section 4 of the Act had been published in the official Gazette and public notice of the same had been given by beat of drum in all the villages, with which we were concerned in these writ petitions. It was admitted by him that objections under S. 5-A of the Act had not been filed by the petitioners in all these cases. They had, however, filed their claims under section 9 of the Act. It was also stated by him that where there was a dispute between the owners and the perpetual lease-holders as to who out of them, namely, owners and perpetual lease holders of the land, were entitled to the compensation amount, the Land Acquisition Collector would deposit the said amount in Court in terms of section 31 (2) of the Act and the same would not be paid to anybody till the dispute between the claimants was settled by the Court.

5. The validity of the notification under section 6 of the Act has been challenged on the ground that the petitioners had not been given any opportunity of filing objections under section 5-A of the Act. It was only when those objections had been decided that a notification under section 6 could be issued.

6. There is no substance in this contention, because if the petitioners had not filed any objections under section 5-A they themselves were to be blamed for that. It is clear from the return filed by the State that a notification under section 4 had been issued on 8th of September, 1966. In that notification, it had been clearly mentioned that any person, who had any objection to the acquisition of some land in that locality, he could, within 30 days of the publication of that notification, file an objection in writing before the Land Acquisition Collector, Directorate of Urban Estates, Punjab, Kothi No. 231, Sector 18-A, Chandigarh. The said notification had been duly published in the official Gazette and the Collector had given public notice of the same by beat of

- (1935) AIR 1935 All 1002 (V 22)=
ILR 58 All 370, Nihal Chand B. v.
Mt. Bhagwan Dei 21, 22, 23, 24
- (1934) AIR 1934 All 527 (V 21)=
151 Ind Cas 141, Nihal Chand
B. v. Mt. Bhagwan Dei 21, 23
- (1929) AIR 1929 All 676 (V 16)=
ILR 51 All 986, Bhagwan Das v.
Zamurrad Hussain 21, 24
- (1928) AIR 1928 All 201 (V 15)=26
All LJ 49, Fazal Haq v. Fazal
Haq 23
- (1928) AIR 1928 All 717 (V 15)=ILR
50 All 706, Chhedi Ram v. Gokul
Chand 23
- (1928) AIR 1928 Nag 39(2) (V 15)=
105 Ind Cas 113, Shridhar v.
Rajabhau 21, 23
- (1926) AIR 1926 Oudh 352 (V 13)=
13 Oudh LJ 512, Baqridi v. Rahim
Bux 22, 23
- (1926) AIR 1926 Oudh 541 (V 13)=
29 Oudh Cas 136, Mt. Subhaga
v. Janki 21, 23
- (1925) 1925-1 JLR (Pt IX) 11,
Khair Uddin v. Jagannath 22
- (1924) 1924-1 JLR (Pt. V) 3, Kesar-
lal v. Malilal 22
- (1915) AIR 1915 All 218 (V 2)=
(1915) 13 All LJ 361, Jamil-Ud-
din v. Abdul Majeed 23
- (1894) ILR 16 All 69=1893 All WN
217, Abdul Rahman v. D. Emile 23
- (1887) ILR 10 All 358=1888 All
WN 135, Gokul Prasad v.
Radho 22, 23, 24
- K. N. Tikku, for Appellants; D. P.
Gupta, for Respondent.

JUDGMENT :— This second appeal arises from the judgment and decree of Senior Civil Judge, Jaipur City, dated October 5, 1960.

2. The parties own properties on Mirza Ismail Road, in Jaipur City. The plaintiffs are the descendants of Hamid Hussain who, according to them, was the owner of their house under gift deed Ex. 6 dated January 1, 1931 made by Nawab Mukarram Ali Khan (D. W. 2) in favour of Hamid Hussain. Adjacent to it, towards the east, is a piece of open land (AMNY) measuring 83' x 16', and the plaintiffs claim that it also belonged to them as it was a part of the gifted house. The property of the defendant is situated along the eastern boundary of this open piece of land, and the defendant claims to be the owner of that property on the basis of a purchase from the Nawab to whom both the properties once belonged. The defendant constructed a building on the plot of land purchased by him from the Nawab, and as he opened a number of doors and windows on the ground and the first floor facing the eastern portion of the house of the plaintiffs, and also built a balcony on the first floor, the plaintiffs felt aggrieved because, ac-

ording to them, this caused "bepardgi" of the persons using the open piece of land, and their house. The plaintiffs also felt aggrieved because the defendant laid a sewer line under the aforesaid open piece of land (measuring 83' x 16'), and built four water spouts and laid some cement pipes on it.

3. The defendant denied the claim of the plaintiffs altogether. He pleaded that the house occupied by the plaintiffs did not belong to them, that the open piece of land AMNY was not their property and that it belonged to Nawab Mukarram Ali Khan who had given him the right to use it. He also pleaded that there was no "bepardgi" of the house of the plaintiffs by the construction of the doors and windows in his western wall, and that there was no interference with the right of privacy of the plaintiffs. It was further pleaded that the sewer line was laid with the permission of the Nawab. As regards the water spouts, it was pleaded that the defendant had every right to use them. Some other pleas were also taken in defence, but it is not necessary to refer to them.

4. Although no agreed site-plan is available on the record, it is not disputed that plan Ex. 1 (a) correctly shows the disputed open piece of land AMNY, as well as the well on its southern end, the plaintiffs' wall towards the east and their house. There is however a dispute regarding the alleged location of a dilapidated latrine, and another latrine on the northern side of the open land. I have therefore used the site-plan Ex. 1 (a), with the consent of the learned counsel for the parties, for the purpose of understanding the location and the nature of the house of the plaintiffs, the location of the property of the defendant including his western wall which forms the eastern boundary of the open piece of land AMNY and the location of the well.

5. The trial court framed a number of issues and held that while the house of the plaintiffs belonged to them, the open piece of land AMNY was not their property although it was in their possession for a long time. It also held that there was a custom of "parda" in the family of the plaintiffs and that while the right of privacy was recognized in Jaipur City, it was not consistent with the Constitution. Besides, it held that the right could not be recognized for the further reason that the disputed constructions did not have any effect on the inner apartments in which the ladies resided. As regards the sewer line the trial court held that it had been laid with the permission of the Nawab as well as the plaintiffs and could not be removed. The claim regarding the removal of the water spouts and the pipes was also

rejected for the reason that they did not discharge the dirty water. The suit of the plaintiffs was therefore dismissed on December 23, 1958.

6. The plaintiffs preferred an appeal, which has been disposed of by the impugned judgment of the Senior Civil Judge referred to above. That judge also held that the open piece of land AMNY did not belong to the plaintiffs and that even though a part of the verandah and the courtyard of the house of the plaintiffs were visible from the windows of the defendant, and the balcony of the defendant overlooked the plaintiffs' courtyard and verandah, that was not sufficient to constitute an actionable claim because there was no interference with the privacy of any of the rooms of the plaintiffs. He also held that the claim of the plaintiffs was repugnant to the Constitution, and went on to observe that since the defendant had given an offer to raise the wall of the plaintiffs at his own cost and the plaintiffs had refused that offer, there was no justification for the exercise of the court's discretion in their favour. Further, the learned Judge observed that even though the plaintiffs had cited a judgment showing that the custom of privacy existed in Jaipur town, they did not plead or prove that it continued to remain in force after the commencement of the Easements Act.

7. It may be mentioned that as it was not quite clear from the pleadings of the parties, or the issues, whether the plaintiffs claimed the right of privacy merely on a customary right, or whether they based it on the provisions of section 18 of the Easements Act, the learned counsel for the appellants submitted that the case really fell within the purview of section 18 and requested that it may be decided only on that basis. Mr. Gupta, learned counsel for the defendant-respondent, did not raise any objection to this request. I shall therefore proceed to examine the case with reference to the said section 18.

8. It is not disputed in this court that the house occupied by the plaintiff is their property for purposes of the present suit, and I need not go into the merits of the earlier controversy on that point. There is however a dispute regarding the ownership and possession of the open piece of land AMNY measuring 83' x 16' and this part of issue No. 1 will therefore be considered first of all. (After considering evidence the judgment proceeded, Prs. 9 to 14).

15. It would thus appear that there is no reason to disagree with the concurrent finding of fact of the two courts below that the plaintiffs had not succeeded in proving that the disputed land AMNY was their property.

16. I shall now proceed to consider the claim regarding the easement. The plaintiffs felt aggrieved because of the opening of doors and windows on the ground floor, and the opening of the windows on the first floor as well as the construction of the balcony, and the claim has been based on section 18 of the Easements Act. It has however not been pressed before us in regard to the doors and windows on the ground floor, and the question is whether it has rightly been disallowed for the windows on the first floor and the balcony?

17. It has been argued by Mr. Gupta that the plaintiffs should not be heard to say that they had any such customary right of privacy because they did not plead it, did not join issue in regard to it, and did not prove it by evidence. The learned counsel has therefore argued that it would prejudice the defendant if the plea is seriously considered in this second appeal and that the courts below also erred in considering it.

18. I have examined the entire record for the purpose of considering this submission of Mr. Gupta. I find that the plaintiffs have used the word "bepardgi" four times in the plaint, and the context leaves no room for doubt that by using that word they really claimed a right of privacy. Thus the statement in the plaint that the new windows caused "bepardgi", was really meant to convey the plea that they invaded the right of privacy of the plaintiffs. Even the word "privacy" has been used in the plaint in specific terms. Moreover a perusal of the written statement shows that the defendant understood, in fact and substance, that by using the word "bepardgi" the plaintiffs were really claiming the right of privacy. It would be sufficient in this respect to refer to those parts of paragraphs 2 and 3 of the written statement in which the defendant clearly took the defence that there was no "bepardgi" by the impugned constructions and that they did not interfere with the right of "privacy" of the plaintiffs. Besides, the plaintiffs have also pleaded that the custom of "parda" was prevalent in Jaipur, and in India the right of privacy can be said to be based largely on that custom. It is therefore futile to argue that the plaintiffs have not taken the plea that the windows and the balcony were invasions on their right of privacy in the house. In almost similar circumstances, this court took the view in *Gokalchand v. Briinarain*, 1954 Raj LW 710 that the use of the word "bepardgi" in the plaint was sufficient to sustain the plea of right of privacy. I am in respectful agreement with this view.

19. It is true that the issues do not, in terms, refer to the right of privacy.

and issue No. 3 (a) no doubt deals with the question whether there was a custom of "parda" in the plaintiffs' family, while issue No. 3 (b) appears to relate to the question whether such a custom of "parda" was established and well recognized in Jaipur City. But a perusal of issue No. 3 (c) shows that the real point asked by issues Nos. 3 (b) and 3(c) was that relating to the existence of the right of privacy in Jaipur City, for there could really be no question of the constitutional invalidity of the private custom of "parda" amongst the ladies. The fact, therefore, that issue No. 3 (c) relates to the question of invalidity of the custom referred to in issue No. 3(b), shows that both those issues relate only to the question of the right of privacy, and not the personal right of observing "parda" by the women-folk residing in individual families or localities. This is further clear from the fact that the issue No. 4 clearly raises the question whether the disputed constructions infringe the right of privacy in the plaintiffs' house? By itself, this is quite sufficient to negate the argument that the plaintiffs had not pleaded or joined issue on the question of the right of privacy. Besides, the defendant undoubtedly knew that it was this point which was the real and substantial point of controversy with the plaintiffs, and plaintiff Mumtaz Hussain P. W. 5 was therefore cross-examined about it. It is therefore futile to argue that a new case was made up during the course of the arguments in the two courts below, to the prejudice of the defendant. The parties went to the trial with the knowledge that the question of the existence of the right of privacy was in issue between them, and they had ample opportunity to lead their evidence in regard to it. As a matter of fact, in a case where a well-known custom exists, it is not very necessary that the plaintiffs should set up the existence of such a custom in any great detail or with any particular emphasis.

20. I shall therefore proceed to consider the question whether a right of privacy, of the nature claimed by the plaintiffs, existed in the locality but, before doing so, I may as well refer to the nature of such a customary easement. It is different from a mere customary right, or a right arising by custom, but unappurtenant to a dominant tenement. The reason is that, as I had occasion to observe in *Ramchandra Singh v. Pratap Singh*, ILR (1965) 15 Raj 948 : (AIR 1965 Raj 217), while it is no doubt true that custom gives rise to a customary right as well as a customary easement, there is a vital difference between the two as section 2 (b) of the Easements Act makes it quite clear that the Act does not deal with a customary right. The reason is

that customary rights are rights arising by custom, but unappurtenant to a dominant tenement, while a customary easement can exist only for the beneficial enjoyment of other land and it is appurtenant to the dominant heritage and cannot exist in gross. All the same, where a customary easement is claimed by virtue of section 18, the essential characteristics of a custom bearing on it have to be established. The courts, however, recognized the customary right of privacy even before the commencement of the Easements Act, in States or localities where it was found to exist, and it was only later that it was recognized as an easement under section 18 of the Easements Act.

21. A case like the present falls under illustration (b) of section 18, but even so the right is different from a prescriptive easement which comes into existence by user over the prescribed length of time. There is no such requirement in the case of a customary easement because nobody really knows when it first came into existence. The right is not, however, personal to any individual or society, and is attached to land for its beneficial enjoyment, as has been held in *Bhagwan Das v. Zamurad Hussain*, AIR 1929 All 676; *Nihal Chand v. Mt. Bhagwan Dei*, AIR 1934 All 527 and its appellate judgment in *Nihal Chand v. Mt. Bhagwan Dei*, AIR 1935 All 1002, *Mt. Daroupdi Debi v. S. K. Dutt*, AIR 1957 All 48, *Mt. Subhaga v. Mt. Janki*, AIR 1926 Oudh 541, *Shridhar v. Rajabhau*, AIR 1928 Nag 39 (2), *Laduram v. Sheodev*, 1959 Raj LW 273 and ILR (1965) 15 Raj 948 = AIR 1965 Raj 217.

22. Having referred to the nature of a customary easement of privacy, I may as well deal here with the questions of its proof. By its very nature, the origin of a custom is lost in antiquity, but the evidence has, nonetheless, to be such as to prove that the custom was consciously followed or recognized as governing the locality for which it is claimed, and one of the modes of proof is to establish the particular instances, referred to in section 13 (b) of the Evidence Act, in which it was claimed, recognized or exercised. In that context, judgments not inter partes will also be relevant if they relate to the custom, even though they may not be conclusive proof thereof. It is also well established that in the case of a customary easement, the court can take judicial notice of a well-established custom, and I may in this connection refer to the decision in *Baqridi v. Rahim Bux*, AIR 1926 Oudh 352 for the view that this can be done by virtue of section 57 of the Evidence Act which is not exhaustive. In fact in the leading case of *Gokul Prasad v. Radho*, (1887) ILR

10 All 358 their Lordships based their decision on a consideration of all the reported and unreported decisions bearing on the point, and gave judicial recognition to the customary right of privacy in what were then known as the North-Western Provinces. In AIR 1935 All 1002 it has been held that it is open to a court to take judicial notice of a custom and it is not necessary that there should be evidence in each case to establish it. In the present case, I have no hesitation in taking judicial notice of the custom as recognised in Jaipur, in the cases which have been cited at the Bar, for the purpose of holding that a customary right or easement of privacy was well established in Jaipur City. I may refer here to the decisions in *Kesarial v. Lalilal*, 1924-1 JLR (Pt V) 3; *Khair Uddin v. Jagannath*, 1925-1 JLR (Pt IX) 11 and *Kanhaiya v. Sedhu*, 1940-13 JLR 86. Two of these judgments were noticed in 1954 Raj LW 710 and it was held by Sharma J. in his abovementioned judgment that even though the plaintiffs had not led any evidence to prove that the custom of privacy prevailed in the Jaipur City, the judgments of the Jaipur Chief Court fully proved that there was such a custom. It was therefore held by him that, "it may be taken that the custom of privacy has become so notorious in the city of Jaipur that the courts can take even a judicial notice of it". Following this view, I have no hesitation in taking judicial notice of the aforesaid judgments and in holding, in the absence of any evidence to the contrary, that a customary right of privacy existed in Jaipur for such a length of time as to suggest that it became the customary law of the locality so as to become a customary easement within the meaning of section 18 of the Jaipur Easements Act, 1943 (Act No. VI of 1943), or section 18 of the Indian Easements Act of 1882.

23. But it is necessary for a customary easement that it should not only be ancient and certain, but that it should also be reasonable, because this is another essential requirement of a valid custom. A custom will not therefore have the sanction of section 18 of the Easements Act if it is not reasonable, but wherever the claim has been found to be reasonable, it has been upheld by courts of law. A number of decisions have been rendered on the point and I may refer to the well-known decision of *Edge C. J.* in (1887) ILR 10 All 358 which was followed by him in *Abdul Rahman v. D. Emile*, (1894) ILR 16 All 69. Those two decisions were given before the commencement of the Indian Easements Act in the North-Western Provinces, but they have been followed thereafter in *Jamil-ud-din v. Abdul Majeed*, 13 All LJ 361 (AIR 1915 All 218), *Chhedil Ram v.*

Gokul Chand, AIR 1928 All 717; AIR 1934 All 527 and its appellate judgment AIR 1935 All 1002 and *Bhulan Lal v. Altaf Husain*, AIR 1945 All 335. The same view has been taken in *Fazal Haq v. Fazal Haq*, AIR 1928 All 201, *Mt. Jarao v. Sri Nath Byas*, AIR 1949 All 308 and AIR 1957 All 48. So far as the other High Courts are concerned, I may refer to the decisions in AIR 1926 Oudh 352; AIR 1926 Oudh 541, AIR 1928 Nag 39 (2), *Gulabchand Gappalal Sarawgi v. Manikchand Gulabchand Sarawgi*, AIR 1960 Madh Pra 263 and *Keshab Sahu v. Dasaratha Sahu*, AIR 1961 Orissa 154. So far as the decisions of this court are concerned, I have already referred to 1954 Raj LW 710 and 1959 Raj LW 273. In paragraphs 8 and 9 of *Laduram's case*, 1959 Raj LW 273 it has been observed that

"A person is not entitled to a customary easement right of privacy merely on the ground that a custom of "Parda" is observed in his family. A customary easement right of privacy is not a personal right of an individual but is a right attached to property and that although the right cannot be stretched to oppressive lengths, an actionable case can only arise when there is substantial interference with the privacy of those parts of the house which are used by pardanashin women."

It would thus appear that in all the cases mentioned above, the right of easement has been upheld wherever it was found to be reasonable.

24. Mr. Gupta, learned counsel for the respondent, has cited four cases for a contrary submission, but I find that all of them are easily distinguishable. In AIR 1929 All 676 the claim was disallowed for the reason that the plaintiffs made no effort of any sort whatever to prove, and had not even alleged, that a customary right of privacy existed in the particular neighbourhood in which they were living, and that was the reason why their Lordships did not uphold the claim. It may be observed, with all respect to the learned Judges who decided the case, that they did not take notice of the numerous other decisions, besides the case of *Gokal Prashad* (1887) ILR 10 All 358, in which the Allahabad High Court had taken the view that the customary right of privacy was well established in the United Provinces and that it was not really necessary that the existence of that customary easement should have been proved in respect of the particular locality for which it was claimed when it had been held to have existed all over the Provinces. In fact another Bench of the same High Court in AIR 1935 All 1002 did not approve of that judgment and disposed of it by observ-

ing that the attention of the learned Judges was not drawn to the fact that there had been numerous cases of that court subsequent to Gokal Prasad's case, (1887) ILR 10 All 358 in which such a right of privacy had been recognized even without strict proof of the existence of a custom in the particular locality. Jivraj Virjee v. Keshavji Lakhamshi, AIR 1952 Kutch 22, does not seem to benefit the respondent because, far from rejecting a claim for a customary right of privacy under section 18 of the Easements Act, it has been held therein that privacy could be claimed in respect of premises or those parts of premises which are secluded from observation. It is true that there is a further observation to the effect that privacy could not be claimed in respect of a garden, a courtyard or a verandah, but this has expressly been stated to be so if they are not intended to be secluded from observation. The decision therefore cannot avail the respondent. The decision in Kanbi Deva Karsan v. Kanbi Bava Punja AIR 1953 Sau 67 was based on AIR 1952 Kutch 22 and the right of privacy was upheld by custom for those portions of the house which could be considered as private. That judgment also cannot be said to be of any help to the respondent. Of course, Basai v. Hasan Raza Khan, AIR 1963 All 340 is a case in which some observations have been made against the view taken in Gokal Prashad's case, (1887) ILR 10 All 358 but, with all respect to the learned Judge who decided it, it appears to me that his remarks are in the nature of obiter dicta and they cannot, at any rate, be said to express the considered view of this court which has, in fact, been stated in the numerous cases to which I have made a reference already.

25. Mr. Gupta has however raised another argument, with reference to issue No. 3 (c), that the easement of privacy claimed by the plaintiffs is unconstitutional. He has argued that Article 19 (1) (f) of the Constitution guarantees the fundamental right to all citizens "to acquire, hold and dispose of property," and that the defendant's right to hold his property is an absolute right and the plaintiffs could not make a grievance if he exercised it by constructing a house in which there were windows or balconies overlooking any portion of the house of the plaintiffs. The learned counsel has argued with reference to Ishwari Prosad v. N. R. Sen, AIR 1952 Cal 273 (FB) that the right to hold the property guaranteed by the Constitution includes the right to enjoy the same and that where a person's enjoyment of property is restricted, his right to hold the property is also thereby restricted. So also,

the learned counsel has relied on K. Ramchandran v. Commr. Hyderabad Municipal Corporation, AIR 1960 Andh Pra 603 for the submission that a person is entitled under Article 19 (1) (f) to acquire property by raising a building upon his own land and no restriction, not statutorily authorised, can be imposed upon the exercise of that right.

26. The argument seems, however, to be based on a misconception of the scope of Article 19 (1) (f) of the Constitution and the decisions of the Calcutta and the Andhra Pradesh High Courts just referred. Clause (5) of the article reads as follows,—

"(5). Nothing in sub-clauses (d), (e) and (f) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, reasonable restrictions on the exercise of any of the rights conferred by the said sub-clauses either in the interests of the general public or for the protection of the interests of any Scheduled Tribe."

It is therefore an integral part of the foundational right to hold the property, enshrined in clause (1) of article 19, that it should be subject to the operation of any law imposing reasonable restrictions on the exercise of that right; and the question is whether any restriction, nothing to say of an unreasonable restriction, has at all been imposed by S. 18 of the Easements Act in so far as it relates to the easement of privacy.

27. The said section 18 and illustration (b) thereof are to the following effect,—

"18. Customary Easements. An easement may be acquired in virtue of a local custom. Such easements are called customary easements.

Illustrations.

(a) "

(b) By the custom of a certain town no owner or occupier of a house can open a new window therein so as substantially to invade his neighbour's privacy. A builds a house in the town near B's house. A thereupon acquires an easement that B shall not open new windows in his house so as to command a view of the portions of A's house which are ordinarily excluded from observation and B acquires a like easement with respect to A's house."

It would thus appear that there is really no restriction on B's right in favour of A's house because, as has been made amply clear in the illustration, B also acquires a like easement with respect to A's house, so that the right really exists for the benefit of both the properties in an equal manner and on a completely equal footing. If there is a restriction on

B's right on account of the right of privacy for A's house, there is an counter-vailing advantage, in equal measure, in favour of B's house. In such a case, therefore, it is futile to argue that anybody's right to property is adversely affected or restricted and this by itself is sufficient to foreclose the argument of Mr. Gupta to the contrary.

28. It is true that the fundamental right to hold one's property guaranteed by the Constitution is a right to enjoy all the benefits attached to the ownership of the property, and if such an enjoyment is restricted, the restriction would undoubtedly affect the right adversely. But human life is very complex, and an unfettered fundamental right of even such a nature may, in a given state of circumstances, adversely affect a similar right of another person. And it is for the purpose of harmonizing the exercise of the right to property of every member of the society that the Constitution has made it clear in clause (5) that the right mentioned in sub-clause (f) of clause (1) shall be subject to the reasonable restrictions imposed by the law in the interest of the general public.

29. The test of reasonableness of any such restriction has been stated by their Lordships of the Supreme Court in *Chintamanrao v. State of Madhya Pradesh*, AIR 1951 SC 118 by observing that the restriction should not be arbitrary or of excessive nature, beyond what is required in the interest of the public, so that the restricting legislation can be held to be reasonable if it strikes a proper balance between the freedom guaranteed under Art. 19 (1) (g) and the social control permitted by the restriction contemplated in its subsequent clause. A similar point arose for consideration in the State of Madras v. V. G. Row, AIR 1952 SC 196 and their Lordships laid down the test of the reasonableness of the restriction by saying that it should be decided with reference to the nature of the right alleged to have been infringed, the underlying purpose of the restriction imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition and the prevailing conditions at the time. The reason is that, as has been observed in *Hathisingh Manufacturing Co. Ltd., Ahmedabad v. Union of India*, AIR 1960 SC 923, the object is to achieve social justice in the interest of the general public. In other words, the court has to take into account the evil that was sought to be remedied by such law and the ratio of the harm caused to individual citizens, by the proposed remedy, to the beneficial effect reasonably expected to result to the general public, *Narendra Kumar v. Union of India*, AIR 1960 SC 430.

30. It has therefore to be seen whether the customary easement of privacy of the nature claimed by the plaintiffs is reasonable so as to be recognized under section 18 of the Easements Act. As the right is based on custom which, as has been stated, has to fulfil the requirement of reasonableness before it can claim its recognition in a court of law, the question of the reasonableness is the *sine qua non* of the claim. It is therefore for the court to decide whether this requirement has been fulfilled, and to uphold only that claim which is reasonable and substantial. If therefore it is found that the intrusion on one's privacy is of a substantial nature or, in other words, as has been stated in illustration (b) of section 18 of the Easements Act, if the offending new window of B's house invades the privacy of those portions of A's house which are ordinarily excluded from observation, there is no reason why A should not succeed in his claim for their closure.

31. What is substantial invasion on the neighbour's privacy, is a matter to be examined with reference to a number of factors like the climatic condition, the habits of the people, and the conditions of domestic life in the locality. For instance, in a city like Jaipur, the climatic conditions are such that for several months in the year the ladies are compelled to sit in the verandahs or in the open in the evenings and to sleep there during the nights. The habits of people are also such that the women, particularly Muslim women of middle class society, observe "parda", and the conditions of the domestic life confine their activities to the inner parts of the houses. It is true that in changing society these factors undergo changes from time to time, and notions about invasion on one's right of privacy also undergo a consequential change. The pace of the change depends largely on the state of social work and literacy in the area but, by its very nature, the process is quite tardy. As it is, there is no evidence to show that the customary easement of privacy has been given up in Jaipur City. On the other hand, as has been stated, it was found to exist in 1954 and it has not been contended that it has ceased to exist thereafter. So it remains for the courts to decide what really amounts to a substantial invasion on the neighbour's right of privacy, and this duty has to be discharged with a greater sense of responsibility wherever changed circumstances of social life are shown to exist. In the present case, however, no such change has been pleaded or proved.

32. It is in this background that it has to be decided whether it could be said that the plaintiffs' easement of privacy has been adversely affected by

the construction of the windows and the balcony on the first floor.

33. In order to arrive at a decision, I have looked into the plan of the plaintiffs' house Ex. 1 (a). It shows that there is a row of four rooms, with a running tin-shed towards the north and a courtyard thereafter. It is therefore unavoidable for the women of the house to use the tin-shed as and when necessary, and to sit and sleep in the courtyard in the evenings and the nights during the summer. The plaintiffs have proved that the women of their house observe "parda" and that the courtyard is clearly visible from the defendant's windows on the first floor so much so they have to set up a "parda" or screen before the women can go to sleep. The defendant has admitted that the ladies of the house of the plaintiffs must be sitting outside the rooms in the tin-shed and the courtyard and must be sleeping in the courtyard. He has also admitted that the courtyard is visible from his windows and that a person sitting in the tin-shed is visible from the balcony. Further he has admitted that the ladies go about in "parda". Then there is the inspection note of the Munsiff which has been read in evidence with the consent of the learned counsel for the parties, and it also shows that the courtyard and portion of the verandah are visible from the windows on the first floor and a major portion of the verandah is visible from the balcony. This has in fact not been disputed in this court, and the very fact that the defendant offered to raise the wall of the plaintiffs at his own expense, shows that he realised that his windows and balcony on the first floor invaded the privacy of the plaintiffs' house. The invasion of the right of privacy is therefore substantial and it is quite reasonable that the offending windows should be walled up, or covered with permanent "Jalis" known locally as "akashi patali Jalis" for, this is also considered sufficient by the learned counsel for the appellants. So far as the balcony is concerned, it has either to be removed or so enclosed to make it impossible for any one to look into the tin-shed or the courtyard of the house of the plaintiffs.

34. In the result, I allow the appeal in part and set aside the judgment of the lower appellate court to the extent of decreeing the suit by directing that the windows in the western wall of the house of the defendant, on the first floor, shall be walled up or covered with permanent "Jalis" known locally as "akashi patali jalis", and the balcony removed or so enclosed as to make it impossible for any one to look into the courtyard or tin-shed of the plaintiffs. Further, it is decreed that the defendant

shall be restrained from opening any such offending window or building any such balcony in the future. The appeal fails with regard to the claim for the closure of the door and the windows on the ground floor. Besides, as the open piece of land AMNY is not the property of the plaintiffs, the appeal is dismissed in regard to the rest of the claim also. The parties will be entitled to costs in proportion to their success or failure, throughout.

RSK/D.V.C.

Order accordingly.

AIR 1969 RAJASTHAN 39 (V 56 C 9)

V. P. TYAGI

AND C. M. LODHA, JJ.

Municipal Council, Ajmer and another, Appellants v. Sadulla and another, Respondents.

Criminal Appeals Nos. 615 of 1967 and 18 of 1968 D/- 25-4-1968 against judgment of S. J., Ajmer, D/- 6-9-1967.

Prevention of Food Adulteration Act (1954), S. 20 — Interpretation — Prosecution under the Act — Sanction from authorities mentioned in the section, not contemplated.

The language of Section 20 does not in any manner indicate that the legislature by making this provision in the Act intended that before launching a prosecution against a person under this Act any sanction was at all necessary. The only safeguard that has been provided by this provision is that nobody except the authorities mentioned in this section and the persons empowered by the authorities can launch the prosecution. (Para 6)

Where by a general resolution the Municipal Council had delegated power to the Law Superintendent or the Municipal Prosecuting Inspector of the Council to institute the prosecution under the provisions of the Act, and the complaint in the case was filed by such officer about two months after the passing of the resolution, the Sessions Judge acted erroneously in setting aside the conviction on the ground that the resolution could not serve as a sanction for prosecuting the accused under Act. The general delegation made under the resolution was permissible under Section 20. (Para 6)

The resolution was also not violative of Section 20 on the ground that it had empowered two persons to institute prosecutions. The section contains no such prohibition because the singular word "person" will include plural under Section 13 (2) of the General Clauses Act and as such the Municipal Council could authorise more than one person to move the court to get the offenders prosecuted. (Para 8)

Cases Referred: Chronological Paras
(1963) AIR 1963 SC 1 (V 50) =
(1963) 3 SCR 22, Vishwanathan
v. Abdul Majid 7

S. K. Jindal, for Appellant (Municipal Council, Ajmer); Neki Das, for Sadulla, accused; A. R. Mehta, for the State.

TYAGI, J.: Both these appeals, one filed by the Municipal Council, Ajmer and the other by the State of Rajasthan are directed against the judgment of the learned Sessions Judge, Ajmer dated 6-9-1967 whereby the respondent Sadulla has been acquitted of the charge under S. 7 read with section 16 of the Prevention of Food Adulteration Act (hereinafter referred to as "the Act") and it raises an important question about the interpretation and the scope of S. 20 of the said Act.

2. On a complaint filed by the Law Superintendent and Municipal Prosecuting Inspector against respondent Sadulla the trial court recorded a finding that the milk sold by Sadulla had 53% of water in it, and, therefore, he was guilty of an offence under S. 7 read with section 16 of the Act and sentenced him to six months' rigorous imprisonment and a fine of Rs. 500/-. The learned Judge on an appeal set aside the conviction of the respondent on the ground that the complaint was filed against the respondent without obtaining proper sanction from the competent authority under section 20 of the Act. During the course of trial the prosecution did not produce before the Court any order empowering the complainant to file the complaint, and it was at that stage that a resolution of the Municipal Council dated 30th March, 1966 Ex. C. 2 was brought on the record. The resolution reads as follows:

"Resolved that the Law Superintendent or the Municipal Prosecuting Inspector of this Council is hereby authorised to institute prosecutions under the provisions of the Prevention of Food Adulteration Act, 1954 (Act XXVII of 1954) as required by S. 20 of the said Act."

3. The learned Sessions Judge did not consider this resolution sufficient to comply with the requirement of S. 20 of the Act as according to him this resolution was passed on 30-3-1966 and the complaint in this particular case was filed on the 23rd May, 1966 about 2 months after the passing of the said resolution and therefore in his opinion the resolution could not serve as a sanction for prosecuting the respondent under the provisions of the Act.

4. In order to understand the real point in controversy raised before us it will be relevant to reproduce S. 20 around which the controversy revolves. S. 20 of the Act runs as follows:

"S. 20. Cognizance and trial of offences:

(1) No prosecution for an offence under this Act shall be instituted except by, or with the written consent of, the Central Government or the State Government or a local authority or a person authorised in this behalf, by general or special order, by the Central Government or the State Government or a local authority."

The proviso is not necessary to be reproduced as there is no controversy about it.

5. From the perusal of this section it is clear that it provides as to who are those authorities or persons who can launch a prosecution under the provisions of the Act. The plain grammatical meaning of this section is that under its provisions the prosecution can be instituted,

(i) by the Central Government;

(ii) by the State Government;

(iii) by a local authority;

(iv) by a person authorised in that behalf;

by any of the above referred authorities either by general or special order.

6. It so appears that the learned Judge while dealing with this provision of law misdirected himself to a question of according a sanction before the prosecution is actually launched in a Court of law. As a matter of fact this provision of law does not in any manner provide for according a sanction by any authority before filing a complaint in the Court of law for an offence committed under the Act. It simply deals with the subject as to who are the persons who can institute prosecution in the Court of law. According to S. 20 the prosecution can be launched either by the Central Government, the State Government, local authority or a person authorised in that behalf either by general order or special order or by any of these three authorities referred to above, or by a person in whose favour the authorities referred to in this section have given a written consent to file the complaint. The language of the section does not in any manner indicate that the legislature by making this provision in the Act intended that before launching a prosecution against a person under this Act any sanction was at all necessary. The only safeguard that has been provided by this provision is that nobody except the authorities mentioned in this section and the persons empowered by the authorities can launch the prosecution. In the present case we find that by a general resolution the Municipal Council, Ajmer had delegated to the Law Superintendent or the Municipal Prosecuting Inspector of the Council to institute the prosecution under the provisions of the Act. This kind of gene-

ral delegation is permissible under the provisions of S. 20 as it has been mentioned therein that the Central Government or a local authority can authorise a person in that behalf by general or special order. We do not find any flaw in the resolution Ex. C-2 passed by the Municipal Council, Ajmer empowering the Law Superintendent or the Municipal Prosecuting Inspector to prosecute the persons who are considered guilty of an offence under the Act. The learned Judge, in our opinion, acted erroneously to think that such general delegation is not permissible under section 20 of the Act and that in each case the authorities mentioned in section 20 including those which are delegated with a power to launch prosecution must apply their mind before a sanction is accorded to prosecute a person.

7. The learned Judge has referred to a Supreme Court decision in *Vishwanathan v. Abdul Majid*, AIR 1963 SC 1 in his judgment. It so appears that he did not carefully go through the entire judgment. In that judgment itself we find that the learned Judges of the Supreme Court have upheld the view of the High Court that under this section the prosecution can be instituted,

- (i) by the State Government;
- (ii) by a local authority;
- (iii) by a person authorised in that behalf by the State Government, or
- (iv) by a person similarly authorised by a local authority.

By the time when this case came before the Supreme Court S. 20 was not amended and therefore their Lordships did not consider whether the Central Government was also authorised to launch the prosecution under this provision of law.

8. Learned counsel appearing on behalf of the respondent-accused urged that the resolution passed by the Municipal Council is violative of the provisions of section 20 as in this resolution the Municipal Council has empowered two persons (i) Law Superintendent, and (ii) Municipal Council Prosecuting Inspector to institute the prosecution under the provisions of this Act, whereas section 20 requires that the authorities mentioned in that section can empower only one person because the words used in this section are "a person". In this view of the matter he contended that the resolution should be declared as invalid and on the strength of such a resolution the prosecution of the respondent accused should be declared to be invalid. We find no force in this argument of the learned counsel, firstly because we are told by the learned counsel for the Municipal Council, Ajmer that the incumbent who is holding the charge of Law Superintendent in the Municipal Council is also working as Municipal Prosecuting Ins-

pector and thus there is only one man who has been authorised by this resolution to launch the prosecution under the provisions of the Act. Even if there are two persons who have been empowered by this resolution we do not find that section 20 contains any such prohibition because under section 13 (2) of the General Clauses Act singular will include plural and as such the Municipal Council should authorise more than one person to move the Court to get the offenders prosecuted.

9. It was next urged by the learned counsel for the respondent that the respondent Sadulla was not the person from whom the milk was purchased by the Inspector and he has been prosecuted for some other person of identical name. We cannot accept this contention of the learned counsel for the respondent because we find that the respondent himself when examined under section 342, Cr. P. C. admitted that it was he who had sold the milk to the Inspector. In these circumstances if there was some difference in the name of the respondent's father, we cannot accept that he was not the person who was selling the milk which was found to be adulterated by the Chemical Analyst.

10. In the end it was prayed that looking to the family conditions of the respondent Sadulla that he has a blind wife and he is the only earning member in the family lenient view may be taken about the sentence. We regret we cannot accept this prayer of the learned counsel because the trial court has awarded the minimum sentence which is prescribed under the law, and we cannot go below the minimum.

11. The result is that both the appeals are allowed, the judgment of the learned Sessions Judge, Ajmer dated 6-9-1967 is set aside and the conviction and sentence awarded to the respondent under section 7 read with section 16 of the Act, by the Municipal Magistrate, Ajmer, vide his judgment dated 21st August, 1967 are restored. Instructions may be issued to the District Magistrate, Ajmer to get the respondent arrested forthwith and send him to jail to serve out the sentences which are upheld by this Court.

CWM/D.V.C. Appeals allowed.

AIR 1969 RAJASTHAN 41 (V 56 C 10)

D. S. DAVE, C. J.
AND C. M. LODHA, J.

Ramsingh, Petitioner v. State of Rajasthan and others, Respondents.

Civil Writ Petn. No. 369/66, D/- 25-7-1968.

JL/KL/E650/68

Constitution of India, Art. 226 — Writ proceedings—Proceedings are Civil Proceedings — Even though provisions of Civil P. C. may not directly apply, such of the provisions as are not in conflict with Rajasthan High Court Rules can apply — Provisions of O. 9 R. 9 can be applied.

Article 226 of the Constitution has conferred an extraordinary jurisdiction on the High Court and the mode of exercising the same is governed by Rules that the Court has framed. The provisions contained in the Civil P. C. will not be attracted to this special jurisdiction in terms, because section 4 (1) of the Civil P. C. provides that in the absence of any specific provision to the contrary, nothing in this Code shall be deemed to limit or otherwise affect any special or local law not in force or any special jurisdiction or power conferred, or any special form of procedure prescribed, by or under any other law for the time being in force. It is thus clear that special procedure has been provided in the Rules of the High Court for writ proceedings under Article 226 of the Constitution and, therefore, the provisions of the Civil P. C. cannot apply in terms to such proceedings. This, however, does not mean that the principles contained in the Code of Civil Procedure would have no application at all to the writ proceedings. Those provisions of the Civil P. C. which do not come in conflict with the Rules made by the High Court of Rajasthan and which can be suitably made applicable to the writ proceedings, will apply to writ proceedings. In other words, even though the provisions of the Civil P. C. may not apply with full rigour to writ proceedings, writ proceedings would nonetheless be governed by the principles analogous to those contained in the Code of Civil Procedure so far as they are not inconsistent with the Rules made by the High Court on the subject. Thus provisions of O. 9 R. 9 can suitably be applied to writ proceedings. AIR 1961 SC 1457 & AIR 1962 SC 1334 and AIR 1963 SC 946 and AIR 1965 SC 1153 and AIR 1964 SC 1013 and AIR 1966 SC 1332 and AIR 1955 Raj 56 and AIR 1963 Punj 510 and AIR 1958 Andh Pra 16 and AIR 1957 Cal 702 and AIR 1959 Mad 137, Ref.

(Paras 12, 13 & 14)

Cases Referred: Chronological Paras

- (1968) AIR 1968 Raj 20 (V 55) = 1967 Raj LW 14, Chandmal Nauratmal v. State of Rajasthan 10, 13
 (1967) AIR 1967 All 334 (V 54) = 1967 All LJ 232, Asst. Dist. Panchayat Officer, Rai Bareilly v. Jai Narain Pradhan 6
 (1967) AIR 1967 Cal 275 (V 54) = ILR (1966) 1 Cal 14, Krishnalal Sadhu v. State of W. B. 5

- (1966) AIR 1966 SC 1332 (V 53) = (1966) 3 SCR 300, Sheodan Singh v. Daryao Kunwar 2
 (1965) AIR 1965 SC 1153 (V 52) = (1965) 2 SCR 547, Gulabchand Chhotalal Parikh v. State of Gujarat 4, 10, 11
 (1965) AIR 1965 SC 1818 (V 52) = (1965) 57 ITR 149, S. A. L. Narayan Raw v. Ishwar Lal Bhagwandas 12
 (1964) AIR 1964 SC 1013 (V 51) = (1963) Supp (1) SCR 172, Amalgamated Coalfields Ltd. v. Janapada Sabha Chhindwara 2
 (1963) AIR 1963 SC 946 (V 50) = (1963) 1 SCR 1, State of U. P. v. Dr. Vijay Anand Maharaj 4, 12
 (1963) AIR 1963 Punj 510 (V 50) = ILR (1963) 2 Punj 341, Sonaram Rangaram v. Central Govt. 13
 (1962) AIR 1962 SC 1334 (V 49) = (1962) Supp (1) SCR 315, Devendra Pratap Narain Rai Sharma v. State of U. P. 4, 10
 (1961) AIR 1961 SC 1457 (V 48) = (1962) 1 SCR 574, Daryao v. State of U. P. 2
 (1961) AIR 1961 Raj 268 (V 48) = 1961 (2) Cri LJ 796, State v. Ugam Singh 11
 (1959) AIR 1959 Mad 137 (V 46) = ILR (1959) Mad 75, Management of Rain Bow Dyeing Factory, Salem v. Industrial Tribunal 13
 (1958) AIR 1958 Andh Pra 16 (V 45) = ILR (1957) Andh Pra 678, Annam Adinarayana v. State of Andhra Pradesh 13
 (1957) AIR 1957 Cal 702 (V 44) = 61 Cal WN 694, Bharat Board Mills Ltd. v. Regional Provident Fund Commr. 13
 (1955) AIR 1955 Raj 56 (V 42) = ILR (1955) 5 Raj 321, Nahar Singh v. State of Rajasthan 8
 (1953) AIR 1953 Raj 201 (V 40) = 1954 Raj LW 134, Taxi Motor Association Kankroll v. Appellate Transport Authority 7, 14

M. M. Tewari, for Petitioner; R. K. Rastogi, for Respondent No. 7; M. M. Vyas, Addl. Advocate General, for the State.

LODHA, J.: By this writ application, the petitioner has challenged the correctness of the judgment of the Board of Revenue, Rajasthan, dated 24-12-60, whereby the respondent No. 7, namely, Smt. Roop Kanwar, daughter of Thakur Jait Singh, the last holder of the jagir of Charwas, was recognised as his heir and compensation on account of the resumption of his jagir was ordered to be paid to her.

2. We do not think it necessary to set out the facts stated in the writ application in detail, as, in our opinion, the writ application deserves to be disposed of on the preliminary objection raised by the learned counsel for the respondent No. 7. The preliminary objection is that the present writ application is not maintainable. In order to appreciate the preliminary objection, it would be necessary to give a few facts leading to the filing of this writ petition.

3. The impugned decision of the Board of Revenue was given on 24-12-60. A writ application challenging the correctness of the said decision of the Board of Revenue was filed in this Court by the petitioner on 23-5-61 and was registered as D. B. Civil Writ Petition No. 273 of 1961. It was admitted on 30-5-61 and after service of notices on the opposite parties, it was listed for hearing on 13-1-65. On this date no body appeared on behalf of the petitioner with the result that it was dismissed in default. An application for restoration was filed and the writ application was restored on 7-4-65. Unfortunately for the petitioner, the writ application was again dismissed in default on 13-4-66 in the presence of Shri D. P. Gupta, counsel for respondent No. 7. This time also an application for restoration was made on 18-4-66, but it was dismissed after hearing the learned counsel for the petitioner on 20-4-66. It would be proper to reproduce the order of the Court dated 20-4-66 dismissing the application for restoration. It is as follows:

"We have heard learned counsel and perused the application and affidavits filed on behalf of the petitioner for restoration of his writ application. We are sorry to have to say that the affidavit filed by Mr. R. S. Kejriwal that this case was taken up at 3 O'clock in the day and that he was watching it until that time is factually incorrect for we fully remember that this case was taken up before lunch and we dismissed it then and Om Prakash's case which was No. 5 on day's list was started immediately after lunch. In these circumstances, we are entirely unable to accept the petitioner's application for restoration as it fails to disclose sufficient cause for the same. The application is accordingly dismissed."

This is the second writ application which has been filed on 3-5-66 on the same facts. In the reply filed on behalf of respondent No. 7, an objection has been taken that the previous writ application having been dismissed in default in the presence of the counsel for respondent No. 7 and the application for its res-

toration also having been dismissed, this second writ application does not lie.

4. We have heard learned counsel for the parties at considerable length. Mr. Tewari, learned counsel for the petitioner, has vehemently argued that this second writ application is not bad and in support of his contention, he has relied on a number of decisions of their Lordships of the Supreme Court. He has referred to *Daryao v. State of U. P.*, AIR 1961 SC 1457, *Devendra Pratap Narain Rai Sharma v. State of U. P.*, AIR 1962 SC 1334, *State of Uttar Pradesh v. Dr. Vijay Anand Maharaj*, AIR 1963 SC 946, *Amalgamated Coalfields Ltd. v. Janapada Sabha, Chhindwara*, AIR 1964 SC 1013, *Gulabchand Chhotalal Parikh v. State of Gujarat*, AIR 1965 SC 1153 and *Sheodan Singh v. Daryao Kunwar*, AIR 1966 SC 1332. We have gone through all these decisions and do not think it necessary to discuss the propositions of law laid down by their Lordships of the Supreme Court in them, because, according to us, none of them has a direct bearing on the facts and circumstances of the present case. Suffice it to say that the propositions of law, in this connection, have been laid down by their Lordships of the Supreme Court in AIR 1965 SC 1153, referred to above, and we cannot do better than to reproduce them hereunder:

1. If a petition under Art. 226 is considered on the merits as a contested matter and is dismissed, the decision would continue to bind the parties unless it is otherwise modified or reversed by appeal or other appropriate proceedings permissible under the Constitution.

2. It would not be open to a party to ignore the said judgment and move this Court under Art. 32 by an original petition made on the same facts and for obtaining the same or similar orders or writs.

3. If the petition under Art. 226 in a High Court is dismissed not on the merits but because of the laches of the party applying for the writ or because it is held that the party had an alternative remedy available to it, the dismissal of the writ petition would not constitute a bar to a subsequent petition under Art. 32.

4. Such a dismissal may, however, constitute a bar to a subsequent application under Art. 32 where and if the facts thus found by the High Court be themselves relevant even under Art. 32.

5. If a writ petition is dismissed in limine and an order is pronounced in that behalf, whether or not the dismissal would constitute a bar would depend on the nature of the order. If the order is on the merits, it would be a bar.

6. If the petition is dismissed in limine without a speaking order, such

dismissal cannot be treated as creating a bar of *res judicata*.

7. If the petition is dismissed as withdrawn, it cannot be a bar to a subsequent petition under Art. 32, because, in such a case, there had been no decision on the merits by the Court."

Learned counsel for the petitioner submits that in the above case one of the propositions of law laid down is that if a writ petition under Article 226 of the Constitution is dismissed in limine without a speaking order, such dismissal cannot be treated as creating a bar of *res judicata*. The learned counsel for respondent No. 7, on the other hand, submits that he has no quarrel with the proposition submitted by the learned counsel for the petitioner on the basis of the various decisions given by their Lordships of the Supreme Court, but his contention is that the present writ application is barred not on the principles of *res judicata* but on account of the principle contained in O. 9, R. 9 of the Code of Civil Procedure and Rule 382 of the Rules of this Court. We may also state, at once, that the question of *res judicata* is not involved in the present case as it is not the case of any of the parties that the institution of the present writ application is hit by S. 11 C.P.C. or by the general principles of *Res Judicata*. The only question, therefore, is, whether the petitioner is precluded from filing this writ petition on account of the principles contained in O. 9, R. 9, C. P. C. and/or the provisions contained in Rule 382 of the Rules of this Court. O. 9, R. 9, C. P. C. reads as follows:

"O. 9, R. 9 (1):— Where a suit is wholly or partly dismissed under Rule 8, the plaintiff shall be precluded from bringing a fresh suit in respect of the same cause of action. But he may apply for an order to set the dismissal aside, and if he satisfies the Court that there was sufficient cause for his non-appearance when the suit was called on for hearing, the Court shall make an order setting aside the dismissal upon such terms as to costs or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit.

(2) No order shall be made under this rule unless notice of the application has been served on the opposite party." At this stage, we may also reproduce Rule 382 of the Rajasthan High Court Rules, 1952. It runs as follows:

"R. 382 — Where an application has been rejected, it shall not be competent for the applicant to make a second application on the same facts."

The argument of the learned counsel for respondent No. 7 proceeds thus. By making reference to section 141 C. P. C.

he submits that a petition under Art. 226 of the Constitution falls within the ambit of a civil proceeding as used in that section. He contends that a writ application under Art. 226 is a civil proceeding to which the procedure provided in the Code of Civil Procedure in regard to suits will apply. Consequently, he submits that by pressing into service O. 9, R. 9, C. P. C. the present writ application would be barred as the previous writ application has been dismissed in the presence of the opposite party and the application for its restoration was also dismissed. In the alternative, he submits that even if the provisions contained in the Code of Civil Procedure are not made applicable in terms, the principle behind O. 9, R. 9 would nevertheless be applicable. Lastly, he contends that apart from the provisions of the Code of Civil Procedure, the present application would also be barred under Rule 382 of the Rules of this Court which lays down that where an application under Art. 226 of the Constitution has once been rejected, it shall not be competent for the applicant to make a second application on the same facts.

5. Before embarking upon the consideration of the contentions raised by the learned counsel for the respondent No. 7, we may state that there is no dispute between the parties that the present writ application is based on the same facts on which the previous writ application, referred to above, was filed by the petitioner. Now, it remains to be considered whether the present writ application is barred under O. 9, R. 9 C. P. C. Learned counsel for the respondent No. 7 has invited our attention to a number of decisions in support of his contention that a writ application filed before this Court under Art. 226 is a civil proceeding. In *Krishnalal Sadhu v. State of West Bengal*, AIR 1967 Cal 275 it was observed that section 141 C. P. C. was directly attracted to an application under Art. 226 of the Constitution and, therefore, such provisions of the Code of Civil Procedure as can be suitably applied to writ proceedings were applicable to such proceedings." In this view of the matter, the learned Judges of the Calcutta High Court held that the provisions of O. 22 C. P. C. would be applicable to writ proceedings.

6. Again, in Assistant District Panchayat Officer, Rae Bareilly v. Jainarain Pradhan, AIR 1967 All 334, it was held that "when the proceedings in a High Court on a petition under Art. 226 of the Constitution relate to civil rights, they are civil proceedings." It was further held that "writ proceedings being civil proceedings, the provisions of the Code of Civil Procedure apply to them

under section 141 C.P.C., in so far as the provisions of the Code can be made applicable."

7. Learned counsel for the respondent No. 7 also invited our attention to three decisions of our own High Court. Firstly, in *Taxi Motor Association, Kankroli v. Appellate Authority, Transport*, 1954 Raj LW 134 : (AIR 1953 Raj 201) to which one of us was a party, it was held that "the Court has an inherent power to deal with an application to set aside an ex parte order made on an application for issue of a writ under Art. 226 of the Constitution on a proper case having been made out." It was further held that "even though section 141 CPC may not be specifically applicable, the Court has inherent powers on the analogy of O. 9, R. 13 CPC to set aside its ex parte order for the ends of justice and preventing the abuse of process."

8. A question again cropped up before this Court whether an application for issue of a writ under Art. 226 is to be treated as a civil proceeding for the purpose of grant of leave to Supreme Court under Art. 133 of the Constitution. In *Nahar Singh v. State of Rajasthan*, AIR 1955 Raj 56, it was held that "under the Rules of the Rajasthan High Court, writ proceedings are dealt with in two Chapters, namely Chapter XXI and Chapter XXII. Chapter XXI deals with writs of Habeas Corpus or with applications under section 491 Cr. P. C., while Chapter XXII deals with all writs under Art. 226 of the Constitution other than a writ in the nature of the Habeas Corpus. It is obvious from this distinction made in the Rules that writs of Habeas Corpus are criminal proceedings, while all other writs are treated as civil proceedings in this Court. There can be no doubt, therefore, that an application for a writ other than the writ of Habeas Corpus, challenging the validity of an Act is a civil proceeding."

9. We may then refer to *State v. Ugamsingh*, AIR 1961 Raj 268. In that case, while dealing with a matter arising out of the proceedings under section 479A, Cr. P. C., it was observed that the expression 'Civil Court' was not defined anywhere and if the proceedings before a duly constituted court were of such a nature that they will involve a decision of the civil rights of the parties and the Court has jurisdiction to decide those rights, it would be in consonance with the general principles of interpretation to hold that the court exercising jurisdiction in such a matter was acting as a civil court. It was further observed that "on the broad principle this Court must be taken to be acting as a civil court while deciding a writ application pertaining to a civil right of a

party". On the basis of the aforesaid decisions, learned counsel for the respondent No. 7 has submitted that according to the view taken by this Court in the earlier decisions, a writ application under Art. 226 of the Constitution must be held to be a civil proceeding and as a necessary corollary, the procedure laid down in the Code of Civil Procedure must, as far as it can be, made applicable to it, by virtue of section 141 C. P. C.

10. In this connection, the learned counsel for the petitioner has placed strong reliance on the following observations of their Lordships of the Supreme Court in AIR 1962 SC 1384 referred to above:

"The High Court has disallowed to the appellant his salary prior to the date of the suit. The bar of O. 2 R. 2 of the Civil Procedure Code on which the High Court apparently relied may not apply to a petition for a high prerogative writ under Art. 226 of the Constitution, but the High Court having disallowed the claim of the appellant for salary prior to the date of the suit, we do not think that we would be justified in interfering with the exercise of its discretion by the High Court."

To lend further force to his argument, he has referred to a still later decision of their Lordships of the Supreme Court in AIR 1965 SC 1153 referred to above. In that case, while dealing with the impact of the principles of *res judicata* on writ proceedings, their Lordships also examined the applicability of O. 2 R. 2 CPC to such proceedings and expressed themselves in the following terms:

"It is urged that if a decision in a writ application on merits be held to operate as *res judicata* in a regular suit, the provisions of O. 2, R. 2, CPC would also be applicable to the institution of the subsequent suit with respect to such part of the cause of action for which no relief was sought in the writ petition. The contention is not sound as the provisions of O. 2, R. 2 apply only to suit. Sub-rule (1) requires that every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court. Sub-rule (2) then provides that where a plaintiff omits to sue in respect of or intentionally relinquishes any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished. By its very language, these provisions do not apply to the contents of a writ petition and consequently do not apply to the contents of a subsequent suit."

On the question whether in a writ application filed under Art. 226 of the

Constitution the procedure laid down in the Code of Civil Procedure would be applicable or not, the learned counsel for the petitioner has placed reliance on a Bench decision of this Court in *Chandmal Nauratmal v. State of Rajasthan*, AIR 1968 Raj 20. So far as the observations made by their Lordships of the Supreme Court are concerned, we may state at once that in AIR 1962 SC 1334, referred to above, the question had not arisen at all as to whether a writ is a civil proceeding and whether the procedure laid down in the Code of Civil Procedure would be applicable to writ procedure. In that case, the writ application was dismissed by the High Court on the ground that the petitioner's claim for salary was barred by virtue of O. 2, R. 2 CPC. On appeal, their Lordships of the Supreme Court concurred with the view expressed by the High Court and did not feel persuaded to interfere with the order of the High Court passed in the exercise of its writ jurisdiction and it was observed that the bar of O. 2, R. 2 CPC may not apply to writ proceedings. Thus, the question whether the writ proceedings fall within the ambit of civil proceedings was not at all canvassed before their Lordships of the Supreme Court.

11. Again in AIR 1965 SC 1153, *Supra*, the question whether the writ proceedings before the High Court under Art. 226 of the Constitution are civil proceedings was not at all dealt with. What was contended in that case was that O. 2, R. 2, CPC would not apply to writ proceedings and their Lordships by interpreting O. 2, R. 2, CPC on its very language held that these provisions do not apply to the contents of a writ petition and consequently do not apply to the contents of a subsequent suit. The rationale of the decision therefore is that if in a writ application certain portion of a claim is omitted, such an omission in the writ application would not bar its inclusion in a suit subsequently instituted. Thus, the point which we are called upon to determine was not the subject matter of decision before their Lordships of the Supreme Court in any of these cases.

12. Another decision relied upon by Mr. Tewari in support of his contention that a writ under Art. 226 is not a civil proceeding is AIR 1963 SC 946. All that their Lordships of the Supreme Court were pleased to lay down in that case was that "it is clear from the nature of the power conferred under Article 226 and the decisions on the subject that the High Court in exercise of its power under Article 226 exercises original jurisdiction though the said jurisdiction shall not be confused with its original civil jurisdiction."

It was further observed that "this jurisdiction, though original in character as contrasted with its appellate and revisional jurisdictions, is exercisable throughout the territories in relation to which it exercises jurisdiction and may, for convenience, be described as extraordinary original jurisdiction." This extraordinary original jurisdiction, however, may, in our opinion, be civil or criminal. It may be observed that if a writ application under Art. 226 is made before the High Court for enforcement of any civil rights, then the extraordinary original jurisdiction which the High Court would exercise in such a matter would amount to a civil proceeding. We have been able to lay our hands on a later decision of their Lordships of the Supreme Court in *S. A. L. Narayan Row v. Ishwarlal Bhagwandas* (1965) 57 ITR 149 : (AIR 1965 SC 1818) where such a view has been taken. In that case, while dealing with the question of applicability of Art. 133 of the Constitution to writ proceedings before the High Court, their Lordships of the Supreme Court were pleased to observe as follows:

"A civil proceeding is therefore one in which a person seeks to enforce by appropriate relief the alleged infringement of his civil rights against another person or the State, and which if the claim is proved would result in the declaration express or implied of the right claimed and relied such as payment of debt, damages, compensation, delivery of specific property, enforcement of personal rights, determination of status, etc."

Again, after discussing the law on the subject, their Lordships were pleased to arrive at the following conclusion:

"By a petition for a writ under Article 226 of the Constitution, extraordinary jurisdiction of the High Court to issue high prerogative writs granting relief in special cases to persons aggrieved by the exercise of authority statutory or otherwise by public officers or authorities is invoked. This jurisdiction is undoubtedly special and exclusive, but on that account the nature of the proceeding in which it is exercised is not altered. Where a revenue authority seeks to levy tax or threatens action in purported exercise of powers conferred by an Act relating to revenue, the primary impact of such an act or threat is on the civil rights of the party aggrieved and when relief is claimed in that behalf it is a civil proceeding, even if relief is claimed not in a suit but by resort to the extraordinary jurisdiction of the High Court to issue writs."

Thus, it is idle to argue that when a writ application is filed before the High Court invoking its extraordinary

jurisdiction under Art. 226 of the Constitution for enforcement of the civil rights, it is not a civil proceeding.

13. The question still, however, remains whether section 141 CPC would apply in terms to writ proceedings instituted under Article 226 of the Constitution. We may state at once that the judicial opinion is divided on this question and we have not been able to lay our hands on any pronouncement of their Lordships of the Supreme Court on this point. A few authorities have been cited by the learned counsel for respondent No. 7, as mentioned above, in support of his contention that S. 141 C.P.C. applies to writ proceedings and to those we may further add two more authorities, one of the Punjab High Court *Sonaram Rangaram v. Central Government*, AIR 1963 Punj 510 and the other of the Andhra Pradesh High Court *Annam Adinarayana v. State of Andhra Pradesh*, AIR 1958 Andh Pra 16. A contrary view has been taken by the Calcutta High Court in *Bharat Board Mills Ltd. v. Regional Provident Fund Commissioner*, AIR 1957 Cal 702 and the Madras High Court in *Management of Rain Bow Dying Factory, Salem v. Industrial Tribunal*, AIR 1959 Mad 137. But so far as this Court is concerned, we must bear in mind that in the Rules made by this Court special procedure has been provided with respect to petitions under Article 226 of the Constitution. Chapter XXII of the Rules of this Court deals with direction, order or writ under Art. 226 of the Constitution other than a writ in the nature of habeas corpus. Thus, as observed in an earlier decision of this Court in AIR 1968 Raj 20, referred to above, Art. 226 of the Constitution has conferred an extraordinary jurisdiction on the High Court and the mode of exercising the same is governed by Rules that the Court has framed." It was further emphasised that the provisions contained in the Code of Civil Procedure will not be attracted to this special jurisdiction in terms, because section 4 (1) of the Code of Civil Procedure provides that in the absence of any specific provision to the contrary, nothing in this Code shall be deemed to limit or otherwise affect any special or local law not in force or any special jurisdiction or power conferred, or any special form of procedure prescribed, by or under any other law for the time being in force. It is thus clear that special procedure has been provided in the Rules of this Court for writ proceedings under Art. 226 of the Constitution and, therefore, the provisions of the Code of Civil Procedure cannot apply in terms to such proceedings. This, however, does not mean that the principles contained in the Code of Civil Procedure would

have not application at all to the writ proceedings. In our view, those provisions of the Code of Civil Procedure which do not come in conflict with the Rules made by this Court and which can be suitably made applicable to the writ proceedings, will apply to writ proceedings. In other words, even though the provisions of the Code of Civil Procedure may not apply with full rigour to writ proceedings we are of the opinion that writ proceedings would nonetheless be governed by the principles analogous to those contained in the Code of Civil Procedure so far as they are not inconsistent with the Rules made by this Court on the subject.

14. Learned counsel for respondent No. 7 submits that there is no provision in the Rules of this Court either setting aside the ex parte proceedings in a writ matter or for making an application for restoration of the writ application dismissed in default and, therefore, the provisions contained in the Code of Civil Procedure, in this respect, can be suitably applied to the writ proceedings.

In AIR 1953 Raj 201 referred to above, it was observed by this Court that even though section 141 CPC may not be specifically applicable, the Court has inherent powers on the analogy of O. 9 R. 13 CPC to set aside its ex parte order for the ends of justice and preventing the abuse of process. Learned counsel submits that on the same principle the present writ application is not maintainable in view of the fact that the earlier writ application on the same facts was dismissed in default in the presence of the opposite party and the application for restoration too was dismissed. He also submits that the principle contained in O. 9, R. 9 CPC is indeed a salutary principle, inasmuch as there is no reason why a party should be harassed for the same cause over and over again when the Court has once held that the petitioner has been guilty of laches.

It is further submitted by him that if the proposition submitted by the learned counsel for the petitioner is accepted, it would result not only in great harassment of the parties, but would also entail unnecessary waste of Court's time. We are of the view that the submission made by the learned counsel for the respondent No. 7 is not without force, and if the contention raised on behalf of the petitioner to the effect that the petitioner has a right to invoke the extraordinary jurisdiction of this Court under Art. 226 of the Constitution successively unless the matter has been disposed of on merits, is driven to its logical conclusion, it would result in *reductio ad absurdum*.

The result of acceptance of such a proposition would mean that even though a writ application may have remained pending for a few years and then it has been dismissed in default or may have been disposed of for any other reason except on merits, the petitioner would have a right to move such an application on the same facts again and again till it is disposed of on merits. Looked at from another point of view, such a procedure would result in disregarding and circumventing the earlier orders of this Court. In these circumstances, we are of the opinion that the principle contained in O. 9, R. 9, CPC can be suitably applied to writ proceedings. As has already been stated above, the earlier writ application in this case based on the same facts was dismissed in default in the presence of the opposite party and the application for its restoration was dismissed on merits. Thus, applying the principle contained in O. 9, R. 9, CPC, the present writ application is not maintainable. Even otherwise we may state that, in the circumstances of the present case, we are not prepared to exercise our inherent and extraordinary jurisdiction in favour of the petitioner on this second writ application. The preliminary objection raised by the learned counsel for respondent No. 7 has, therefore, force and must prevail.

15. The result is, that this writ application is dismissed as not maintainable. In the circumstances of the case, however, the parties are left to bear their own costs.

GGM/D.V.C.

Petition dismissed.

AIR 1969 RAJASTHAN 48 (V 56 C 11)

V. P. TYAGI
AND C. M. LODHA, JJ.

State of Rajasthan, Appellant v. Budhram, Respondent.

Criminal Appeal No. 760 of 1964, D/- 28-3-1968 against judgment of Addl. S.J., Ganganagar D/- 5-8-1964.

(A) Sea Customs Act (1878), Ss. 171-A, 167 (81) — Evidence Act (1872), S. 80 — Conviction based on statement made under S. 171-A — Recording of statement in English — Failure to interpret it to illiterate accused — Conviction improper.

The presumption under S. 80 arises only when a confession is recorded strictly in accordance with law. Since no procedure has been prescribed in law for recording of the statement by the Customs Authorities under section 171-A of the Act, no presumption can be raised under section 80 of the Evidence Act,

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and it is to be decided on the facts and circumstances of each case whether the confession was free and voluntary.

(Para 5)

Though the statement is signed by the accused, it is unsafe to base his conviction on the statement made by him, admitting his guilt, before the Customs authorities, when the statement is in English and it is not interpreted to him in the language he knows. In such a case it remains doubtful whether the accused put his signature after fully understanding the same. It is of utmost importance that, if conviction is to be based on the incriminating statement made by the accused before the Customs Authorities, the Court must feel convinced that the statement was duly taken by observance of all the care and caution.

(Para 5)

Moreover the fact that the accused is kept in custody up-till the time the statement is recorded creates a doubt regarding the voluntary nature of the statement and conviction based on such statement is liable to be set aside.

(Para 6)

(B) Sea Customs Act (1878), 178-A — Presumption under, when can be raised — Neither application for issue of search warrant nor search memo mentioning possession by accused of smuggled gold — Reasonable belief not proved — Presumption cannot be raised.

In order to raise the presumption under section 178-A of the Act the Court must be satisfied from the evidence that the officer did entertain the belief that the goods seized were smuggled goods and that such belief was a reasonable belief.

(Para 8)

Where in the application made to the Magistrate for issue of a warrant, there is no mention that smuggled gold was lying in the premises of the accused but all that was stated was that it was reliably learnt that dutiable and prohibited goods are secreted in the premises of the accused and even in the search memo there is no mention that the gold was seized as it was believed to be smuggled one, presumption under section 178-A cannot be raised. Hence the burden lies on the prosecution to prove that gold seized is smuggled one.

(Para 8)

(C) Evidence Act (1872), S. 25 — Statements made before Customs officials — Not hit by section 25.

A statement made by an accused before the Customs Authorities is not hit by S. 25 and hence the statements made by the accused before the Customs Authorities are relevant unless it appears that they have been caused by any inducement, threat or promise. AIR 1965 SC 481, Foll.

(Para 5)

Cases Referred: Chronological Paras

(1965) AIR 1965 SC 481 (V 52)=
1965 (1) Cri LJ 490, Soni Vallabhadas Liladhar v. Asst. Collector of Customs, Jamnagar 5

S. K. Tiwari, Dy. Govt. Advocate, for the State; L. R. Mehta, for Respondent.

LODHA, J.: The State has filed this appeal from the judgment of the Additional Sessions Judge, Ganganagar dated 5th August, 1964 by which the conviction and sentence passed against the accused-respondent by the Magistrate First Class, Ganganagar under section 167 (81) of the Sea Customs Act (No. 8 of 1878) were set aside.

2. The prosecution case briefly was that Shri J. P. Tandon, Deputy Superintendent, Customs, Sri Ganganagar received information on 14-9-1958 that the accused Budhram was in possession of some dutiable and prohibited goods. He, therefore, obtained a search warrant from the First Class Magistrate, Ganganagar authorising Shri Heerasingh, Inspector, Land Customs, to search the premises of the accused. In execution of the warrant, Shri Heerasingh searched the house of the accused situated in Sri Ganganagar the same night and recovered 11 bars of gold which contained foreign markings. Further investigation was made in the matter and eventually the Collector of Central Excise and Land Customs, New Delhi confiscated the gold bars under section 167 (8) of the Act read with section 23 of the Foreign Exchange Regulation Act, 1947. Thereafter a complaint was filed by the Assistant Collector of Customs under S. 167 (81) of the Sea Customs Act No. 8 of 1878 (hereinafter to be referred as "the Act") before the Sub-divisional Magistrate, Ganganagar on 11-8-1961.

3. The case of the accused Budhram was that his brother Ramjas lived with him in the same house and the gold in question was recovered from the room occupied by Ramjas. It may be added that the accused is alleged to have made statements before Shri Heerasingh, Inspector, Customs, Ganganagar and Shri J. P. Tandon, Deputy Superintendent, Customs, Sri Ganganagar on 15-9-1958, and those statements were also put in evidence in support of the prosecution case and they have been marked Ex. P. 1 and Ex. P. 2. In those statements the accused practically admitted the prosecution case that the gold was smuggled one and he had purchased the same from one Chirag Ali, a national of Pakistan. The learned Magistrate convicted the accused under section 167 (81) of the Act and sentenced him to one year's rigorous imprisonment and a fine of Rs. 1000/-; in default of payment of fine six months' further rigorous imprison-

ment. The learned Magistrate relied on the evidence produced before him which was mainly about the recovery of gold and did not attach any importance to the statements Ex. P. 1 and Ex. P. 2 alleged to have been made by the accused before the Customs Authorities.

4. The accused filed an appeal to the Sessions Judge, Ganganagar but it was heard by the Additional Sessions Judge, Ganganagar, who acquitted the accused.

5. The learned Deputy Government Advocate has urged that it is amply proved that the gold was recovered from the exclusive possession of the accused Budhram. He has also argued that the learned Additional Sessions Judge, Ganganagar erred in holding that the gold was not smuggled one. In support of his contentions he has placed strong reliance on the statements Ex. P. 1. and Ex. P. 2 made by the accused before the Customs Authorities. It is urged that there is a clear admission of the accused in these statements that the gold was recovered from the exclusive possession of the accused and further that this was smuggled gold which the accused had purchased from Chirag Ali knowingly with intent to evade the restrictions for the time being in force with respect thereto. These statements, according to the learned Deputy Government Advocate, are relevant and the learned Additional Sessions Judge committed an error of law in placing no reliance on them. In support of his contention the learned Deputy Government Advocate has relied upon Vallabhadas Liladhar v. Asst. Collector of Customs, AIR 1965 SC 481. In that case the contention raised by the counsel for the accused that the statements made before the Collector of Customs were inadmissible in evidence under sections 24 and 25 of the Indian Evidence Act, was undoubtedly repelled and it was held that section 25 of the Indian Evidence Act has no application to such a case. It was observed that the Customs Officers are not Police Officers and statements made to them were not inadmissible under section 25 of the Evidence Act. Their Lordships were pleased to observe that,

"Section 24 would however apply, for Customs Authorities must be taken to be persons in authority and the statements would be inadmissible in a criminal trial if it is proved that they were caused by inducement, threat or promise."

In face of this authority there is no room for argument that a statement made by an accused before the Customs Authorities is hit by section 25 of the Indian Evidence Act and we must therefore hold that the statements Ex. P. 1 and Ex. P. 2 made by the accused before the Customs Authorities are relevant unless it appears that they have been caus-

ed by any inducement, threat or promise. P. W. 4 Heerasingh states that he had taken down the statement of Budhram Ex. P. 1 and it was signed by Budhram. As regards Ex. P. 2 P. W. 1 Shri J. P. Tandon has stated that he interrogated the accused and all the questions and answers contained in Ex. P. 2 were written by him and also that the accused had signed the statement Ex. D. 2 after the same had been read out to him. In his statement under section 342, Criminal Procedure Code, when the accused was asked to explain as to what he had to say with respect to his alleged statements Ex. P. 1 and Ex. P. 2 before the Customs Authorities, he replied that the Deputy Superintendent, Customs, and the Inspector, Customs had both beaten him and obtained his signatures the next day. However, he did not produce any evidence in support of his allegation. The learned counsel for the accused has contended that before the statements Ex. P. 1 and Ex. P. 2 which are in the nature of a confession can be received in evidence, they must be shown to have been voluntarily made. The material question therefore is whether they have been obtained by the influence of hope or fear or under the influence of an improper inducement?

We may in this connection draw attention to the provisions of section 80 of the Evidence Act which inter alia provides that whenever a statement by an accused person, taken in accordance with law, and purporting to be signed by any Judge or a Magistrate or by any officer authorised by law to take evidence, is produced before any Court, the Court shall presume that the document is genuine and that any statement as to the circumstances under which it was taken, purporting to be made by the person signing it is true and that such statement was duly taken. The presumption under section 80 can be raised only when the statement has been taken in accordance with law. The Code of Criminal Procedure provides how a confession is to be recorded by a Magistrate (See sections 164 and 364, Criminal Procedure Code) and the moment it is shown that a confession of the accused has been recorded in accordance with law and all the acts required by law to be done have been done it can then be presumed to be duly taken. The presumption under section 80 thus arises only when a confession is recorded strictly in accordance with law.

Since no procedure has been prescribed in law for recording of the statement by the Customs Authorities under section 171-A of the Act, no presumption can be raised under section 80 of the Evidence Act, and it is to be decided on the facts and circumstances of

each case whether the confession was free and voluntary. It is noteworthy in the present case that both the statements Ex. P. 1 and Ex. P. 2 are recorded in English, and the accused does not know English but from the way in which he has put his signature on these statements, it appears that he is almost illiterate. There is no certificate under either of these statements that these statements were interpreted to the accused in Hindi and that he understood the same. On the other hand what has been mentioned below these statements is "Read over and admitted correct." In his statement before the Court Shri J. P. Tandon (P. W. 2) only states that the statement Ex. P. 2 was read over to the accused and then he signed it. Reading over a statement in English to a person who does not know English is useless. Similarly it is not borne out from the evidence of P. W. 4 Shri Heerasingh that the statement Ex. P. 1 was duly taken with due care and attention. The mode of recording deposition in civil and criminal cases is to be found in O. 18, Rr. 5, 6, C. P. C. and Ss. 356, 359, 360, 361, Criminal Procedure Code. It is laid down that the depositions shall be read over or interpreted when the witness does not understand the language in which it is so taken down. It is of utmost importance that, if conviction is to be based on the incriminating statement made by the accused before the Customs Authorities the Court must feel convinced that the statement was duly taken by observance of all the care and caution. In the circumstances of the present case we are doubtful whether the accused put his signatures on these statements after fully understanding the contents of the same. This is one aspect of the matter.

6. Another aspect is, that the recovery of the gold was made on the night between 14th and 15th of September, 1958, and both these statements were recorded on 15-9-1958. It is clear from the evidence of P. W. 4 Heerasingh that the accused Budhram was kept in his custody throughout the night after the recovery and also up-till the time the statements Ex. P. 1 and Ex. P. 2 were recorded. Learned counsel for the accused has argued that these circumstances are sufficient to make it appear that these statements were made under the influence of some improper inducement. We have given our careful consideration to this aspect of the matter. The doubt created in the mind of the learned Additional Sessions Judge regarding the voluntary nature of these statements cannot be said to be unreasonable and in the facts and circumstances of the case, in our opinion, also, it would be unsafe to base conviction of the accused

on these statements in view of the doubt subsisting on the question of the free and voluntary nature of these statements.

7. This takes us to the question whether, apart from the statements Ex. P. 1 and Ex. P. 2, there is sufficient evidence on the record to show that the gold was smuggled one, and whether it was recovered from the possession of the accused? As regards the place of recovery Shri Heerasingh, Inspector (P. W. 4) has stated that the gold was recovered from a bag of lime and a tin lying in the room in which Budhram was sleeping with his family. P. W. 6 Jagdish Chander and P. W. 7 Ajitsingh, who are also Inspectors of Land Customs Department have both stated that on search of the house of Budhram they found the gold lying in one bed room. As against the evidence of these witnesses P. W. 3 Abhey Singh has deposed that it was Ramjas who had pointed out the gold lying in a bag of lime and a tin and that Ramjas and some children were in that room. This witness was of course declared hostile and permitted to be cross-examined by the prosecution. Another Motbir P. W. 5 Shri Gopal states that he does not remember whether any thing had been recovered in his presence at all. The accused has examined D. W. 1 Bachnam and D. W. 2 Amichand to show that he was living in that house along with his brother Ramjas and his son Hanuman.

In this state of evidence the learned Additional Sessions Judge came to the conclusion that Ramjas and Budhram used to reside in the house from which the gold was recovered and the exclusive possession of the accused over the house and the room from which the gold was recovered is not established. Both the Motbirs produced by the prosecution viz., P. W. 3 Abhey Singh and P. W. 5 Shri Gopal have not supported the prosecution on this point, and in our opinion, it would not be safe to infer the exclusive possession of the accused merely because according to Heerasingh (P. W. 4) the gold was recovered from the room where Budhram was sleeping with his family.

8. Apart from this there is another hurdle in the way of the prosecution and that is, whether the gold has been proved to be smuggled one? The learned Deputy Government Advocate has invited our attention to section 178-A (1) of the Act which runs as follows:

"178-A. Burden of proof:— (1) Where any goods to which this section applies are seized under this Act in the reasonable belief that they are smuggled goods,

the burden of proving that they are not smuggled goods shall be on the person from whose possession the goods were seized."

It has been urged by him that the gold in the present case was seized under the reasonable belief that it was smuggled and the accused had failed to prove that it was not smuggled. We may state at once, that there is no other evidence on the record produced by either side whether the gold was smuggled one or not except the admissions contained in the statements Ex. P. 1 and Ex. P. 2 which, as stated above, are not worth reliance, and, therefore, all that we have to determine is, whether a presumption can be raised under section 178-A of the Act. In order to raise the presumption under section 178-A of the Act the Court must be satisfied from the evidence that the officer did entertain the belief that the goods seized were smuggled goods and that such belief was a reasonable belief. In order to be satisfied on the first point, there must be direct evidence whether oral or written of the officer seizing the goods that he entertained at the time of seizing them or at time before it, reasonable belief that the goods were smuggled one. Now in the present case in the application (Ex. P. 9) made to the Magistrate for issue of a warrant, there is no mention that smuggled gold was lying in the premises of the accused but all that was stated was that it was reliably learnt "that dutiable and prohibited goods are secreted in the premises of Budhram." Even in the search memo Ex. P. 6 there is no mention that the gold was seized as it was believed to be smuggled one. P. W. 4 Shri Heera Singh did not state that he seized the gold as he entertained a reasonable belief at the time of seizure that it was smuggled gold. All that he has stated is that the gold was seized as it was considered to be smuggled.

It is well established that the question whether there was a reasonable belief or not is justiciable and the Court has jurisdiction to consider whether there were grounds which prima facie justified the reasonable belief. In the present case, however, as already observed above, there is no evidence that the officer seizing the gold entertained, at the time of seizing them or at any time before it, reasonable belief that the gold was smuggled one. In these circumstances we are afraid, no presumption can be raised under S. 178-A of the Act for convicting the accused, and the burden of proof which lay on the prosecution to prove affirmatively that it was smuggled gold has not been discharged.

9. The result is that there is no force in this appeal and it is hereby dismissed.

The accused is on bail and need not surrender. The bail bond is discharged.

BNP/D.V.C.

Appeal dismissed.

AIR 1969 RAJASTHAN 52 (V 56 C 12)

D. M. BHANDARI
AND G. M. MEHTA, JJ.

The State of Rajasthan and another, Petitioners v. Sawai Tejsinghji Maharaja of Alwar, Opposite Party.

Civil Misc. Petns. Nos. 67 and 68 of 1965, D/- 29-4-1968.

Constitution of India, Art. 363 — Scope — Bar to jurisdiction of civil courts — Nature of — Emphasis is not on parties to dispute but on nature of dispute — Possibility of illusory defence being raised to invoke bar under the article — Whether court can undertake preliminary investigation in nature of dispute.

After the coming into force of the Constitution, there is no question of any act of State against the plaintiff but still if a dispute falls under Art. 363 of the Constitution, it cannot be decided by any court in India. The remedy lies by making an appeal to the President to make a reference to the Supreme Court of India under Art. 143 of the Constitution : AIR 1962 SC 1288 and AIR 1954 SC 447 and AIR 1965 SC 1798, Foll. (Para 19)

Article 363 is a provision which shuts out the jurisdiction of a court of law and like any other provision of similar nature, it is to be construed strictly so that a citizen of India may not be denied the opportunity, except when the case strictly falls under this Article to get his right adjudicated and decided by a civil court and obtain any relief which he may be found entitled to. This article is applicable not only when there is a direct dispute between the State and the citizen but even when the dispute arises in a case to which the State of India is not a party and a claim is made either on behalf of the State or by any other party to the dispute that the subject-matter of the dispute is covered by Art. 363 of the Constitution. This article is couched in a language which lays emphasis not to the parties to the suit but to the nature of the dispute and if any dispute arises out of any provision of a treaty, agreement, covenant etc. the jurisdiction of the civil court is barred. (Para 21)

If the jurisdiction of a municipal court is ousted however flimsy may be the defence raised by the defendants while seeking shelter under Article 363 of the Constitution, cases may occur where injustice may be inflicted on the plaintiff

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solely for the reason that the defendants have mala fide adopted a defence which in truth has no basis and which the court of law would reject outright. On the other hand, if a preliminary investigation in the nature of the dispute by a court of law is permitted, there is no limit how far the investigation is to go in order to determine whether in truth the defendants had a defence. Placed in this situation, the view that the court must be satisfied that conflicting rights have to be decided between the parties and it is only where there is such a case that it must decline to decide the rights and must stay the action, but it ought not to stay the action before that point is reached is to be preferred : 1955 App Cas 72, Rel. on. (Para 26)

Cases Referred: Chronological Paras

(1965) AIR 1965 SC 1798 (V 52) =	
1965-3 SCR 201, Usmanali Khan v. Sagar Mal	20
(1962) AIR 1962 SC 1288 (V 49) =	
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(1958) 1958 App Cas 379 = 1957-3 All ER 441, Rahimtoola v. Nizam of Hyderabad	25
(1955) 1955 App Cas 72 = 1954-3 All ER 236, Juan Ysmael & Co. Incorporated v. Govt. of the Republic of Indonesia	25
(1954) AIR 1954 SC 447 (V 41) =	
1955 SCR 415, Virendra Singh v. State of Uttar Pradesh	19
(1938) 1938 Ch 839 = 107 LJ Ch 380, Halle Selassie v. Cable and Wireless Co. Ltd.	19
(1930) AIR 1930 PC 267 (V 17) =	
57 Ind App 318, Dattatraya Krishna Rao v. Secy. of State	17
(1924) 40 TLR 815 = 1924 P 236, The Jupiter	24, 25
(1921) 1921 AC 262 = 90 LJ PC 181, Johnstone v. Pedlar	10
(1892) 1892 AC 491 = 61 LJ PC 92, Walker v. Baird	10

M. M. Vyas, Addl. Advocate General, for the State; Marudhar Mridul, for Opposite Party.

BHANDARI, J.: These two cases have come before this Court under the following circumstances.

2. On 12th October 1963, Colonel His Highness Maharaja Sawai Tejsinghji of Alwar filed Civil Suit No. 5 of 1963 in the court of the District Judge, Alwar, for a declaration that the properties detailed in paragraph No. 4 of the plaint were the private properties of the plaintiff and the defendant No. 2, the State of Rajasthan, be ejected therefrom, or, in the alternative, ordered to pay rent at Rs. 1000/- p.m. A decree for Rupees 36,000/- was also claimed for mesne profits. These properties may be briefly des-

cribed as (1) The stable of the City Palace known as Secretariat these days; (2) Daulatkhana and (3) Indraviman Station. The plaintiff's case is that he was the Ruler of the erstwhile Alwar State on the 1st April, 1948, and till then he was the owner of all the properties belonging to the State of Alwar. On 1st April, 1948, the Alwar State merged into the State of Matsya and thereafter in the State of Rajasthan. The plaintiff made a claim before the Government of India that the City Palace and the adjoining buildings be held to be the private property of the plaintiff. The Union of India accepted this claim and sent a letter D. O. No. F. 4/40/P/49 dated 14th September, 1949, to this effect. According to the plaintiff, the City Palace and the adjoining buildings included the suit properties. The plaintiff further alleged that after the coming into force of the Constitution, the plaintiff became an ordinary citizen of India and became owner of the suit properties in that capacity. On 31st September, 1952, the plaintiff received a letter from the Deputy Secretary, Political Department, Government of Rajasthan, communicating to him that the suit properties were not included in his private properties. On receipt of this letter, the plaintiff carried on correspondence with the Union of India but without any result. He was informed by D. O. No. F10/30/59 dated 24th December, 1959, by the Government of India stating that the disputed properties were not included in his private properties. The plaintiff claimed that the possession of the State of Rajasthan was mere permissive possession; but since it is denying the right of ownership of the plaintiff he had a right to obtain the possession of the suit properties and to claim mesne profits for use and occupa-

tion for the last three years preceding the suit.

3. In the written statement filed on behalf of the Union of India, it was admitted that on 28th February, 1948, a Government for the formation of the United State of Matsya was entered into by the plaintiff, who was then the Ruler of Alwar, and the Rulers of Bharatpur, Dholpur and Karauli. Under Article XI of the said Covenant, it was provided that the Ruler of each Covenantee State shall be entitled to enjoy the full ownership, use and enjoyment of all private properties belonging to him on the date of his making over of the administration of his State. Each of the Rulers was required to furnish before 1st May, 1948, an inventory of all the immovable properties, etc. held by him as private property. The said Article also provided for resolution of disputes in regard to the character of any property as between the Ruler and the Union by reference to a nominee of the Government of India. Subsequently on 10th May, 1949, an agreement was drawn up between the Rajpramukh of the United State of Rajasthan and the Rulers of Alwar, Bharatpur, Dholpur and Karauli for the merger of the United State of Matsya with effect from 15th May, 1949, and the abrogation of the Covenant entered into by the Rulers of the Matsya States. In accordance with the provisions of the Matsya Covenant, the Ruler of Alwar submitted an inventory of the properties which he claimed to be private, and in this was included the City Palace including the adjoining building. In their letter dated 14th September, 1949, the following decision of the Government of India in respect of the City Palace was communicated to the Ruler of Alwar:

**"Description
of property,**

City Palace including
adjoining building

**Decision of the
States Ministry.**

'Ancestral. The portion of the building at present in use by the State for administrative purpose or for Museum and Imperial Bank will continue to be so used till such time as required. The requirements of the State in future will not be of the same order as today and every effort will be made to release the accommodation at present occupied in the Zenana and Mardana Mahals at the earliest practicable date. The State will bear the maintenance cost of the portion used by it. Any addition or alteration in the portion used by the State will require the prior consent of His Highness and should be carried out at State expense."

According to the Union of India, the above decision broadly and in outline represented the agreement between the

Ruler and the Government of India in terms of Article XII, Clause (3) of the Covenant constituting the United State

of Rajasthan, which had become applicable, with certain amendments, to the Ruler of the State of Alwar. It is contended that the agreement was not complete and detailed, and there was a difference of opinion between the Government of Rajasthan and the Ruler of Alwar about the precise limits of the City Palace and the adjoining properties. After discussion with the Ruler, it was decided in 1952, that the main building of the City Palace and the adjoining building comprising the Jagir Office, the Central Record, Imperial Bank, Treasury etc. would be treated as belonging to the Ruler. It was also specifically decided that the Ruler's property would not include the Secretariat. The Ruler of Alwar was informed of this decision through the State of Rajasthan. The Ruler was also informed on 24th December, 1959, by the Government of India that the suit properties had not been recognised as his private properties. It was contended that the letter dated 24th December, 1959, represented the final agreement between the parties as regards the property in dispute. It is contended that Article 363 of the Constitution ousted the jurisdiction of the court as regards any disputes arising out of any provision of the Covenant. It was further contended that without prejudice to the provisions of Article 363 of the Constitution, the Ruler having been a party to the discussion after differences had arisen, it was not open to him to go back upon the decision finally communicated to him by the letter dated 24th December, 1959. The State of Rajasthan has also taken up the same line of defence.

4. The trial court framed several issues and the first issue framed is as follows:

"Is the trial of the suit barred by the provisions of Article 363 of the Constitution of India and the matter being an act of State, the adjudication of the same is beyond the scope of jurisdiction of Civil Court?"

The defendant filed an application in this Court under article 228 of the Constitution praying that the suit be withdrawn from the court of the District Judge, Alwar to this Hon'ble Court to be decided by this Court. Notice of this application was given to the plaintiff. Arguments were heard whether this case is fit to be transferred under Article 228 as also on issue, No. 1.

5. The second suit has also been filed by Col. His Highness the Maharaja Tej Singhji of Alwar. To this suit, the State of Rajasthan is the only opposite party. This suit relates to a part of the Mardana Palace in which certain offices of the defendant were functioning. The plaintiff referred to the letter of

Shri Menon dated 14th September, 1949, under which it was stated that the State of Rajasthan would vacate the part of the City Palace as early as possible but it failed to do so. It is urged that the plaintiff was entitled to rent or mesne profits at the rate of Rupees 3000/- per mensem for the last three years which amounted to Rs. 1,08,000/-. The plaintiff prayed for a decree for that amount.

6. The defendant filed a preliminary objection to the maintainability of the suit stating that it was barred under Article 363 of the Constitution. It was also stated that the suit property was not the exclusive property of the plaintiff. Several issues were framed in this case and the first issue was the same as in the other suit. On an application of the State praying that the suit be withdrawn from the court of the District Judge, Alwar under Article 228 of the Constitution and decided by this Court, the record of the case was summoned and notice of the application was given to the plaintiff. Arguments were heard both on the point whether any substantial question of law both on the applicability of Article 228 of the Constitution and also on issue No. 1.

7. After considering the matter carefully, we have come to the conclusion that in these cases, a substantial question of law as to the interpretation of Article 363 the determination of which is necessary for the disposal of these cases is involved, and we have, therefore, decided to determine that question of law.

8. Before we take up this question, we may refer briefly to the history of the merger of the State of Alwar in the United State of Rajasthan. A Covenant hereinafter called the Matsya agreement was entered into on the 28th February, 1948, by the Rulers of Bharatpur, Dholpur, Alwar and Karauli by which the United State of Matsya came into being on 1st April, 1948. The Covenant provided the integration of the territories of these four States into one State by the name of the United State of Matsya. Article VI of the Covenant provided that the Ruler of each Covenantee State shall as soon as may be practicable and in any event not later than the 15th March, 1948, make over the administration of his State to the Rajpramukh and thereupon all rights, authority and jurisdiction belonging to the Ruler which appertained or were incidental to the Government of the Covenantee State shall vest in the United State. Article XI provided for the private properties of the Ruler and runs as follows:

"(1) The Ruler of each Covenantee State shall be entitled to the full owner-

ship, use and enjoyment of all private properties (as distinct from State properties) belonging to him on the date of his making over the administration of that State to the Raj Pramukh.

(2) He shall furnish to the Raj Pramukh before the 1st of May, 1948, an inventory of all the immovable properties, securities and cash balances held by him as such private property.

(3) If any dispute arises as to whether any item of property is the private property of the Ruler or State property, it shall be referred to such person as the Government of India may nominate, and the decision of that person shall be final and binding on all parties concerned."

The Rulers of the four States made over the administration of their States to the Rajpramukh and the new State by the name of United State of Matsya came into being on 1st April, 1948. Thereafter the United State of Rajasthan comprising the territories of the other States in Rajasthan was formed and by an agreement dated 10th May, 1949, between the Rajpramukh of the United State of Rajasthan and the Rulers of Alwar, Bharatpur, Dholpur and Karauli, the United State of Matsya was integrated with that or became part of the United State of Rajasthan as from the mid-day of the 15th May, 1949, and the Covenant entered into by the Rulers of the Matsya States for the formation of Matsya stood abrogated. This agreement provided for the adoption of the Covenant hereinafter called the Rajasthan Covenant entered into between the Rulers of the United State of Rajasthan with some modifications. Article XII of that Covenant runs as follows:

"Article XII

(1) The Ruler of each Covenanting State shall be entitled to the full ownership, use and enjoyment of all private properties (as distinct from State properties), belonging to him on the date of his making over the administration of that State to the Raj Pramukh of the former Rajasthan State or, as the case may be, to the Raj Pramukh of the United State under this Covenant.

(2) If any dispute arises as to whether any item of property is the private property of the Ruler of a Covenanting State other than a new Covenanting State or is State property, it shall be referred to such person as the Government of India may nominate in consultation with the Raj Pramukh, and the decision of that person shall be final and binding on all parties concerned:

Provided that no such dispute shall be so referable after the first day of May, 1949.

(3) The private properties of the Ruler of each new Covenanting State shall

be as agreed to between the Government of India in the States Ministry and the Ruler concerned and the settlement of properties thus made shall be final." It may be mentioned that both the Covenants and the Agreement contained a guarantee on behalf of the Government of India and in this sense to these documents, the Government of India was a party. With regard to the private property of the Ruler of Alwar, the letter dated 14th September, 1949, was sent to the plaintiff by Shri V. P. Menon on behalf of the Government of India with a copy of the final inventory of his private property. In both the cases, the foundation for the plaintiff's suits is this letter and the copy of the inventory of the property which he sent with the letter. The material portion of the letter has already been referred to above.

9. According to the plaintiff, the inventory with the letter was the final list of his private property which received the approval of the Government of India and that the City Palace including the adjoining buildings mentioned in the inventory included the suit property in civil case No. 5 of 1963 filed in the court of the District Judge, Alwar. It is contended on behalf of the plaintiff that with respect to this property there had been a final approval of the Government of India and the contention of the Government of India that it was not a final approval was wrong. In this case, the argument is that with the abdication of his sovereign powers by the Ruler of Alwar on the formation of the United State of Matsya, the plaintiff became a private citizen owning private property the extent of which was finally approved by the Government of India by the letter of Mr. Menon dated 14th September, 1949, and it was not open to any body and least of all the Union of India to change its approval subsequently. In civil suit No. 4 of 1963, the contention of the plaintiff is that the letter of Mr. Menon included the entire Mardana Mahal in the private property of the plaintiff and the State of Rajasthan was permitted to vacate the same at the earliest practicable date and as it failed to do so, it was bound to reimburse the plaintiff. This in brief is the gist of the case of the plaintiff in both the suits.

10. In suit No. 5 of 1963, the defence of the defendants is that the letter of Shri Menon did not specify clearly the limits of the adjoining buildings to the Palace and later on it was found that the suit properties involved in that suit were not part of the private properties of the plaintiff. In civil suit No. 4 of 1963, the defence of the State of Rajasthan which is the sole defendant in that

case is that part of Mardana Mahal in its possession was not the exclusive private property of His Highness.

11. We have thus mentioned the nature of the disputes involved in both the cases and we have examined whether such disputes are not justiciable by the Civil Courts in view of Article 363 of the Constitution.

12. Article 363 runs as follows:

"363. (1) Notwithstanding anything in this Constitution but subject to the provisions of Article 143, neither the Supreme Court nor any other Court shall have jurisdiction in any dispute arising out of any provision of a treaty, agreement, covenant, engagement, sanad or other similar instrument which was entered into or executed before the commencement of this Constitution by any Ruler of an Indian State and to which the Government of the Dominion of India or any of its predecessor Governments was a party and which has or has been continued in operation after such commencement, or in any dispute in respect of any right accruing under or any liability or obligation arising out of any of the provisions of this Constitution relating to any such treaty, agreement, covenant, engagement, sanad or other similar instruments.

(2) In this article—

(a) "Indian State" means any territory recognised before the commencement of this Constitution by His Majesty or the Government of the Dominion of India as being such a State; and

(b) "Ruler" includes the Prince, Chief or other person recognised before such commencement by His Majesty or the Government of the Dominion of India as the Ruler of any Indian State."

This Article shuts out the jurisdiction of all the courts in any dispute arising out of any provision of a treaty, agreement, covenant, engagement, sanad or other similar instrument which were entered into or executed before the commencement of the Constitution by any Ruler of an Indian State. It is urged on behalf of the defendants that in both the suits there was a dispute arising out of the provisions of the Covenants, and the agreement dated 10th May, 1949, to both of which the Dominion of India was a party and which had continued in operation after the commencement of the Constitution. The crux of the matter, therefore, is to examine in each case whether in deciding these suits the court would be called upon to decide or adjudicate any dispute arising out of any provisions of the aforesaid Covenants or of the aforesaid agreement.

13. We first take up suit No. 5 of 1963. In order that the provisions of Article 363 be attracted in this case,

there must be a dispute which must arise out of any provisions of the aforesaid Covenants or must arise out of the agreement. The contention of the plaintiff is that none of these conditions are satisfied. It may be said that so far as the provisions of the Covenants are concerned, there was no dispute between the parties. Both the sides agree with regard to their contents and their terms. Nor is there any disagreement about the interpretation of any clause contained in these Covenants.

14. On behalf of the defendants, the contention is that under Article XII (3) of the Rajasthan Covenant, the private property of the ruler of each Covenanting State shall be as agreed between the Government of India and the Ruler concerned and the settlement of the property thus made shall be final and the dispute that has arisen is with regard to the terms of the agreement as embodied in the letter dated 14th September, 1949. Learned counsel for the plaintiff argued that the letter dated 14th September, 1949, was not an agreement but it merely conveyed the decision of the Government of India on the claim of the plaintiff which he had preferred under Article XI of the Matsya Covenant and it cannot be said that it contained any agreement between the Ruler and the Government of India.

15. An inventory was submitted under Article XI of the Matsya Covenant but by the time decision was taken by the Government of India, the United State of Matsya had merged in the United State of Rajasthan and under Article XII of the Rajasthan Covenant, it was contemplated under sub-clause (3) that the private properties of the ruler shall be as agreed to between the Government of India and the Ruler concerned. In our opinion, the letter incorporated the result of such agreement. The concluding paragraph of that letter clearly shows that the settlement of the inventory was an integral part of an over-all agreement in respect of all outstanding matters of dispute and did not stand by itself. The defendants have in this case raised a dispute with regard to that agreement on the point that the description given in the inventory did not include the suit property. Such a dispute cannot be said to be not a dispute arising out of the provisions of the agreement between the Government of India and the Ruler which was contemplated with regard to private properties under clause (3) of Article XII of the Covenant.

16. Learned counsel for the plaintiff has then argued that after abdication of his sovereign power, the ruler of Alwar became a private citizen though for the purpose of Constitution, he remained a

Ruler, and as a private citizen he could own private property and the extent of his private properties was settled by the Government of India by that letter and as a private citizen he has a right to get an adjudication by a civil court on the point whether a particular property has been recognised by the Government of India or not and such adjudication cannot be said to be barred under Art. 363 of the Constitution because if such an interpretation of Article 363 will be adopted, the plaintiff will be put in a position worse than that of a private citizen. He has placed before us various authorities of the Privy Council and the Supreme Court to show that a private citizen of India could enforce any right which he possessed before the commencement of the Constitution if those rights had been recognised by the State.

17. We need not review the entire law on the subject and the following propositions may be taken to be well settled on the authority of the judgment of the Supreme Court in *Promod Chandra v. State of Orissa*, AIR 1962 SC 1288:

"On an examination of the authorities discussed or referred to above, the following propositions emerge. (1) 'Act of State' is the taking over of sovereign powers by a State in respect of territory which was not till then a part of its territory, either by conquest, treaty or cession, or otherwise, and may be said to have taken place on a particular date, if there is a proclamation or other public declaration of such taking over. (2) But the taking over of full sovereign powers may be spread over a number of years, as a result of a historical process. (3) Sovereign power, including the right to legislate for that territory and to administer it, may be acquired without the territory itself merging in the new State, as illustrated in the case in 57 Ind. App. 318: AIR 1930 PC 267. (4) Where the territory has not become a part of the State, the necessary authority to legislate in respect of that territory may be obtained by a legislation of the nature of Foreign Jurisdiction Act. (5) As an act of State, derives its authority not from a municipal law but from ultra-legal or supra-legal means, Municipal Courts have no power to examine the propriety or legality of an act which comes within the ambit of 'act of State'. (6) Whether the act of State has reference to public rights or to private rights, the result is the same, namely, that it is beyond the jurisdiction of Municipal Courts to investigate the rights and wrongs of the transaction and to pronounce upon them and, that, therefore, such a Court cannot enforce its decisions, if any. It may be that the presumption is that the pre-existing laws of the

newly acquired territory continue, and that according to ordinary principles of International Law private property of the citizens is respected by the new sovereign, but Municipal Courts have no jurisdiction to enforce such international obligations. (7) Similarly by virtue of the treaty by which the new territory has been acquired, it may have been stipulated that the precession rights of old inhabitants shall be respected, but such stipulations cannot be enforced by individual citizens because they are no parties to those stipulations. (8) The Municipal Courts recognised by the new sovereign have the power and the jurisdiction to investigate and ascertain only such rights as the new sovereign has chosen to recognise or acknowledge by legislation, agreement or otherwise. (9) Such an agreement or recognition may be either express or may be implied from circumstances and evidence appearing from the mode of dealing with those rights by the new sovereign. Hence, the Municipal Courts have the jurisdiction to find out whether the new sovereign has or has not recognised or acknowledged the rights in question, either expressly or by implication, as aforesaid. (10) In any controversy as to the existence of the right claimed against the new sovereign, the burden of proof lies on the claimant to establish that the new sovereign had recognised or acknowledged the right in question."

18. Learned counsel for the plaintiff has laid stress on propositions Nos. 8 and 9 and urged that the right of the plaintiff to the suit property was recognised by both the Government of India and the State of Rajasthan and if there is any doubt on this point, the Municipal Court has the jurisdiction to find out whether they had or had not recognised the rights of the plaintiff to the suit property. This is the position which every citizen of India can take up as against the State, and there is no reason why the plaintiff who was at one time the Ruler of a princely State of Rajasthan be not allowed to take up this position.

19. Learned counsel has also submitted that the sovereign cannot exercise an act of State against its own subject. If we leave aside Article 363 of the Constitution, this contention of learned counsel for the plaintiff is correct in the eye of law. It has been held that a Ruler of a State becomes an Indian citizen after the coming into force of the Constitution and as against him the State cannot exercise any act of State. In this connection we may refer to the following observations made in *Virendra Singh v. State of Uttar Pradesh*, 1955 SCR 415 : (AIR 1954 SC 447):

"Article 1 (1) sets out that India shall be a Union of States and clauses (2) and

(3) define the territories of which India shall be composed. They include the territories in which the disputed lands are situate. Article 5 defines Indian citizens. They include in their wide embrace the Rulers of Charkhari and Sarila who made the grants, the petitioners who received them and those who now seek as an act of State to make the confiscation. It is impossible for a sovereign to exercise an act of State against its own subjects. However disputable the proposition may be that an act of State can be exercised against a citizen who was once an alien the right being only in abeyance till exercised there has never been any doubt that it can never be exercised against one who has always been a citizen from the beginning in territory which has from its inception belonged to the State seeking to exercise the right. This is so even on the English authorities which claim far higher rights for the State than other laws seem to allow. Lord Atkinson said in *Johnstone v. Pedlar*, (1921) 2 A. C. 262 at p. 281:

'The last words of Lord Halsbury's judgment clearly suggest that the Government of this country cannot assert as a defence against one of their own subjects that an act done to the latter's injury was an act of State, since such a subject clearly could not rely on his own sovereign bringing diplomatic pressure against himself to right the subject's wrong. In conformity with this principle it was held in *Walker v. Baird*, (1892) A. C. 491 that where the plaintiffs are British subjects in an action for trespass committed within British territory in time of peace it is no answer that the trespass was an act of State, and that thereby the jurisdiction of the Municipal Courts was ousted.'

And so Lord Phillimore said at page 295:

'Because between Her Majesty and one of her subjects there can be no such thing as an act of State.' Thus after the coming into force of the Constitution, there is no question of any act of State against the plaintiff but still if a dispute falls under Article 363 of the Constitution, it cannot be decided by any court in India. The remedy lies by making an appeal to the President to make a reference to the Supreme Court of India under Article 143 of the Constitution.

20. In *Usmanali Khan v. Sagar Mal*, AIR 1965 SC 1798, the matter has been put in another form by pointing out that Article 363 preserves the political character of the obligation entered into by the State of India by ousting the jurisdiction of the Courts to such questions. It has been observed:

'The guarantee given by the Govern-

ment of India was in the nature of a treaty obligation contracted with the sovereign Rulers of Indian States and cannot be enforced by action in municipal courts. Its sanction is political and not legal. On the coming into force of the Constitution of India, the guarantee for the payment of periodical sums as privy purse is continued by Art. 291 of the Constitution, but its essential political character is preserved by Art. 363 of the Constitution and the obligation under the guarantee cannot be enforced in any municipal court.'

21. Article 363 is a provision which shuts out the jurisdiction of a court of law and like any other provision of similar nature it is to be construed strictly so that a citizen of India may not be denied the opportunity, except when the case strictly falls under this Article to get his right adjudicated and decided by a civil court and obtain any relief which he may be found entitled to. This article is applicable not only when there is a direct dispute between the State and the citizen but even when the dispute arises in a case to which the State of India is not a party and a claim is made either on behalf of the State or by any other party to the dispute that the subject-matter of the dispute is covered by Article 363 of the Constitution. This article is couched in a language which lays emphasis not to the parties to the suit but to the nature of the dispute and if any dispute arises out of any provision of a treaty, agreement, covenant etc. the jurisdiction of the civil court is barred.

22. Now in a suit in which the State of India is not a party and an illusory dispute is raised by a defendant, can it be said that the jurisdiction of the court is barred? If so, would it make any difference in which the State of India is a party? These points we are compelled to examine because in both the cases it is strongly emphasized by learned counsel for the plaintiff that the defendants are raising disputes which have altogether no substance but which have been raised by them only to defeat the claim of the plaintiff by invoking Article 363 of the Constitution. Whether this is so in both the cases, we shall decide presently. At this stage, let us consider whether the jurisdiction of the court of law is ousted as soon as a dispute arising out of any provision of a treaty, agreement etc. is raised or the civil court can at least examine whether the disputes is not altogether illusory and the defence raised by the defendant on the very face of it untenable.

23. We realise that in answering the above question, we are faced with a very difficult proposition of law. One view may be that howsoever illusory the

dispute may be, it is not for the court of law to decide it because a dispute has been raised. The other view may be that the court of law should examine whether *prima facie* there is no valid ground for raising that dispute and when there is no valid ground, the court may hold that no dispute really exists. If the first view is adopted, it may in certain circumstances result in such injustice that the court of law may shudder to construe Article 363 in such manner. For example, a Ruler may file a suit for the ejectment of a trespasser from a property which indisputably belongs to him and such person raises the defence that it is not the private property of the Ruler. Would the court of law be justified in rejecting the claim of the ruler on the ground that it has no jurisdiction to entertain it because of the provisions contained in Article 363 of the Constitution? Can the court of law not take into consideration that the defence raised by him is illusory and as there is no real dispute raised for the application of Article 363, the court's jurisdiction is not ousted? Can such person be permitted to say that whatever may be the nature of the dispute, it is still there and if an inquiry is embarked upon for examining the merits of the dispute, it cannot be permitted under Article 363 of the Constitution?

24. We have examined this matter carefully. There is no direct authority on this point. Cases have arisen in England in connection with the immunity enjoyed by a sovereign of being sued in a court of law in England. The view taken is that there is no limit to the immunity in the case of a sovereign personally. Cheshire on 'Private International Law' Sixth Edition has stated at page 90:

"Whether there is any limit to the immunity where an interest in property to which an action relates is claimed by a sovereign is not so clear, for the difficulty is to define what is meant by an interest sufficient to justify a stay of proceedings. It is obvious that if the bare assertion of a right in the property were to be regarded as sufficient, the doctrine of immunity might be nothing but a cloak for injustice."

Then the author mentions some cases in which the immunity has been held to be unlimited and proceeded to observe as follows at page 92:

"The four categories of cases already considered cover the situation where the ouster of a sovereign State from its existing ownership, possession or control is the object of the legal proceedings. What raises a far more complex problem however is an attempt by a sovereign to intervene in an action between two third-parties and to obtain a stay of

proceedings on the ground that it possesses, for instance, a contractual interest to the property to which the action relates. In such a case the court is faced with a dilemma. On the one hand the court itself offends the principle of immunity if it requires the sovereign to establish a claim; on the other hand, it can scarcely be content with the bare assertion of a claim that may or may not in fact be baseless. Dealing with this latter position, Lord Greene, in *Haile Selassie v. Cable and Wireless Co. Ltd.*, (1938) Ch. 839 remarked:

It would be a strange result if a person claiming property in the hands of, or a debt alleged to be due by, a private individual in this country, were to be deprived of the right to have his claim adjudicated upon by the courts merely because a claim to the property or the debt had been put forward on behalf of a foreign sovereign."

In the case of *Jupiter*, (1924) 40 TLR 815, Scrutton L. J. took the view that an assertion by a foreign sovereign that he claimed the right in property must be accepted by the court as conclusive without investigation whether the claim is good or bad.

25. With regard to this view, the Privy Council observed in *Juan Ysmael & Company Incorporated v. Government of the Republic of Indonesia*, 1955 AC 72 at p. 87 that

"The view that a bare assertion by a foreign government of its claim is sufficient has the advantage of being logical, and simple in application, but it may lead to a very grave injustice if the claim asserted by the foreign government is in fact not maintainable and the view of Scrutton L. J. has not found favour in subsequent cases."

After examining several cases it was observed as follows:

"In their Lordships' opinion the view of Scrutton L. J. that a mere assertion of a claim by a foreign government to property the subject of an action compels the court to stay the action and decline jurisdiction is against the weight of authority, and cannot be supported in principle. In their Lordships' opinion a foreign government claiming that its interest in property will be affected by the judgment in an action to which it is not a party, is not bound as a condition of obtaining immunity to prove its title to the interest claimed, but it must produce evidence to satisfy the court that its claim is not merely illusory, nor founded on a title manifestly defective. The court must be satisfied that conflicting rights have to be decided in relation to the foreign government's claim. When the court reaches that point it must decline to decide the rights and must stay the action, but it

ought not to stay the action before that point is reached."

This view of the Privy Council was considered by the House of Lords in *Rahimtoola v. Nizam of Hyderabad*, 1958 AC 379. Lord Denning in his speech observed as follows at pages 415-416:

"It has sometimes been supposed that there is an absolute rule that a foreign Government cannot be impleaded in our courts in any circumstances, and, as a corollary, that it cannot be asked to come to our courts to litigate about its interest in property. That is supposed to be the result of Dicey's rule and Lord Adkin's two set propositions. But there are difficulties in it. To begin with, the rule about "not impleading a foreign Government" is by no means universal or absolute, as I will show. In the next place, the rule about "property" only applies, I think, to property which plainly or admittedly belongs to a foreign sovereign, or plainly or admittedly is in his possession or control. It is not appropriate in cases such as the present where the question "to whom does this debt belong?"...."whose property is it?" is the very question which has to be decided in the action. It cannot also be the question which has to be decided on a summons to stay. It is obvious that, if that is the question to be decided by the courts, it ought to be decided at the trial—or, at any rate, at a trial after full discovery and examination of witnesses. Instead of being done imperfectly at this preliminary stage with no discovery and on insufficient materials, Lord Maugham was of that opinion. He thought the foreign Government ought to prove its title. But if that is to be done, there is no point in a stay. You might as well have the trial anyway.

What is the alternative? If the foreign Government has not to prove its title, will a mere claim by it suffice? That is the only logical alternative, as Scrutton L. J. perceived. He pointed out that if the foreign Government is not to be impleaded, directly or indirectly, it must not be called upon for proof of anything, not even to show good cause: see (1924) 40 T. L. R. 815. But the Privy Council have refused to carry the rule about "not impleading a "foreign Government" to that absolute extreme. It would be far too unjust to a plaintiff in an English court: see 1955 A. C. 72. But is there any halfway house? The Privy Council there said that a foreign Government is not bound to prove its title "but it must produce "evidence to satisfy the court that its claim is not merely illusory, nor founded on a title manifestly defective". Even this leaves many questions unanswered. What degree of evidence is needed for this purpose? And if the foreign Government produces

some evidence, is it not open to the plaintiff to displace it? And if the plaintiff does succeed in displacing it (as the Nizam did here)—so that on the uncontroverted affidavits there is no longer an arguable issue—is the foreign Government still entitled to a stay?"

26. It is not our purpose to review the entire case law on the subject nor is it necessary to do so. Strictly speaking, the principles contained in the cases decided by the highest courts in England are not directly applicable to the cases before us. But nonetheless, they do show that if the jurisdiction of a municipal court is ousted however flimsy may be the defence raised by the defendants while seeking shelter under Article 363 of the Constitution, cases may occur where injustice may be inflicted on the plaintiff solely for the reason that the defendants have mala fide adopted a defence which in truth has no basis and which the court of law would reject outright. On the other hand, if a preliminary investigation in the nature of the dispute by a court of law is permitted, there is no limit how far the investigation is to go in order to determine whether in truth the defendants had a defence. Placed in this situation, we prefer to adopt the view taken by their Lordships of the Privy Council that the court must be satisfied that conflicting rights have to be decided between the parties and it is only where there is such a case that it must decline to decide the rights and must stay the action, but it ought not to stay the action before that point is reached.

27. Applying this test to suit No. 5 of 1953, we find that the inventory attached to the letter of Mr. Menon dated 14th September, 1949, mentioned that the City Palace including the adjoining building is to be treated as private property of the plaintiff but the extent of adjoining building is not to be found with precision in that inventory and there is really a dispute between the parties in this case whether the suit property was included in the expression 'adjoining building.'

28. This dispute no doubt arises out of the provision contained in the letter dated the 14th September, 1949, but, as we have already pointed out, it embodies the agreement referred to in Article 363 of the Constitution.

29. This being the position, in our opinion, issue No. 1 in suit No. 5 of 1953, should be partly decided in favour of the defendants and it is held that the suit is barred by the provision of Article 363 of the Constitution.

30. Now we come to suit No. 4 of 1953. The principle which we have adopted with regard to suit No. 5 when

applied in this case, leads to the conclusion that the property about which mesne profits are claimed in this suit is part of City Palace itself. It is a part of Mardana Mahal as mentioned in the decision of the State Ministry embodied in the letter of Sri Menon with regard to the private property of the plaintiff. It has been further mentioned that every effort will be made to release the accommodation at present occupied in the Mardana Mahal at the earliest possible date. In the written statement filed by the State of Rajasthan, practically all this is conceded but it is said that the suit property was not the exclusive property of the plaintiff but what is meant by saying it as not exclusive property of the plaintiff is not clarified. An altogether illusory dispute about a matter that it is not the property of the plaintiff is sought to be raised by the State of Rajasthan in this suit. The plaintiff has produced letter dated 6/8th December, 1960, from Ministry of Home Affairs, para No. 3 of which runs as follows:

"Regarding the buildings recognised as Your Highness' private property, but maintained and utilised by the Government of Rajasthan, the State Government have informed us that they would be prepared to consider purchasing them if you are agreeable to this course. By parting with the proprietary rights over these buildings, you will be eliminating a cause of potential friction with the State Government and also saving the expenditure on the payment of wealth tax on them. We, therefore, feel that the suggestion is worth consideration. If your Highness agrees you will no doubt inform that State Government." This letter exposes the illusory character of defence adopted by the State Government.

31. Thus, in our view, there is no real dispute between the parties so as to bar the jurisdiction of the District Judge, Alwar under Article 363 of the Constitution. It may also be mentioned that the plaintiff in this case has claimed mesne profits about this property and if there is no genuine dispute about the suit property, no dispute can arise about the mesne profits out of the provisions of any covenant or agreement as contemplated in Article 363. We have already pointed out that there is no question of exercise of an act of State against a subject. Thus, in our opinion, issue No. 1 in this case must be decided in favour of the plaintiff. We do not think that for deciding other issues, arising in this case, this case should be kept in this Court.

32. We, therefore, remit this case back to the trial court for deciding the other issues arising in this case according to law.

33. The result is that suit No. 5 of 1963 (Col. H. H. Maharaja Sawai Shri Tej Singh of Alwar v. The Union of India and another) is dismissed. We award no costs to the defendants in this case. Suit No. 4 of 1963 (Col. H. H. Maharaja Shri Sawai Tejsingh of Alwar v. State of Rajasthan) is remitted to the trial court to be decided as mentioned above. We do not award any costs to the plaintiff in this Court.

RSK/D.V.C.

Order accordingly.

AIR 1969 RAJASTHAN 61 (V 56 C 13)
C. M. LODHA, J.

Shyamesh, Petitioner v. Public Prosecutor, Pali, Respondent.

Criminal Revns. Nos. 84 and 86 of 1968, D/- 17-5-1968 against order of S.J., Jodhpur D/- 14-12-1967.

(A) Criminal P. C. (1898), Ss. 198B, 4(1) (h), 4 (1) (f), 259, 270, 492 — Complaint under S. 198B — Transfer of case — Charge of case handed over to another Public Prosecutor — Such Prosecutor must be deemed to be 'complainant'.

It is by virtue of his office as a Public Prosecutor that a Public Prosecutor acquires the authority to file a complaint under section 198B with the previous sanction of the Government. Therefore where the case is transferred to another Court of Session and any Public Prosecutor holding the charge of the case puts in appearance, the case is not liable to be dismissed on account of the non-appearance of the Public Prosecutor who has previously instituted the complaint as a Public Prosecutor in charge of the case before such transfer. When the case is transferred the Public Prosecutor, to whom the charge of the case is given, steps into the shoes of the Public Prosecutor who has instituted the complaint and will be deemed to be the complainant for all purposes.

(Para 10)

(B) Criminal P. C. (1898), Ss. 259 and 198B — Complaint under S. 198B — Court has ample discretion to discharge or not to discharge accused in the absence of complainant, Public Prosecutor — Refusal to discharge does not necessarily make his order illegal. (Para 12)

(C) Criminal P. C. (1898), S. 198B — Complaint under—Aggrieved person not required to sign nor his presence necessary as a complainant. (Para 11)

S. D. Rajpurohit, for Petitioner; Dr. S. K. Tiwari, Deputy Govt. Advocate, for the State.

ORDER: These are two connected revisions arising out of the orders of the

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learned Sessions Judge, Jodhpur dated 14th December, 1967 in Criminal Original cases No. 5 of 1964 and No. 6 of 1965.

2. In view of the short point involved in these cases it is not necessary to set out the facts in detail. Suffice it to say that the petitioner Shyamesh who is an editor and publisher of a weekly newspaper 'Karwat' published an alleged defamatory article against Shri Gumansingh, the then Superintendent of Police, at Pali. After obtaining the previous sanction of the Government of Rajasthan in this behalf, the Public Prosecutor, Pali filed a complaint under sections 500, 501 and 502, Indian Penal Code on 6-7-1964 in the Court of Sessions Judge, Pali against the accused petitioner in accordance with the provisions of S. 198-B, Criminal Procedure Code.

3. It appears that the accused petitioner moved an application before this Court for transfer of the case to some other Court for reasons which it is not necessary to relate here. This Court eventually withdrew the case from the Court of Sessions Judge, Pali and transferred it to the Court of Sessions Judge, Jodhpur for trial. I am informed that an objection about misjoinder of charges was taken before the learned Sessions Judge on behalf of the accused as a result of which there were two cases registered in respect of this complaint, and they were numbered as Criminal Original cases No. 5 of 1964 and No. 6 of 1965. After some evidence on behalf of the prosecution had been recorded Hon'ble Shri Lehar Singh Mehta, who was seized of these cases as Sessions Judge, Jodhpur, was elevated to the High Court and Shri Kalyan Dutt Sharma succeeded him as Sessions Judge, Jodhpur.

Consequently there was a de novo trial before Shri Kalyan Dutt Sharma and when the case came up before him on 14-12-1967 for recording the prosecution evidence an application was moved wherein a preliminary objection was taken on behalf of the accused petitioner to the effect that the cases should be dismissed under S. 259, Criminal Procedure Code as the complainant viz. the Public Prosecutor, Pali was absent. To be more specific the contention of the accused-petitioner was that the cases had been taken cognizance of upon a complaint made in writing by the Public Prosecutor, Pali and as such the Public Prosecutor, Pali was the complainant and since the procedure prescribed for the trial of such a complaint was the same as prescribed for the trial by a Magistrate of warrant cases instituted otherwise on a Police report, section 259, Criminal Procedure Code had full applica-

tion and therefore it was prayed that the Court may be pleased to exercise its powers under section 259, Cr. P. C., and dismiss the cases on account of the failure on the part of the complainant to appear before the Court.

It may be stated that the Public Prosecutor, Jodhpur attached to the Court of Sessions Judge, Jodhpur was looking after these cases ever since they were transferred to the Court of Sessions Judge, Jodhpur. He, therefore, opposed the preliminary objection raised on behalf of the accused petitioner and contended that he was entitled to appear and act on behalf of the State in the case and that his presence was sufficient. The learned Sessions Judge disallowed the preliminary objection and held that the appearance of the Public Prosecutor, Jodhpur who held charge of the case was sufficient in the eye of law. He also held that Shri Guman Singh the aggrieved person, who was present in the Court had put his signatures on the complaint, and, therefore, in his view no case for dismissal of the complaint on account of the non-appearance of the Public Prosecutor, Pali was made out. In this view of the matter the application by which the aforesaid preliminary objection was raised by the petitioner was rejected. The petitioner has therefore come up in revision before this Court.

4. The controversy raised by the learned counsel for the petitioner centres round one question viz. whether the appearance of the Public Prosecutor, Jodhpur in these cases before the Sessions Judge, Jodhpur was sufficient in the eye of law. In other words whether the cases were liable to be dismissed on account of non-appearance of the Public Prosecutor, Pali.

5. It may be stated at the outset that no authority exactly, on the point has been cited at the Bar and the question has therefore to be decided on the interpretation of the relevant sections of the Criminal Procedure Code and on first principles. For a correct appraisal of the point canvassed before me it would be necessary to reproduce the relevant portions of section 198-B, Criminal Procedure Code:

"198-B (1) Notwithstanding anything contained in this Code, when any offence falling under Chapter XXI of the Indian Penal Code is alleged to have been committed against the President, or the Vice-President, or the Governor or Rajpramukh of a State, or a Minister, or any other public servant employed in connection with the affairs of the Union or of a State, in respect of his conduct in the discharge of his public functions, a Court of Session may take cognizance of such offence, without the ac-

cused being committed to it for trial, upon a complaint in writing made by the Public Prosecutor:

(2)

(3) No complaint under sub-section (1) shall be made by the Public Prosecutor except with the previous sanction,—

(a) in the case of the President or the Vice-President or the Governor of a State, of any Secretary to the Government authorised by him in this behalf;

(b) in the case of a Minister of the Central Government or of a State Government, of the Secretary to the Council of Ministers, if any, or of any Secretary to the Government authorised in this behalf by the Government concerned;

(c) in the case of any other public servant employed in connection with the affairs of the Union or of a State, of the Government concerned."

(4)

(5) When the Court of Session takes cognizance of an offence under sub-section (1), then, notwithstanding anything contained in this Code, the Court of Session shall try the case without a jury and in trying the case, shall follow the procedure prescribed for the trial by Magistrates of warrant cases instituted otherwise than on a police report and the person against whom the offence is alleged to have been committed shall, unless the Court of Session, for reasons to be recorded, otherwise directs, be examined as a witness for the prosecution."

6. It would appear from the above mentioned provisions contained in section 198-B, Cr. P. C. that this section engrafts a kind of exception on the general rule that only a person aggrieved by a defamatory statement should be permitted to move the Court for redress. The section provides for a special procedure for the trial of a certain category of offences of defamation of high dignitaries of the State and public servants in respect of their conduct in the discharge of public functions. In order that a Court of Session may take cognizance of such offence it is necessary that there must be a complaint made in writing by the Public Prosecutor with the previous sanction of the authorities specified in sub-section (3). The object of the section is obviously to save a public servant from the embarrassment of a private prosecution in respect of a defamatory statement made against him in the discharge of his public duties.

7. Sub-section (5) of section 198-B further prescribes the procedure regarding trial of such cases and it is mentioned therein that the Court of Session shall follow the procedure pres-

cribed for the trial by the Magistrates of warrant cases instituted otherwise than on a police report. The procedure prescribed for cases instituted otherwise on a police report is contained in sections 252 to 259, Criminal Procedure Code. Thus there is no doubt that the provisions of sections 252 to 259, Cr.P.C. would be applicable mutatis mutandis to the trial of such cases. As a necessary corollary if the complainant is absent and the offence may be lawfully compounded (as it is so in the present case) the Sessions Court may, in its discretion, at any time before the charge has been framed discharge the accused. The word "complainant" has not been defined in the Code of Criminal Procedure, though the word "complaint" has been defined in section 4 (1) (h).

In the absence of any definition, the word "complainant" has to be interpreted in the light of the definition of the word "complaint" which has been defined as below:

"Section 4 (1) (h) "Complaint" means the allegation made orally or in writing to a Magistrate, with a view to his taking action under this Code, that some person whether known or unknown, has committed an offence, but it does not include the report of a police-officer,"

8. Since "complaint" means the allegation made orally or in writing to a Magistrate with a view to his taking action under the Criminal Procedure Code, a complainant, therefore, is a person (of course other than a Police Officer) who moves the machinery of a Magisterial Court by making certain allegations before it for taking action against a person who has committed an offence.

9. We may now refer to the definition of term "Public Prosecutor" which has been defined in section 4 (1) (t) as follows:

"(t) "Public Prosecutor" means any person appointed under section 492, and includes any person acting under the directions of a Public Prosecutor and any person conducting a prosecution on behalf of Government in any High Court in the exercise of its original criminal jurisdiction."

10. Section 493, Cr. P. C. provides that the Public Prosecutor may appear and plead without any written authority before any Court in which any case of which he has a charge is under enquiry, trial or appeal. It is not disputed before me that the Public Prosecutor, Pali as well as the Public Prosecutor, Jodhpur have been duly appointed by the State Government. It is also true that the Public Prosecutor, Pali has charge of the cases instituted or pending in the Court of Sessions Judge, Pali whereas the Public Prosecutor, Jodhpur has

charge of cases which are under enquiry, trial or appeal in the Court of Sessions Judge, Jodhpur. Thus the Public Prosecutor, Jodhpur must be held to be authorised on behalf of the State to appear and plead without any written authority. The learned counsel for the petitioner has vehemently contended that even though the Public Prosecutor, Jodhpur may appear and plead without any authority in these cases he cannot put in appearance as a complainant because the complainant in this case is the Public Prosecutor, Pali.

On the other hand Dr. Tiwari, learned Deputy Government Advocate submits that the complainant in these cases is the Public Prosecutor by virtue of his office and if any Public Prosecutor duly appointed by the State Government holding charge of the case puts in appearance, he must be deemed to be the complainant for all purposes, and the cases are not liable to be dismissed on account of the non-appearance of the Public Prosecutor, Pali. It may be stated here even at the risk of repetition that the complaint under section 198-B, Criminal Procedure Code has to be made by the Public Prosecutor i.e. it is by virtue of his office as Public Prosecutor that a Public Prosecutor acquires the authority to file a complaint with the previous sanction of the Government. In the present case the complaint was filed by Shri Sumer Raj Daga, an Advocate of this Court, who was appointed as a part-time Public Prosecutor for Pali District. He instituted the complaint as a Public Prosecutor in charge of the cases in the Sessions Court, Pali. In these circumstances it would not be unreasonable to infer that the complainant in the case was the Public Prosecutor though of course at the time he filed the complaint he was holding the charge of cases in particular Sessions Court.

If the contention of Mr. Rajpurohit were driven to its logical conclusion it would mean that the complainant in the present case was Shri Sumerraj Daga and it is he alone who can put in appearance as complainant. Such an interpretation, in my opinion, would not only lead to insurmountable difficulties but would defeat the very purpose with which S. 198B, Criminal Procedure Code was incorporated in the Criminal Procedure Code. It is clear from the provisions contained in this section that the intention of the legislature was that there should be an independent authority apart from the person aggrieved to set the law in motion, and in order to avoid cumbersome and more expensive procedure laid down in S. 194 (2) this exceptional procedure was provided in section 198-B. In these circumstances I am inclined to hold that the complainant in the pre-

sent case was the Public Prosecutor holding the charge of the case. Previously the Public Prosecutor, Pali was holding the charge of the case and had instituted the complaint. When the case was transferred to the Court of Sessions Judge, Jodhpur, the Public Prosecutor to whom the charge of the case was given stepped into the shoes of the Public Prosecutor, Pali and will be deemed to be the complainant for all purposes. The Sessions Judge, Jodhpur was therefore in my opinion right in not dismissing the cases on account of the non-appearance of the Public Prosecutor, Pali in his Court and the appearance of the Public Prosecutor, Jodhpur was in my opinion sufficient for proceeding with the cases.

11. The learned Sessions Judge, Jodhpur has mentioned in his order that the complaint was signed on 14-12-1967 by Shri Guman Singh, who was present in the Court, and, therefore, the complaint could not be dismissed. In my view the presence of Shri Guman Singh and the fact of his having signed the complaint on that day did not make any difference. Section 198-B does not require the complaint to be signed by the aggrieved person nor does it make the presence of the aggrieved person necessary as a complainant. His appearance, therefore, was immaterial.

12. There is, however, another aspect of the matter which I must mention before taking leave of the case. Section 259, Criminal Procedure Code, does not make it obligatory on the part of the Magistrate to discharge the accused on account of the absence of the complainant and therefore apart from anything else the learned Sessions Judge, Jodhpur had ample discretion to discharge or not to discharge the accused in absence of the complainant and if he did not do so, his order does not necessarily become illegal. This is another consideration which tilts the scales against the petitioner.

13. The result is that there is no force in these revision applications and hence they are dismissed.

14. Learned counsel for the petitioner prays for leave to appeal to Supreme Court. Leave can be granted only under Article 134 of the Constitution of India from any judgment, final order, or sentence in a criminal proceeding. Since the judgment sought to be appealed is not a final order, no leave can be granted under Article 134 of the Constitution of India. Besides I do not consider it a fit case for grant of leave to appeal to the Supreme Court of India. The prayer is rejected.

CWM/D.V.C.

Revision dismissed.

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